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COMPLETE DIGEST

OF THE

DECISIONS OF THE SUPREME COURT

AND

DISTRICT COURTS OF APPEAL

OF THE

STATE OF CALIFORNIA.

COVERING THE CASES OFFICIALLY REPORTED IN VOLUMES 1 TO 147 OF THE SUPREME COURT REPORTS—VOLUME 1 OF THE DISTRICT COURTS OF APPEAL REPORTS—ALSO ALL CALIFORNIA DECISIONS CONTAINED IN VOLUMES 1 TO 88 OF THE PACIFIC REPORTER, WITH COMPLETE TABLE OF CASES REFERRING TO SUBJECT MATTER AND PAGE, AND REVERSE TABLE CONTAINING NAMES OF DEFENDANTS ALPHABETICALLY ARRANGED.

BY

EDMUND SAMSON GREEN,
Author of "Complete Texas Digest," "American State Reports Digest."

VOLUME TWO.

CORPORATE BONDS TO EXECUTIVE WARRANT,
Pages 1117 to 2209.

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DIGEST

OF THE

REPORTS OF THE SUPREME COURT

OF

CALIFORNIA.

VOLUMES 1 TO 147, INCLUSIVE,

AND

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Railroad corporations. See Railroads, §§ 3-5.
Corporations formed for purpose of religious worship and instruction. See Religious Societies, §§ 1-4.

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School districts. See Schools and School Districts.
Companies engaged in transportation of freight and passengers by water. See Shipping.
Companies engaged in producing and distributing steam. See Steam.
Regulation of corporations by special laws. See Statutes, § 21.
Street railroad corporations. See Street Railroads, §§ 1-13.
Taxation of corporate property, franchises and capital stock. See Taxation, §§ 29-32.
Corporate property exempt from taxation. See Taxation, § 44.
Place of taxation of corporate stock or property. See Taxation, § 55.
Mode of assessment and valuation of corporate property for taxation. See Taxation, §§ 76-79.
Telegraph and telephone companies. See Telegraphs and Telephones, § 2.
Labor organizations. See Trade Unions.
Turnpike and toll-road companies. See Turnpikes and Toll Roads, § 4.
Warehouse and stockyard companies. See Warehousemen.
Water companies. See Waters and Watercourses, §§ 226-252.
Irrigation companies. See Waters and Watercourses, § 236.
Wharf companies. See Wharves.

I. INCORPORATION AND ORGANIZATION.

A. Nature and Kinds, §§ 1-5.
B. Creation and Organization, §§ 6-30.
C. De Facto Corporations, §§ 31-38.
D. Promoters, §§ 39-45.

Incorporation of banking corporations. See Banks and Banking, §§ 1-3.
Incorporation of savings banks. See Banks and Banking, § 105.
Organization of insurance companies. See Insurance, § 5.
Incorporation of city. See Municipal Corporations, § 5.
Incorporation and organization of religious societies. See Religious Societies, § 1.

A. NATURE AND KINDS.

NATURE AND STATUS OF CORPORATION, § 1.
—— AS PERSONS, § 2.
KINDS OF CORPORATIONS, § 3.
PUBLIC OR PRIVATE, § 4.
STATE REGULATION, § 5.

§ 1. Nature and Status of Corporation.

[a] A corporation for commercial purposes, formed under our statute, is little more than a joint stock company under the English laws, more nearly resembling a limited partnership under special articles than a corporation at common law.—Chater v. San Francisco etc. Co., 19 Cal. 219.

[b] Where a corporation is formed under our system, between certain parties for commercial purposes, in pursuance of a previous agreement fixing the terms of the corporation and the rights of the members therein, the corporation, when formed, is the mere agency of the associates created for the sake of convenience in carrying out the agreement, as between those who made the bargain—the different characters and forms in which or by which the bargain was made, and the order in which the several parts of it were executed, making no substantial difference in the obligation.—Chater v. San Francisco etc. Co., 19 Cal. 219.

[c] Where corporation is formed to more conveniently carry out purposes of certain parties, and the corporation incurs no liability, and is to receive none of the profits, but they are to be divided among the parties and no stock was issued, the corporation will be treated as the mere trustees of the partners, and their respective rights will be ascertained in the light of their agreements among themselves independently of the contract.—Shorb v. Beaudry, 56 Cal. 446.

[d] Corporation is creature of legislation having no rights, powers or existence without statutory authority.—Moran v. Ross, 79 Cal. 164, 21 Pac. 547.

[e] Corporations are creatures of law.—People v. Dashaway Assn., 84 Cal. 117, 24 Pac. 277.

[f] Grants of corporation franchises are always subject to implied condition that they will not be abused.—People v. Dashaway Assn., 84 Cal. 117, 24 Pac. 277.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 143; 12 Cent. Dig., cols. 15, 16, § 1.

§ 2. —— As Persons.

[a] Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons, expressly included in a statute.—Douglass v. Pacific Mail S. S. Co., 4 Cal. 304.

§ 3. Kinds of Corporations.

[a] Gas, ice and water companies are "manufacturing" corporations.—People v. Blake, 19 Cal. 579.

[b] Benevolent corporation formed to promote cause of temperance is not corporation formed for profit.—Ashton v. Dashaway, 84 Cal. 68, 24 Pac. 711.

[c] A land and improvement company, organized for the purpose of acquiring real property, by purchase or otherwise, buying and selling the same, building hotels, street railroads, and otherwise developing lands, stands upon the same basis as banking, railroad, insurance, and like commercial corporations having a subscribed capital stock.—Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

FOR AUTHORITIES FROM OTHER STATES:
What are quasi corporations: 13 Am. Dec. 523, note. See, also, 10 Cyc. 145-148; 12 Cent. Dig., cols. 22-31, §§ 7-10.

§ 4. Public or Private.

[a] Corporations are divisible into such as relate to the public police; such as have for

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their object the personal emolument of the incorporators; and such as partake of the nature of both, such as bridge and canal companies.—(Cal. 1869) Miners' Ditch Co. v. Zellerbach, 37 Cal. 543.

[b] A levee district, organized under the laws of California, to construct works for preventing portions of the territory from overflow, and clothed with powers, for this purpose, to issue bonds, levy and collect assessments, construct and repair highways, open canals, etc., is a public corporation.—Dean v. Davis, 51 Cal. 406.

[c] Reclamation districts are public corporations.—People v. Williams, 56 Cal. 647.

[d] A corporation organized to reclaim swamps and overflowed lands is of a quasi public character, and the proceedings leading up to its creation cannot be collaterally attacked.—Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. 1038.

§ 5. State Regulation.

[a] Corporations accepting charter consents to regulation by state.—Spring Valley W. W. v. San Francisco, 61 Cal. 8.

[b] Legislature may control charters by general laws.—Thomason v. Ashworth, 73 Cal. 77, 14 Pac. 615.

[c] State may impose such new terms and conditions on right of corporation to do business as it sees fit.—San Francisco v. Insurance Co., 74 Cal. 119, 15 Pac. 380.

[d] State may, in absence of constitutional prohibition, allow only foreign corporations within its borders, or may impose tax on domestic corporations not imposed on foreign ones.—San Francisco v. Insurance Co., 74 Cal. 118, 119, 15 Pac. 380.

B. CREATION AND ORGANIZATION.

CORPORATION SOLE, § 6.
RIGHT TO INCORPORATE, § 7.
—— COMPLIANCE WITH STATUTE AS CONDITION PRECEDENT, § 8.
PURPOSES FOR WHICH CORPORATION MAY BE CREATED, § 9.
AMOUNT OF CAPITAL TO BE SUBSCRIBED OR PAID, § 10.
NUMBER OF PERSONS REQUIRED TO INCORPORATE, § 11.
ORGANIZATION BY SPECIAL ACT, § 12.
—— CONSTRUCTION OF CONSTITUTIONAL PROVISION, § 13.
ORGANIZATION UNDER GENERAL LAWS, § 14.
WHAT CONSTITUTES CORPORATE CHARTER, § 15.
ACCEPTANCE OF CHARTER, § 16.
CONSTRUCTION OF CHARTER, § 17.
ARTICLES OR CERTIFICATES OF INCORPORATION, § 18.
—— SIGNATURE AND ACKNOWLEDGMENT, § 19.
—— AUTHENTICATION AND VERIFICATION, § 20.
—— FILING OR RECORDING, § 21.
—— AMENDED ARTICLES, § 22.
—— PROOF OF ISSUANCE AND FILING, § 23.
—— AMENDMENT, § 24.
—— ACT CURING DEFECTS IN CERTIFICATE, § 25.
EFFECT OF DEFECTIVE ORGANIZATION, § 26.
—— PROPERTY RIGHTS OF ORGANIZERS, § 27.
EFFECT OF FRAUDULENT ORGANIZATION, § 28.
OFFICIAL RECOGNITION OF INVALID CORPORATION, § 29.
UNAUTHORIZED ASSUMPTION OF CORPORATE EXISTENCE, § 30.

§ 6. Corporation Sole.

See, also, post, §§ 33, 63, 67, 268.

[a] In California a corporation sole can be created only by compliance with the provisions of section 602 of the Civil Code.—Blakeslee v. Hall, 94 Cal. 159, 69 Pac. 623.

7. Right to Incorporate.

[a] There is no natural right to do business as corporations. Corporations act as such purely by grace, depending on consent of state for enforcement of their contracts. Power of state to impose conditions on corporations is absolute; it may exclude them entirely.—San Francisco v. Insurance Co., 74 Cal. 118, 15 Pac. 380.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 167-170; 12 Cent. Dig., cols. 32-35, §§ 11-13.

§ 8. —— Compliance with Statute as Condition Precedent.

[a] Existence of corporation, formed under a general statute, requiring certain acts to be done before the corporation can be considered in esse or its transactions be valid, must be proved by showing at least a substantial compliance with the requirements of the statute.—Mokelumne Hill Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

[b] Where an act incorporating a water company provided that three thousand feet of water pipe should be laid within a year, the laying of such pipe within such period was not a condition of the existence of the corporation, and hence proof of compliance was not necessary in order to entitle it to sue.—Spring Valley W. W. v. City of San Francisco, 22 Cal. 434.

[c] A strict, literal compliance with the requirements of the statute is not essential, and the proceedings will not be held invalid for slight defects or omissions.—Spring Valley W. W. v. City of San Francisco, 22 Cal. 434.

[d] There must be substantial compliance with all forms of the acts by the persons seeking to become a body corporate before the corporation can be considered in esse.—Harris v. McGregor, 29 Cal. 124.

[e] The right to be a corporation is a franchise, to acquire which the prescribed statutory conditions for the formation of the corporation must be substantially complied with, without the omission of any require-

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ment, though a substantial, rather than a literal, compliance with each provision of the statute will suffice.—People v. Montecito Water Co., 97 Cal. 276, 133 Am. St. Rep. 172, 32 Pac. 236.

[f] Substantial compliance with the law is essential to the valid organization of a corporation, and it cannot be dispensed with as against an attack upon its validity in an action of quo warranto.—People v. Golden Gate Lodge, 128 Cal. 257, 60 Pac. 865.

§ 9. Purposes for Which Corporation may be Created.

[a] Act of March 5, 1864, providing for the organization of corporations for manufacturing, mining, or "for the purpose of engaging in any other species of trade, business, or commerce," is broad enough to authorize the formation of a corporation for the "purchase and sale of swamp and overflowed lands and adjacent high lands, the construction of dikes, levees, canals, reservoirs, and other works." People v. Hagar, 52 Cal. 171.

[b] Under Civil Code, section 286, a corporation may be formed for the purpose of "buying, selling, and dealing in all kinds of public and private stocks," and a purchase by a corporation so formed of stock in another corporation is not ultra vires.—Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

§ 10. Amount of Capital to be Subscribed or Paid.

[a] The provision of section 1 of the California act for the incorporation of railroad companies, requiring payment of ten per cent of the amount subscribed in cash, is not merely directory; it is a condition precedent, without which the subscribers to a company have no power to incorporate.—People v. Chambers, 42 Cal. 201.

[b] Act of April 14, 1843, authorizes the organization of certain corporations, and requires the certificate of incorporation to state the amount of capital stock and the number of shares. Statutes of 1869-70, pages 32, 36, provide that the corporations formed under the first-named act for the purpose of receiving, from the members and others, deposits and investing the same, may receive deposits of money from minors and married women. Held, that a corporation organized under said first-named act is not required to have a capital stock, the latter statute being a construction of the former to that effect by the legislature.—People v. Perrin, 56 Cal. 345.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 230, 231; 12 Cent. Dig., cols. 46-54, §§ 23, 24.

§ 11. Number of Persons Required to Incorporate.

[a] Sections 593 and 594 of the Civil Code, providing for the incorporation of any number of persons associated together for any purpose where pecuniary profit is not their object, must be read in connection with section 292 of the Civil Code, as not providing for the incorporation of any number less than five persons.—People v. Golden Gate Lodge, 128 Cal. 257, 60 Pac. 865.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 54, 55, § 25.

§ 12. Organization by Special Act.

Creation by special laws. See, also, Statutes, § 21.

[a] The provision in an act granting an exclusive franchise to build a telegraph line between the two points, that "no existing law shall be construed so as to conflict or interfere with the provisions of this act," does not repeal the general corporation law, so as to take away the right of forming corporations to build lines of telegraph between those points, but only to subject subsequent builders to the exclusive prior right of the grantees named in the act.—California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398.

[b] No particular words are necessary to the creation of a corporation, it being sufficient if the legislative intention is clearly manifested.—(Cal. 1876) Dean v. Davis, 51 Cal. 406.

[c] Act of March 28, 1872, granting to certain persons "and their assigns" the exclusive right to supply a town with water, prescribing certain duties, and authorizing the town "to purchase all the works and franchises" granted after fifteen years, does not create a corporation, within the prohibition of constitution, article 4, section 31, against the creation of corporations by special act.—San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 201-203; 12 Cent. Dig., cols. 62-77, §§ 28-47.

§ 13. —— Construction of Constitutional Provision.

[a] The thirty-first section of the fourth article of the constitution provides that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." Held, that the term "municipal" is limited to governmental, and cannot be extended to commercial, purposes.—Lowe v. City of Marysville, 5 Cal. 214.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 167-200; 12 Cent. Dig., cols. 63, 64, §§ 30-34.

§ 14. Organization Under General Laws.

[a] The act of 1850, concerning corporations, has no application to corporations formed under the act of 1853, "for manufacturing, mining, mechanical, or chemical purposes, or for the purpose of engaging in any species of trade or commerce." The act of 1853 repealed the act of 1850 so far as these classes of corporations are concerned.—Larrabee v. Baldwin, 35 Cal. 155.

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[b] By section 288 of the Civil Code the provisions of the act of April 22, 1850, relating to corporations were continued in force as to corporations created under them.—Estate of Eastman, 60 Cal. 308.

[c] Corporations can only be formed under general laws.—California Central Ry. Co. v. Hooper, 76 Cal. 406, 18 Pac. 599.

[d] Provisions of Civil Code, regarding organization of corporations apply to all corporations.—West v. Crawford, 80 Cal. 30, 21 Pac. 1123.

[e] Legislature cannot confer benefit or impose duty on one or more corporations formed under general law not conferred or imposed on all other corporations formed under same law.—People v. Central etc. R. R. Co., 83 Cal. 413, 23 Pac. 303.

[f] Corporation organized for the purpose of transacting such real business as natural person can is not organized under 639 of the Civil Code, but under general provisions of title 1, part 4 of the Civil Code.—Vercoutere v. Golden State L. Co., 116 Cal. 412, 48 Pac. 375.

[g] General operation of statute is not affected if it gives to all corporations of its kind or class opportunity to adopt either of two different provisions.—Murphy v. Pacific Bank, 119 Cal. 341, 51 Pac. 317.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 219-235; 12 Cent. Dig., cols. 36-61, §§ 16-27; cols. 78-110, §§ 48-69.

§ 15. What Constitutes Corporate Charter.

Amendment or repeal of charter. See post, § 58. Charters of municipal corporations. See Municipal Corporations, §§ 6-8.

[a] In this state the charter is the statute or statutes granting and defining the powers of the corporation under which it is constituted and exists, together with the instruments required to be executed by the provisions of such statute or statutes. These are sometimes called the constating instruments. Such franchises are legal estates, not mere naked powers, and are powers coupled with an interest, which vest in the corporation by virtue of its charter or constating instruments.—Spring Valley W. W. v. Schottler, 62 Cal. 69.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 201-205; 12 Cent. Dig., cols. 55-77, §§ 27-47.

§ 16. Acceptance of Charter.

[a] Where corporation is organized under a general law, no acceptance of charter is requisite.—Spring Valley W. W. v. City of San Francisco, 22 Cal. 434.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 203-205; 12 Cent. Dig., cols. 69-76, §§ 39-45.

§ 17. Construction of Charter.

[a] Charters should be strictly constructed, and nothing allowed by implication.—Bartram v. Central Turnpike Co., 25 Cal. 283.

[b] Charter must be reasonably construed so as to promote its object.—Vandall v. South etc. Co., 40 Cal. 89.

[c] Where a corporation is formed "to buy, improve, lease or sell, and otherwise dispose of real estate," etc., the term "improve" includes the performance of any act, whether on or off the land, the direct and proximate tendency of which is to benefit the property or enhance its value.—Vandall v. South San Francisco Dock Co., 40 Cal. 83.

[d] No infallible rule can be laid down defining accurately the point at which the benefit to be derived from a proposed work would cease to be direct and proximate, but each case must be determined on its own circumstances.—Vandall v. South San Francisco Dock Co., 40 Cal. 83.

[e] Ambiguous words in the charter of a corporation are to be construed most strongly against the corporation.—Spring Valley W. W. v. City of San Francisco, 52 Cal. 111.

§ 18. Articles or Certificates of Incorporation.

[a] Where certificate of incorporation states that San Francisco is "the place of business," instead of "the principal place of business," it is a mere technical error, not invalidating the charter.—Spring Valley W. W., Ex parte, 17 Cal. 132.

[b] A statute requiring a certificate of incorporation to state the names of the city or town and county in which the principal place of business is to be located is not complied with by a certificate which states that the operations of the corporation are to be carried on in the county of Calaveras, state of California.—Harris v. McGregor, 29 Cal. 124.

[c] Under act of May 20, 1861 (Stats. 1861, p. 607), providing that there shall be annexed to the articles of incorporation an affidavit setting forth in substance that the stock has been subscribed, and that ten per cent in cash thereon has been actually and "in good faith paid," a certificate of incorporation complying substantially with the statute is not void merely because the affidavit omits the words "in good faith" in that portion of the affidavit relating to the payment of ten per cent. People v. Stockton etc. R. Co., 45 Cal. 306, 13 Am. Rep. 178.

[d] Under Statutes of 1850, pages 273, 274, authorizing the formation of moral, beneficial, literary, or scientific associations by such methods as their rules or regulations may direct, on the appointment of not less than three nor more than nine trustees to take charge of the estate and property belonging thereto, a certificate of incorporation, showing the appointment of nine trustees, is sufficient to bring such corporation into existence, though it does not show that the corporation had previously organized, adopted rules and

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regulations, and that the trustees were chosen in accordance with such rules and regulations. Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455.

[e] If the articles of incorporation do not state that a majority of the members of the association were present and voted at the election of directors, the certificate does not constitute the association a corporation; nor can evidence be admitted that a majority were present and voted.—People v. Selfridge, 52 Cal. 331.

[f] Defective certificate of incorporation is not proof of corporation in esse.—McCallon v. Hibernia etc. Soc., 70 Cal. 168, 12 Pac. 114.

[g] Certificate or articles of incorporation not conforming to statutory requirements is ineffectual.—McCallon v. Hibernia etc. Soc., 70 Cal. 167, 12 Pac. 114.

[h] The articles of incorporation of a manufacturing company formed to own and run a sawmill and to manufacture lumber and articles made of wood, are not vitiated by including therein power to operate, construct, maintain, and deal in railroads, tramways, and rights of way, it being frequently necessary in such business to have tramways and railroads as part of the manufacturing plant though such a corporation could not exercise the right of eminent domain to acquire rights of way.—People ex rel. Loy v. Mount Shasta Mfg. Co., 107 Cal. 256, 40 Pac. 391.

[i] Corporation has no de jure existence until the Secretary of State has issued the certificate required by Civil Code, section 296.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

§ 19. —— Signature and Acknowledgment.

[a] The certificate of incorporation of a company claiming in good faith to be a corporation under the laws of this state, and doing business as such corporation, is admissible in evidence in a private suit to which the company is a party, as evidence of its right to act as a corporation, although it is not acknowledged by all the corporators.—Dannebroge Mining Co. v. Allment, 26 Cal. 286.

[b] Stockholder is bound by articles of corporation, whether he has signed them or not. McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. 397.

[c] Civil Code, section 292, provides that articles of incorporation must be subscribed by five or more persons, and acknowledged by each. Held, in an action by the state to forfeit a charter, that a complaint showing that the articles of incorporation were signed by five persons, and acknowledged by four only, stated a cause of action.—People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

[d] It is not necessary to the validity of the corporation or to the subscribers who agreed to its formation becoming stockholders, that they should all sign the articles of incorporation.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

[e] The articles of incorporation of benevolent or social associations organized without profit under sections 593 and 594 of the Civil Code must be subscribed and acknowledged by at least five persons, in accordance with section 292 of the Civil Code, in addition to the verification required by section 594 of that code.—People ex rel. Weatherly v. Golden Gate Lodge, 128 Cal. 257, 60 Pac. 865.

§ 20. —— Authentication and Verification.

[a] Effect must be given so far as possible to the consistent provisions of the Civil Code relating to the formation of corporations; and the fact that section 594 provides for the contents of articles of incorporation of the associations mentioned in section 593, in addition to the requirements of section 290, and further provides a mode of verification of such articles, cannot be construed as providing a complete scheme for their authentication, or as dispensing with the additional authentication required by section 292, which is not inconsistent with sections 290, 593, and 594.—People ex rel. v. Golden Gate Lodge, 128 Cal. 257, 60 Pac. 865.

[b] Section 290 of the Civil Code applies to associations organized for benevolent and social purposes, and hence such a corporation, the articles of which were verified by only two persons, was not duly organized.—People v. Golden Gate Lodge, No. 6, Benevolent and Protective Order of Elks of United States of America, 128 Cal. 257, 60 Pac. 865.

[c] The verification required by Civil Code, section 594, requiring that the articles of incorporation of a benevolent association must set forth certain facts relating to the election of directors, "which facts must be verified by the officers conducting the same," is an essential prerequisite to the assumption of corporate powers by the association as a de jure corporation.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

§ 21. —— Filing or Recording.

Necessity that foreign corporation file articles. See post, § 479.

[a] The statute provides that a certificate of incorporation shall be filed with the county clerk, and a duplicate with the Secretary of State, and that when a certificate is filed the persons shall be a corporation. Held that, as to third persons, the filing in the clerk's office was all that was required.—Mokelumne Hill Canal etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

[b] That a duplicate certificate is not filed in the office of the Secretary of State on the organization of a corporation, as provided by the statute, is a matter between the corporation and the state, and not necessary to be shown, on the issue of corporation and incorporation, in suits against third persons.—Mokelumne Hill Canal etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

[c] Where articles of incorporation state one county to be the principal place of business, and instead of being filed in that county,

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as required by the statute, are filed in another county, the corporation does not become one de jure.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

[d] Civil Code, section 296, requires every corporation to file its articles of incorporation in the county of its principal place of business, and a certified copy in the office of the Secretary of State. Section 299 provides that it shall file "a copy of the copy of its articles of incorporation filed in the office of the Secretary of State, duly certified by such Secretary of State," in the office of the clerk of any county in which it holds any property, and, further, that it shall not maintain or defend any action in relation to such property "until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation shall be filed at the places directed by the general law and this section." Held, that a certified copy of the copy on file with the Secretary of State was the only one required by section 299 to be filed in counties because property was there situated.—California Savings etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525.

§ 22. —— —— Amended Articles.

[a] Where amended articles of incorporation of a railroad company have not been filed with the Secretary of State, the corporation can claim no rights thereunder as to the condemnation of a right of way.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

§ 23. —— Proof of Issuance and Filing.

[a] When the fact of the issuance of a certificate of incorporation by the Secretary of State as directed by Civil Code, section 296, is in issue, the presumption "that official duty has been regularly performed," as declared by Code of Civil Procedure, section 1963, cannot dispense with legal proof that such certificate was issued.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

[b] Articles of incorporation of plaintiff with filing marks thereon held evidence of proper filing of articles and due incorporation. Sierra Land etc. Co. v. Bricker (Cal. App.), 85 Pac. 665.

§ 24. —— Amendment.

[a] A change of the laws of a mutual benefit association in regard to the payment of benefit certificates is not an amendment of its certificate of incorporation or articles of association, within the meaning of Civil Code, section 362, providing the method for making such amendments.—Bowie v. Grand Lodge of Legion of the West, 99 Cal. 392, 34 Pac. 103.

[b] Under Civil Code, section 362, amended articles of incorporation need not be acknowledged.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

§ 25. —— Act Curing Defects in Certificate.

[a] Defects in certificates of incorporation are cured by the act of April 1, 1864.—Larrabee v. Baldwin, 35 Cal. 155.

§ 26. Effect of Defective Organization.

See, also, Partnership, § 17.

[a] A partnership or a joint stock company is not necessarily the result of an abortive attempt to organize a corporation.—Blanchard v. Kaull, 44 Cal. 440.

FOR AUTHORITIES FROM OTHER STATES:

Defective formation of corporation and its consequences: 33 Am. St. Rep. 176, note. See, also, 10 Cyc. 251; 12 Cent. Dig., cols. 110-166, §§ 70-96.

§ 27. —— Property Rights of Organizers.

[a] Where certain persons associated themselves in a corporation for the development of land for irrigation purposes, and each conveyed land to the corporation, and two of them contracted to pay a third the difference in the proportionate value of the land conveyed by him, and no stock was ever issued in the corporation, it will be treated as a trustee for the associates in an action between them for an accounting, and its capital stock treated as partnership assets sold, and the proceeds distributed among them in proportion to the value of the property contributed by each.—Shorb v. Beaudry, 56 Cal. 446.

§ 28. Effect of Fraudulent Organization.

[a] A corporation fraudulently organized to avoid payment of mining royalties under a lease held liable for such royalties.—Higgins v. California Petroleum etc. Co., 147 Cal. 363, 81 Pac. 1070.

§ 29. Official Recognition of Invalid Corporation.

[a] Where the constitution of the state forbids corporations to be created except by general laws, the mere recognition of a corporate body, as an existing corporation, in acts of the legislature, cannot operate to give the organization validity.—Oroville etc. R. Co. v. Plumas County Supervisors, 37 Cal. 354.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 241; 12 Cent. Dig., cols. 115-118, § 72.

§ 30. Unauthorized Assumption of Corporate Existence.

[a] Where persons knowingly and fraudulently assume or pretend to have a corporate existence, they may be held liable as individuals; but where they are acting in good faith, supposing that they are stockholders or members in a valid corporation, and where the corporation assumes to transact business for a number of years, and the assumed corporate existence is not challenged by the state, they cannot be held liable as individuals. The principle that shields the members from claims of persons dealing with the corporation under such circumstances is equally efficacious to protect the members as between themselves.—Perkins v. Fish, 121 Cal. 317, 53 Pac. 901.

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FOR AUTHORITIES FROM OTHER STATES:

Transactions in the name of supposed, but nonexisting, corporations: 94 Am. St. Rep. 593-598, note.

C. DE FACTO CORPORATIONS.

WHAT CONSTITUTES, § 31.
—— COMPANY ORGANIZED UNDER INVALID LAW, § 32.
SOLE CORPORATION, § 33.
PROOF OF EXISTENCE, § 34.
CORPORATE POWERS, § 35.
RIGHTS IN FRANCHISE OR PROPERTY, § 36.
ATTACKING VALIDITY OF INCORPORATION—PERSONS ENTITLED, § 37.
—— COLLATERAL ATTACK, § 38.

Effect of defective organization. See ante, §§ 26, 27.

Officers of de facto corporations. See post, § 286.

FOR AUTHORITIES FROM OTHER STATES:

Personal liability of members of de facto corporations: 29 Am. St. Rep. 600, note.

Transactions in the name of supposed, but nonexisting, corporations: 94 Am. St. Rep. 593, note. See, also, 10 Cyc. 251-255, 1100; 12 Cent. Dig., cols. 110-115, § 70.

§ 31. What Constitutes.

[a] Preliminary organization, and doing business in good faith, is sufficient to make company a corporation de facto.—Stockton etc. Co. v. Stockton etc. Co., 45 Cal. 680.

[b] Body acting as corporation in good faith is de facto corporation.—Lakeside Ditch Co. v. Crane, 80 Cal. 186, 22 Pac. 76.

[c] Corporation de facto exists where a number of persons have organized and acted as a corporation; and where the directors named in the articles never met nor acted, and no stock is issued, nor by-laws passed, nor seal adopted, or any election held, nor any other corporate act done by an intended corporation, it is not a corporation de facto, and its right to exist as a corporation may be collaterally attacked in a private action.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Cal. 368.

§ 32. —— Company Organized Under Invalid Law.

[a] Company organized under unconstitutional law is not a corporation de facto.—Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562.

§ 33. Sole Corporation.

See, also, ante, § 6; post, §§ 63, 67, 268.

[a] An individual cannot become a corporation de facto by assuming the name of a toll-road company, where there are no directors or officers, and no acts in corporate forms.—People v. Volcano Cañon etc. Co., 100 Cal. 87, 34 Pac. 522.

§ 34. Proof of Existence.

[a] On an indictment for arson committed with intent to defraud an insurance company, testimony of a witness that he was acting as the agent of the company, and effected the insurance on the property and delivered the policy, which was received by the defendant, is sufficient to warrant a finding that the corporation had a de facto existence.—People v. Hughes, 29 Cal. 257.

[b] The de facto existence of a corporation may be proved by parol, but the proof must be of reputation, and not by a direct statement of a witness, so that a witness cannot testify that a certain bank is a corporation. Judgment (1898), 51 Pac. 945, reversed.—People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[c] In a suit involving the corporate existence of a benevolent association, evidence that there were no meetings of the members or trustees, no election of officers, no by-laws adopted, no certificate of shares issued, no seal adopted or used, no records kept, and that the institution was managed after the attempted incorporation as it had been before, was sufficient to sustain a finding that it was not a corporation de facto.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

§ 35. Corporate Powers.

[a] Corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, its acts are binding.—People v. La Rue, 67 Cal. 526, 8 Pac. 84.

§ 36. Rights in Franchise or Property.

[a] A de facto corporation can be deprived of its franchise or property only in a direct proceeding by the state.—Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049.

§ 37. Attacking Validity of Incorporation—Persons Entitled.

Attack on existence of de jure corporation. See post, §§ 51-53.

[a] Question whether a de facto corporation was organized strictly according to law can only be inquired into at the suit of the state, or on information by the attorney general.—Rondell v. Fay, 32 Cal. 354.

[b] A mere trespasser cannot justify his entry on the ground that plaintiff was only a corporation de facto, and was not de jure entitled to a franchise.—Stockton etc. R. Co. v. Stockton etc. R. Co., 45 Cal. 680.

FOR AUTHORITIES FROM OTHER STATES:

See 10 Cyc. 256-261, 1086-1088; 12 Cent. Dig., cols. 122-136, §§ 77-86.

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§ 38. —— Collateral Attack.

[a] The corporate existence of a corporation de facto cannot be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation de jure. The legality of its corporate existence may be inquired into by the state, but not by anyone else. And this is equally true where the corporation is formed under a general law as under a special charter.—Spring Valley W. W. v. City of San Francisco, 22 Cal. 434; Pacific Bank v. De Ro, 37 Cal. 538; Bakersfield Town Hall Assn. v. Chester, 55 Cal. 99.

[b] Right of company, doing business as a corporation de facto, and claiming in good faith to be a corporation under laws of state, to act as corporation, cannot be inquired into collaterally in a private action to which the corporation de facto may be a party.—Dannebroge Mining Co. v. Allment, 26 Cal. 286.

[c] Where it appears that plaintiff was recognized in the community as a corporation, and its records show that it was acting as such, and in all its dealings was so styled, and that it had held corporate meetings, and pursued corporate forms of action, sufficient is shown to bring it within Civil Code, section 358, which declares that "the due incorporation of any company claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party."—Lakeside Ditch Co. v. Crane, 30 Cal. 181, 22 Pac. 76.

[d] The validity of the incorporation of a body, which is de facto existing and acting, cannot be questioned collaterally, but only in a direct proceeding in behalf of the people.—Dean v. Davis, 51 Cal. 406.

[e] Due incorporation of a company claiming in good faith to be a corporation under the laws of the state cannot be collaterally attacked, where the incorporators signed and acknowledged the articles stating the object, name, duration, amount of stock, place of business, and number of trustees, and attempted to file the articles, but by mistake filed them with the wrong officer, and took possession of its property, and did business named in the articles.—Bakersfield Town Hall Assn. v. Chester, 55 Cal. 98.

[f] Corporate existence of a plaintiff in ejectment may be established by evidence that it was a corporation de facto.—Oakland Gaslight Co. v. Dameron, 67 Cal. 663, 8 Pac. 595.

[g] Validity of the incorporation of a corporation which had properly signed and acknowledged its articles could not be collaterally attacked on the ground that the articles were erroneously filed with the county recorder, instead of the county clerk.—San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

D. PROMOTERS.

AGREEMENT TO FORM CORPORATION, § 39.
PROMOTER DEFINED, § 40.
FIDUCIARY RELATION TO CORPORATION, § 41.
PROMOTER'S AGENTS, § 42.
DUTY IN SELLING PROPERTY TO CORPORATION, § 43.
LIABILITY OF CORPORATION FOR PROMOTER'S ACTS AND CONTRACTS, § 44.
FRAUD AND RATIFICATION OR WAIVER THEREOF, § 45.

§ 39. Agreement to Form Corporation.

Contracts of promoters before incorporation. See post, § 375.

[a] An agreement to form a corporation for certain specified purposes, and to make a part payment on the shares of stock subscribed by the contracting parties within a specified time after the filing of the articles of incorporation, to a person therein designated as agent, inures, with its advantages and rights, to the benefit of the corporation upon its formation, irrespective of any agreement, or want of agreement, to that effect, and notwithstanding it may contain special provisions for carrying its own terms into execution.—San Joaquin Land etc. Co. v. West, 94 Cal. 399, 29 Pac. 785.

[b] Where a street railroad franchise was granted to two persons, and they thereupon organized a corporation for the express purpose of constructing and operating a railroad under the franchise, and so declared in the articles of incorporation, an assignment of the franchise by said persons to the corporation was not necessary to vest the latter with any right relating thereto.—Santa Rosa City R. Co. v. Central St. Ry. Co., 38 Pac. 986.

FOR AUTHORITIES FROM OTHER STATES:

Promoters of corporations and their relations thereto: 17 Am. St. Rep. 161, note.

Misrepresentations by promoters: 85 Am. St. Rep. 385, note; 46 C. C. A., note; 25 L. R. A. 90, note. See, also, 10 Cyc. 262-280; 12 Cent. Dig., cols. 166-179, §§ 97-100.

§ 40. Promoter Defined.

[a] A promoter of a corporation is a person who, by his active endeavors, assists in procuring the formation of the company and the subscription of its shares, whether he afterward becomes connected with the company or not, and he is considered in law as occupying a fiduciary relation to the corporation and to its shareholders who subscribe upon the trust that the promoters will control the enterprise for the benefit of the company.—Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

§ 41. Fiduciary Relation to Corporation.

[a] Promoter of corporation who brings about its organization and aids in procuring subscriptions thereto is considered in law as occupying a fiduciary relationship toward the corporation and its stockholders.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

§ 42. Promoter's Agents.

[a] Authority to agents of promoters of corporation to sell land of the promoters to the

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corporation for a commission tends, in connection with other evidence, to prove authority to such agents to promote the corporation.—Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

§ 43. Duty in Selling Property to Corporation.

[a] A promoter of a corporation or joint stock association may sell property thereto, but it is incumbent upon him, as a person occupying a fiduciary position, to make full and fair disclosure of his interest and position with respect to the property, and not to make any false representations as to its cost price.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

[b] In an accounting had against a promoter of the corporation he should be credited with a sum paid to perfect the title of one of the tracts sold, and should only be charged with the profit actually realized upon a particular tract.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

§ 44. Liability of Corporation for Promoter's Acts and Contracts.

[a] Corporation is not responsible for acts nor bound by contracts of promoters before incorporation, unless made so by its charter or its own contract or ratification.—Mitchell v. Patterson, 120 Cal. 293, 52 Pac. 589.

[b] Promoters are not the corporation and their contracts are not its contracts.—Scadden etc. Co. v. Scadden, 121 Cal. 38, 53 Pac. 440.

§ 45. Fraud and Ratification or Waiver Thereof.

[a] Where fraud is practiced upon the stockholders by the promoters of the corporation, knowledge of it by the directors is not knowledge to the stockholders, and the fraud practiced upon the stockholders cannot be ratified or waived by the directors.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

[b] Transactions in which the promoters of a corporation suppress or misrepresent material facts, or otherwise deceive the corporation, or corruptly control its action, are fraudulent, and the company may elect either to set aside such transaction, or to recover the promoter's secret profits.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

II. CORPORATE EXISTENCE AND FRANCHISE.

NATURE OF FRANCHISE, § 46.
EFFECT OF FRANCHISE AS VESTING IN CORPORATION, § 47.
—— OWNERSHIP, § 48.
—— ASSIGNABILITY AND LIABILITY TO FORCED SALE, § 49.
EVIDENCE OF CORPORATE EXISTENCE, § 50.
ATTACK ON CORPORATE EXISTENCE, § 51.
—— BY TRESPASSER, § 52.
—— COLLATERAL ATTACK, § 53.
ESTOPPEL TO QUESTION CAPACITY OR EXISTENCE, § 54.
—— OFFICERS OF CORPORATION, § 55.
COMMENCEMENT OF CORPORATE EXISTENCE, § 56.
EXTENDING FRANCHISE TO TERM OF EXISTENCE, § 57.
AMENDMENT OR REPEAL OF CHARTER, § 58.

§ 46. Nature of Franchise.

[a] The right to be a corporation is a franchise, and to acquire a franchise under a general law the required statutory conditions must be complied with.—People ex rel. Hamilton v. Selfridge, 52 Cal. 331.

[b] Franchises are legal estates, not mere naked powers, and are powers coupled with an interest which vest in corporation by virtue of charter and constating instruments. Spring Valley W. W. v. Schottler, 62 Cal. 69.

[c] Very existence of corporation as such is franchise, and it exercises its franchise in every act which it performs as a corporation. A corporation whose existence is a franchise may possess powers and privileges which in themselves are not franchises; but it usually owns along with such privileges some that are franchises, but whether the powers be entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise.—Spring Valley W. W. v. Schottler, 62 Cal. 69.

[d] That a corporation is organized to and may acquire public uses or franchises does not make such franchises "when acquired" a part of the corporation's general franchise to be and act as a corporation.—San Joaquin etc. Irr. Co. v. Merced County (Cal. App.), 84 Pac. 285.

§ 47. Effect of Franchise as Vesting in Corporation.

Right of de facto corporation to franchise. See ante, § 36.

[a] Where a franchise was granted to an individual and his associates and assigns, with a provision in the act requiring their incorporation within a fixed time, it was held that the franchise passed to the corporation so formed by operation of law.—Spring Valley W. W. v. San Francisco, 22 Cal. 434.

§ 48. —— Ownership.

[a] Stockholder owning majority of stock does not own franchise of the corporation, and is not a trustee of the other stockholders.—Johnsen v. Kirby, 65 Cal. 488, 4 Pac. 458.

§ 49. —— Assignability and Liability to Forced Sale.

[a] Franchises of a corporation are privileges granted and held in personal trust, and cannot be transferred by forced sale, or by voluntary assignment except by permission of the government, and, when that permission is granted, the mode of transfer pointed

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out must be followed.—Wood v. Truckee Turnpike Co., 24 Cal. 474.

[b] Corporate franchise may be assigned to a legally organized corporation by persons having lawful right to exercise and transfer it.—People v. Stanford, 77 Cal. 371, 18 Pac. 85, 19 Pac. 693.

§ 50. Evidence of Corporate Existence.

See, also, post, § 482.

Right to prove corporate existence by hearsay evidence, in criminal prosecution. See Criminal Law, § 192.

Degree of proof required to prove corporate existence. See Criminal Law, § 279.

[a] Existence of a corporation formed under a general statute cannot be proved without proof of at least a substantial compliance with the requirements of the statute, differing herein from a corporation under a special charter, whose existence is proved prima facie by production of the charter, and proof of a user under it.—Mokelumne Hill Canal etc. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

[b] Existence of corporation formed under general corporation laws of this state is proved by its articles of association or incorporation, executed and filed in accordance with the statute.—Spring Valley W. W. v. City of San Francisco, 22 Cal. 434.

[c] Proof of a company raises no presumption that it is an incorporated company; nor, if the name of a state appears in the name of the company, does it raise the presumption that it was incorporated under the laws of that state.—Briggs v. McCullough, 36 Cal. 542.

[d] Where a certificate of incorporation is legally defective for want of conformity to the statutory requirements under which it purports to have been made, it cannot be used as proof of a corporation in esse.—McCallion v. Hibernia Savings etc. Soc., 70 Cal. 163, 12 Pac. 114.

[e] Copy of certified copy of articles proves corporate existence.—Fresno etc. Co. v. Warner, 72 Cal. 382, 14 Pac. 37.

[f] Evidence reviewed and held sufficient to prove corporate existence.—Fresno etc. Co. v. Warner, 72 Cal. 382, 14 Pac. 37.

[g] Proof that body was recognized in community as corporation and was acting as such is sufficient proof of corporate existence.—Lakeside Ditch Co. v. Crane, 80 Cal. 185, 186, 22 Pac. 76.

[h] Where a patent to a mining claim was issued to the California Iron, Mining and Smelting Company, which patentee conveyed the claim to defendant, the patent was proof that the patentee was a corporation.—Galbraith v. Shasta Iron Co., 143 Cal. xviii, 94, 76 Pac. 901, 1127.

[i] Receipt showing that defendants contracted with plaintiff in its corporate name held competent evidence as to plaintiff's incorporation.—Sierra Land etc. Co. v. Bricker (Cal. App.), 85 Pac. 665.

FOR AUTHORITIES FROM OTHER STATES:

22 L. R. A. 276, note. See, also, 10 Cyc. 235-244; 12 Cent. Dig., cols. 192-214, §§ 106-118.

§ 51. Attack on Corporate Existence.

[a] The allegation that the plaintiffs are a corporation is an indispensable allegation in any action brought by them, and necessarily the adverse party may deny it. The statute does not contemplate that the mere allegation that the company has been duly organized should put that fact beyond dispute, but only that, when the evidence establishes that the company claims in good faith to be a corporation, and is actually doing business as such, then its due incorporation shall not be inquired into collaterally. Irregularities or defects in the mode of performing the acts prescribed by law as constituting a corporation cannot be set up by a private individual, but he may show that those acts have not been performed at all.—Oroville etc. R. Co. v. Plumas County Supervisors, 37 Cal. 354.

[b] Upon an application for a mandamus to compel county authorities to complete their subscription to the stock of plaintiff's railroad company, the defendants may deny the plaintiff's incorporation, and may deny that they have complied with the provisions of the law prescribing their organization, or are doing business as a railroad company.—Oroville etc. R. Co. v. Plumas County Supervisors, 37 Cal. 354.

[c] The corporate existence of a company which is neither a de facto nor de jure corporation may be questioned in a private action to which it is a party.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

§ 52. —— By Trespasser.

[a] Mere trespasser cannot question corporation's existence in action by it for injury to its property.—Golden Gate etc. Co. v. Hendy M. Works, 82 Cal. 186, 23 Pac. 45.

§ 53. —— Collateral Attack.

[a] Validity of corporate existence cannot be collaterally attacked or questioned.—Hoke v. Perdue, 62 Cal. 545.

§ 54. Estoppel to Question Capacity or Existence.

[a] In contracts of corporations, where the question is one of capacity or authority to contract, arising either upon a question of regularity in the corporate organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot be allowed, in a suit upon it, to question its validity,—Argenti v. City of San Francisco, 16 Cal. 255.

[b] Under act of 1862, page 110, section 6, providing that a corporation's right to exercise corporate powers cannot be inquired

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into collaterally in any private suit to which it is a party, defective incorporation cannot be set up as a defense to an action by a corporation to recover on a note.—Pacific Bank v. De Ro, 37 Cal. 538.

[c] The provisions of Statutes of 1862, page 110, section 6, does not go to the extent of precluding a private person from denying the existence de jure or de facto of an alleged corporation. The mere allegation that a party is a corporation cannot put the question whether it is such a corporation beyond the reach of inquiry in a suit with a private person.—Oroville etc. R. Co. v. Plumas County Supervisors, 37 Cal. 354.

[d] A person making a contract with a corporation as such is estopped to deny its corporate existence, where the contract was within the power of the corporation to make, and where its organization was sufficient to make it a de facto corporation.—Pacific Bank v. De Ro, 37 Cal. 538.

[e] One contracting with an alleged corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped to deny its corporate existence, in an action by the corporation to enforce the contract.—Grangers' Business Assn. v. Clark, 67 Cal. 634, 8 Pac. 445; Fresno Canal etc. Co. v. Warner, 72 Cal. 379, 14 Pac. 37.

[f] One who has contracted with an apparent corporation as such is estopped, in an action on the contract, from denying the existence of the corporation.—Fresno Canal etc. Co. v. Warner, 72 Cal. 379, 14 Pac. 37.

[g] Making a corporation a party in a proceeding to forfeit its charter is not such an admission of its corporate character as to preclude the state from questioning its right to corporate existence.—People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

[h] One who has given a note or other evidence of indebtedness to a corporation by its corporate name cannot deny that the corporation was legally organized.—Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337.

[i] One purchasing goods from a corporation is estopped to deny its corporate capacity.—Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238.

[j] Party making contract with corporation cannot, by way of collateral attack, deny that it was a corporation.—California etc. Assn. v. Stelling, 141 Cal. 720, 75 Pac. 320.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 244-250, 1065, 1345, 1346; 12 Cent. Dig., cols. 136-166, §§ 81-96.

§ 55. —— Officers of Corporation.

[a] Where a certificate of incorporation has been signed by certain persons, who accept the office of trustees, they are estopped from denying the validity of the certificate.—Parrott v. Byers, 40 Cal. 614.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 205, 223; 12 Cent. Dig., cols. 181-184, § 103.

§ 56. Commencement of Corporate Existence.

[a] Under our law corporations have a legal existence from the date of filing the certificate of incorporation in the county clerk's office.—Mokelumne Hill Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658.

§ 57. Extending Franchise or Term of Existence.

[a] Where a corporation organized prior to the adoption of the code had thereafter continued its existence thereunder, it became a code corporation, and might therefore extend the term of its existence beyond the original period of its limitation.—People v. Pfister, 57 Cal. 532.

[b] Constitution, article 12, section 7, provides that no act shall be passed extending the charter of any corporation or remitting the forfeiture of a franchise. During the pendency of an action to forfeit the charter of a street-car company alleged to be operating under an unwarranted city ordinance authorizing the use of electric power, acts of 1891, chapters 18, 19, were passed, one amending Civil Code, section 497, so as to invest municipal corporations with power to authorize street railways to use electricity as a motive power; the other ratifying existing ordinances granting such power. Held, that the acts did not extend the company's franchise or charter, and, as there had been no decree of forfeiture, there was none to remit, and therefore the acts were not repugnant to the constitution.—People v. Los Angeles Electric Ry. Co., 91 Cal. 338, 27 Pac. 673.

[c] Civil Code, section 288, provided that no corporation formed or existing before the code took effect should be affected by its provisions unless such corporation should elect to continue its existence thereunder. Held, that the provisions which did not affect such corporation without its election were such only as related to the formation and existence of corporations.—McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418.

[d] Civil Code, sections 287, 401, permitting corporations to continue their existence for fifty years, on certain terms, is not limited to private corporations as distinguished from quasi public corporations.—People v. Auburn, etc. Turnpike Co., 122 Cal. 335, 55 Pac. 10.

§ 58. Amendment or Repeal of Charter.

[a] Charters may be amended or repealed at any time.—San Francisco v. Insurance Co., 74 Cal. 119, 15 Pac. 380.

[b] Power of legislature to amend or repeal the charters of corporations organized in California does not authorize the legislature, while the corporation exists, to deprive it of the rights, guaranteed to it by the federal constitution, to due process of law, and to the equal protection of the laws, nor has the legislature any power to alter, amend, or re-

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peal the charters of foreign corporations doing business in this state.—Johnson v. Goodyear Min. Co., 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304.

FOR AUTHORITIES FROM OTHER STATES:

Legislative power to repeal franchise of corporations under a conditional reservation: 43 Am. Dec. 118, note. See, also, 10 Cyc. 1272, 1273; 12 Cent. Dig., cols. 231-233, § 128.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

CHANGE OF NAMES, § 59.
USE OF NAME SIMILAR TO THAT OF ANOTHER COMPANY, § 60.
—— ENJOINING, § 61.
SEAL, § 62.
—— OF SOLE CORPORATION, § 63.
DOMICILE OR PLACE OF BUSINESS, § 64.
EVIDENCE OF DOMICILE, § 65.
BY-LAWS, § 66.
—— OF SOLE CORPORATION, § 67.
—— NATURE AND FUNCTION, § 68.
—— POWER TO ENACT, § 69.
—— ADOPTION, § 70.
—— CONSTRUCTION AND OPERATION, § 71.
—— AMENDMENT, § 72.
—— SIGNING, § 73.
—— VALIDITY, § 74.
—— RETROSPECTIVE BY-LAW, § 75.
—— ABRIDGING RIGHTS OF MEMBERS, § 76.
—— IMPUTED NOTICE OF, § 77.

Corporate name of savings and loan societies. See Banks and Banking, § 127.
Corporate records as evidence. See Evidence, § 322.
Admissibility of parol or extrinsic evidence to vary corporate records. See Evidence, § 373.
Firm names. See Partnership, § 21.
Subscription book. See post, § 109.

§ 59. Change of Names.

[a] Code of Civil Procedure, section 1276, providing that any religious, benevolent, literary, scientific, "or other corporation," or any corporation having, or being known by, the name of any benevolent or charitable society, may apply to the superior court for a change of its corporate name, is not restricted in its application to corporations of the kind specially enumerated, but applies to a corporation organized for profit.—In re La Societe Francaise De Pargnes et de Prevoyance Mutuelle, 123 Cal. 525, 56 Pac. 458, 787.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 155, 156; 12 Cent. Dig., cols. 235, 237, §§ 134, 135.

§ 60. Use of Name Similar to that of Another Company.

[a] While a private person may engage in a business in his own name, although his name is used in the same business by a corporation of which he was at one time a leading stockholder, so long as he does not resort to any artifice to produce the impression that the place of business conducted by him and that conducted by the corporation are identical, yet he cannot, by becoming a stockholder in a new corporation, confer on it the right to adopt a name similar to that used by the former corporation to palm off the business of the new corporation as that of the old.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 151; 12 Cent. Dig., cols. 238-242, § 137.

§ 61. —— Enjoining.

[a] Where a name adopted by a corporation is so similar to that of another corporation as to create confusion and enable the later corporation to obtain the business of the prior one, injunction will lie to restrain the simulation, so far as necessary to protect the rights of the prior corporation.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

[b] The use by one corporation or individual of a name similar to that of another corporation engaged in the same business will be enjoined only so far as is necessary to protect against fraudulent representations.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

[c] A corporation engaging in business under a name similar to that of another corporation engaged in the same business should be enjoined from making use of that name only in the business in which both corporations were engaged, and not from making use thereof in any other business.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

[d] The names "The Dodge Stationery Company" and the "J. S. Dodge Company," when taking into consideration the fact that the business conducted by the latter is the same as that conducted by the former, are sufficiently similar to warrant an injunction restraining the latter from conducting its business under the name adopted by it.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

[e] A person whose name was used as the corporate name of a corporation of which he was at one time president, and whose surname was used as the popular name of that corporation, who engaged in the same business, after the termination of his connection with the corporation, in a new corperation making use of his name as a corporate name and of his surname standing alone as a popular name, was properly enjoined from engaging in the business and at the place in the same city where the new corporation had established itself, and had used misleading signs similar to those used by the old corporation, and from causing any business similar to that of the old corporation to be carried on by the new corporation in the city under the designation of the surname without a qualifying statement that the business so carried on was not the business theretofore carried on by the old corporation under that name, and from in any manner representing that such business was the same business as that carried on

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by the old corporation; but a further provision of the injunction restraining him from using his own name in the carrying on of the business at any other place in the city unless qualifying that name by explanatory statements making its use burdensome was unauthorized.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

§ 62. Seal.

See, also, post, § 340.

[a] Admitted, for the purposes of this decision, that a corporation may adopt the private seal of the several trustees or any one of them as its seal for the occasion.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

[b] A seal affixed to an instrument, which purports to be the corporate seal of a corporation, must, in the absence of objection, be presumed to be genuine, as well as to have been affixed by proper authority, and is evidence of the corporate act which it purports to authenticate.—Burnett v. Lyford, 93 Cal. 114, 28 Pac. 855.

[c] Where a seal which had not been formally adopted by a corporation was used for the first time in the execution of instruments afterward in question, the finding that it had become the common seal of the corporation by use is sustained by a showing that it had afterward been employed as the seal of the corporation in all transactions requiring the impress of a seal.—Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

For Authorities from Other States:

Seal of corporation, as evidence: 64 Am. St. Rep. 260, note.

Adoption of corporate seal, and effect and necessity for its use: 50 Am. St. Rep. 150, note. See, also, 10 Cyc. 1010-1012; 12 Cent. Dig., cols. 242-245, § 139.

§ 63. —— Of Sole Corporation.

[a] A sole corporation has no need of a corporate seal, nor of a secretary or treasurer, nor of by-laws. His own will and judgment alone regulate his acts, like any other individual acting in his own right. His possession of land, when the title is in him as an individual, can in no way be distinguished from his holding thereof as a sole corporation when the title is in the corporation.—Roman Catholic Archbishop of San Francisco v. Shipman, 79 Cal. 288, 21 Pac. 830.

§ 64. Domicile or Place of Business.

[a] Every corporation has a "residence," within the meaning of the word as used in the practice act, where its principal office or place of business is established.—Jenkins v. California Stage Co., 22 Cal. 537.

[b] It is duty of every corporation to have an office and principal place of business. Chapman v. Doray, 89 Cal. 54, 26 Pac. 605.

[c] Corporation's residence is county where it has its principal place of business.—Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395.

For Authorities from Other States:

12 Cent. Dig., cols. 246-254, §§ 140-150.

§ 65. Evidence of Domicile.

[a] In proceedings by creditors of a corporation to have the same declared insolvent, the creditors may prove by parol evidence in what county the corporation has its place of business.—Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196.

§ 66. By-laws.

See, also, post, § 178.

[a] In the absence of legislative restriction, the propriety and character of a corporation's by-laws are to be determined by the corporation itself.—People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

For Authorities from Other States:

What by-laws corporations may adopt: 85 Am. Dec. 617, note. See, also, 10 Cyc. 349-364; 12 Cent. Dig., cols. 255-261, §§ 151-159.

§ 67. —— Of Sole Corporation.

[a] Sole corporation has no need of by-laws. Roman Catholic Archbishop v. Shipman, 79 Cal. 288, 21 Pac. 830.

§ 68. —— Nature and Function.

[a] By-laws are the body of rules laid down for government of corporation, its officers and stockholders in conduct of its affairs.—Wells v. Black, 117 Cal. 161, 59 Am. St. Rep. 162, 48 Pac. 1090.

[b] The function of a by-law of a private corporation is to prescribe the rights and duties of members with reference to the internal government of the corporation, the management of its affairs, and the rights of members inter se.—Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith (Cal. App.), 84 Pac. 271.

§ 69. —— Power to Enact.

[a] A corporation's power to make by-laws, conferred by Civil Code, section 354, held not limited by section 303.—People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[b] Corporations may make only such by-laws as are consistent with the constitution and laws of the state.—Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090.

[c] A corporation's right to enact by-laws, while inherent and incident to its existence, is subject to the condition that the by-laws must be reasonable and not contravene the charter or any existing state law.—Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith (Cal. App.), 84 Pac. 271.

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FOR AUTHORITIES FROM OTHER STATES:

Limitations on power to enact by-laws: 43 Am. St. Rep. 152, note. See, also, 10 Cyc. 353-355; 12 Cent. Dig., cols. 255, 256, § 152.

§ 70. —— Adoption.

[a] The fact that corporation adopted by-laws before completion of organization justifies finding that corporation had by-laws since its formation.—Vercoutere v. Golden State L. Co., 116 Cal. 415, 48 Pac. 375.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 353-355; 12 Cent. Dig., cols. 255, 256, § 152.

§ 71. —— Construction and Operation.

[a] A by-law authorizing a board of directors to call in unpaid stock subscriptions, on being assented to by stockholders, held to constitute a contract enforceable by the corporation.—People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[b] By-laws of a corporation construed, and held to authorize the vice-president to call special meetings of the directors, in the absence or inability of the president to act.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

FOR AUTHORITIES FROM OTHER STATES:

25 L. R. A. 48, note. See, also, 10 Cyc. 349-352; 12 Cent. Dig., cols. 260, 261, § 159.

§ 72. —— Amendment.

[a] Act of April 11, 1862, section 10 (Stats. 1862, p. 201), provides that the capital stock of savings banks shall be a security for non-stockholding depositors, and that the by-laws may extend the security to stockholding depositors also. Defendant's by-laws formerly extended the security. Thereafter a "committee on revision of by-laws reported." The minutes recited that "the proposed new by-laws" were submitted; and subsequent minutes that "the same are hereby declared to be the by-laws." The by-laws were set out in full in the minutes, and contained no provision making the capital stock a security to depositors, whether stockholders or not. Held, that the by-laws as adopted in the later meetings were new by-laws, and not mere amendments of the former by-laws, and hence the provision of the old by-laws extending the security to stock-holding depositors was not continued in force.—Murphy v. Pacific Bank, 130 Cal. 542, 62 Pac. 1059.

§ 73. —— Signing.

[a] A stockholder of a corporation is bound by its duly and regularly adopted by-laws, whether he has signed them or not.—McFadden v. Board of Supervisors of Los Angeles County, 74 Cal. 571, 16 Pac. 397.

[b] Under Civil Code, section 301, providing for the adoption of by-laws after organization of a corporation, a copy of by-laws prepared and signed by the stockholders before organization is invalid.—Vercoutere v. Golden State Land Co., 116 Cal. 410, 48 Pac. 375.

[c] Signature of stockholder to by-laws, though made before organization of corporation, constitutes an agreement which corporation can enforce after formation.—Vercoutere v. Golden State L. Co., 116 Cal. 415, 48 Pac. 375.

§ 74. —— Validity.

[a] By-laws which contravene provisions of an existing law are void.—Vercoutere v. Golden State L. Co., 116 Cal. 412, 48 Pac. 375.

[b] By-laws of a corporation cannot have the effect of forbidding what the law expressly authorizes.—Reclamation Dist. v. Hagar, 66 Cal. 56, 4 Pac. 945.

[c] By-law relieving stockholders from constitutional or statutory liability is void.—Wells v. Black, 117 Cal. 162, 163, 59 Am. St. Rep. 162, 48 Pac. 1090.

§ 75. —— Retrospective By-law.

[a] Corporation cannot pass a retrospective by-law to prevent transfer of stock until indebtedness to company is paid.—People v. Crockett, 9 Cal. 112.

[b] Where a by-law of a corporation expressly provides that it shall operate retrospectively, and its effect is to annul or impair an existing obligation of the corporation, it will be held unreasonable and in contravention of existing laws.—Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith (Cal. App.), 84 Pac. 271.

§ 76. —— Abridging Rights of Members.

[a] Substantial rights of a stockholder cannot be taken from him or even abridged by the by-laws.—People's Home Savings Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, 38 Pac. 452.

§ 77. —— Imputed Notice of.

[a] Where actual notice of by-laws is necessary it must be proved against shareholders and agents, as well as against strangers, by direct or presumptive evidence, and cannot be imputed by an arbitrary rule of law.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

IV. CAPITAL STOCK, AND DIVIDENDS.

A. Capital Stock, §§ 78-83.
B. Subscription to Stock, §§ 84-109.
C. Assessment of Stock, §§ 110-128.
D. Issue of Stock and Certificates, §§ 129-141.
E. Transfer of Shares, §§ 142-169.
F. Dividends, §§ 170-175.
G. Lien Corporation on Stock, §§ 176-183.

A. CAPITAL STOCK.

NATURE OF CAPITAL STOCK OR SHARES, § 78.
NATURE OF PROPERTY IN SHARES, § 79.

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VALUATION OF STOCK, § 80.
INCREASE, § 81.
REDUCTION, § 82.
DIVISION OF CAPITAL STOCK AMONG SHAREHOLDERS, § 83.

Amount of capital to be subscribed or paid. See ante, § 10.
Capital stock of state banks. See Banks and Banking, §§ 17-20.
Evidence admissible to show value of corporate stock. See Evidence, § 109.

§ 78. Nature of Capital Stock or Shares.

[a] By capital stock the statute intends the capital of the corporation on which it transacts business, whether such capital consists of money, property, or other valuable commodities.—Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

[b] "Capital stock" and "shares of capital stock" distinguished.—Kohl v. Lilienthal, 81 Cal. 385, 22 Pac. 689.

[c] Shares of stock merely represent portion to which holders are entitled out of profits of corporation and in final distribution of estate of corporation on dissolution.—Kohl v. Lilienthal, 81 Cal. 386, 22 Pac. 689.

[d] Mining stock is personal property.—Mattingly v. Roach, 84 Cal. 207, 23 Pac. 1117.

[e] Restrictions as to capital stock of corporation may be created by contract mutually agreed to by stockholders.—Williams v. Ashurst, 144 Cal. 619, 98 Pac. 28.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 364-366; 12 Cent. Dig., cols. 265, 266, § 162.

§ 79. Nature of Property in Shares.

[a] Capital stock or property of company used to carry on its business is vested in corporation in trust for protection of its creditors.—Kohl v. Lilienthal, 81 Cal. 385, 22 Pac. 689.

[b] In absence of provision to contrary in stock certificates, or in resolutions, by-laws or charter authorizing their issue, or other writing, stockholders are regarded as equal in right.—Richey v. East Redlands Water Co., 141 Cal. 228, 74 Pac. 754.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 364-366; 12 Cent. Dig., cols. 267-270, §§ 165-172.

§ 80. Valuation of Stock.

[a] Goodwill is not an element of value of stock in a trading corporation.—Spring Val. Waterworks v. Schottler, 62 Cal. 69.

§ 81. Increase.

[a] The last clause of article 12, section 11, prohibiting the increase of the stock by a corporation, except in a certain manner, is not self-executing.—Ewing v. Oroville Min. Co., 56 Cal. 649.

[b] Code, section 359, authorizing the increase of corporate stock on the written assent of the holders of three-fourths of the capital stock, being in contravention of Constitution, article 12, section 11, prohibiting a corporation from increasing its stock except on the assent of the holders of a majority of the stock at a meeting called for that purpose, on sixty days' notice, is unconstitutional and void, and hence an increase under such section was void.—Ewing v. Oroville Min. Co., 56 Cal. 649.

[c] Constitution, article 1, section 22, article 12, section 11, and Civil Code, section 359, held to prohibit any increase in the capital stock of a corporation, unless sixty days' notice of the meeting at which the increase is voted is given.—Navajo Mining etc. Co. v. Curry, 147 Cal. 581, 82 Pac. 247.

FOR AUTHORITIES FROM OTHER STATES:

38 L. R. A. 616, note. See, also, 10 Cyc. 538-545, 950; 12 Cent. Dig., cols. 270-278, §§ 173-180.

§ 82. Reduction.

[a] The fact that corporation becomes the owner of the shares converted, where a recovery is had for the conversion, is not ground for refusing the remedy for such recovery, as the authorized capital is not reduced by such ownership, and the shares are not extinguished, and may be reissued by the corporation.—Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476.

[b] Purchase by a corporation of a part of its own stock, until it is reissued, in effect reduces its stock to that extent.—Tulare Irr. Dist. v. Kaweah Canal etc. Co., 44 Pac. 662.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 545; 12 Cent. Dig., cols. 278, 279, §§ 181-183; cols. 542-544, § 449.

§ 83. Division of Capital Stock Among Shareholders.

[a] Prohibition of the thirteenth section of the act concerning corporations is directed against the trustees, and is designed to protect creditors as such; and, also, to protect the stockholders against their mismanagement in distributing capital stock in the form of dividends.—Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

[b] Capital and all assets except surplus profits are to be retained intact and form a fund to secure corporate creditors.—People v. San Francisco Savings Union, 72 Cal. 204, 13 Pac. 498.

[c] Money or property received by corporation in exchange for its capital stands in place of such capital, and cannot be divided or withdrawn.—Kohl v. Lilienthal, 81 Cal. 386, 390, 22 Pac. 689.

[d] Capital of corporation must be kept intact until final dissolution.—Kohl v. Lilienthal, 81 Cal. 389, 22 Pac. 689.

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[e] There can be no division of capital stock among shareholders except on dissolution of corporation.—Kohl v. Lilienthal, 81 Cal. 388, 22 Pac. 689.

[f] Unanimous agreement or consent of shareholders will not authorize distribution of any part of capital stock (Civ. Code, 309). Kohl v. Lilienthal, 81 Cal. 386, 22 Pac. 689.

[g] "Capital stock" which directors are prohibited from withdrawing or dividing among stockholders means money and property with which corporation carries on its corporate business (Civ. Code, sec. 309).—Kohl v. Lilienthal, 81 Cal. 384, 385, 22 Pac. 689.

[h] Corporation not for profit cannot divide any part of its funds among its members.—Ashton v. Dashaway, 84 Cal. 69, 24 Pac. 111.

[i] Mining corporation may distribute its net earnings, although the value of its mine is thereby diminished; and it is not deemed to have divided its capital, within the meaning of section 309 of the Civil Code, merely because it has distributed the net proceeds of its mining operations.—Excelsior Water etc. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

27 L. R. A. 136, note. See, also, 10 Cyc. 368-370; 12 Cent. Dig., col. 267, § 164.

B. SUBSCRIPTION TO STOCK.

CONTRACT OF SUBSCRIPTION, § 84.
—— CONSIDERATION, § 85.
—— CONSTRUCTION AND OPERATION, § 86.
—— VALIDITY, § 87.
—— RESCISSION FOR MISREPRESENTATION, § 88.
—— CONDITIONS PRECEDENT TO RESCISSION, § 89.
—— ESTOPPEL TO RESCIND, § 90.
CONDITIONAL SUBSCRIPTION, § 91.
CONDITIONS PRECEDENT TO LIABILITY, § 92.
ESTOPPEL TO DENY LIABILITY, § 93.
CANCELLATION, § 94.
RELEASE OR DISCHARGE, § 95.
—— CHANGES IN NATURE OF BUSINESS, § 96.
PAYMENT, § 97.
—— BY NOTES OR CHECKS, § 98.
—— CUSTODY OF MONEY PAID, § 99.
ACTIONS ON SUBSCRIPTIONS—CALL OR ASSESSMENT AS CONDITION PRECEDENT, § 100.
—— RIGHT OF CORPORATION TO SUE, § 101.
—— DEFENSES, § 102.
—— TIME TO SUE AND LIMITATIONS, § 103.
—— PLEADING, § 104.
—— FINDINGS CONSTRUED, § 105.
—— ATTACHMENT, § 106.
ACTION TO SET ASIDE SUBSCRIPTION, § 107.
FORFEITURE OF STOCK FOR NONPAYMENT, § 108.
SUBSCRIPTION BOOK, § 109.

§ 84. Contract of Subscription.

[a] Rights in corporation under our laws can be fixed by contract. A man can as well make an agreement with another for certain stock in a corporation to be organized hereafter as an agreement for stock in a corporation already existing; and may contract that each shall have so many shares of stock on such and such terms.—Chater v. San Francisco etc. Co., 19 Cal. 219.

[b] A, B, and C entered into an agreement to form a corporation for commercial purposes. Each was, by this agreement and by the corporate act, to have an equal share of the stock. Two contributed capital in money. The third gave his note, pledging his stock as security; the other two agreeing to raise the money for him on his stock. It was agreed that the stock due him should be issued on a given event, which occurred, but his note was not made, nor the stock issued; but the company, controlled by the other two corporators, went on in its business, recognizing the third as a corporator. No demand was made for his note or the stock. His share in the profits of the corporation amounted to enough to pay his contribution. Held, that the two must be held to have waived their formal rights, they having omitted to demand the note and stock, and having otherwise obtained the object of this security, and that the third might recover his stock in a suit for that purpose.—Chater v. San Francisco Sugar Refining Co., 19 Cal. 219.

[c] Defendant and others, for the purpose of forming a corporation, agreed to "subscribe for stock to the amount set opposite to our respective names; amounts to be due and payable on the formation of the company and the issuance of the stock." Held, that the corporation, when formed, could sue on such agreement as a contract made for its benefit.—Marysville Electric Light etc. Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

[d] In an action by an opera-house company to recover a subscription to its capital stock, it appeared that a "prospectus" recited in detail the objects of the intended corporation, the amount of stock, etc.; that the subscriptions were to be called in on installments; and that defendant signed the prospectus for a certain number of shares. Held, that the prospectus constituted a contract under which defendant was liable for the amount of his subscription.—Auburn Opera House etc. Assn. v. Hill, 113 Cal. 382, 45 Pac. 695, affirming (1893) 32 Pac. 587.

[e] It is not necessary, for one to subscribe to a subscription agreement to become the owner of shares and the holder of original certificates of the first issue of a corporation's stock.—Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

[f] If acting in good faith, it is valid for all the stockholders to agree that shares of stock be issued to themselves in exchange for property conveyed by them to the corporation, and to acquire which, in part, the corporation is formed.—Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838.

[g] In a stock subscription, by which the subscribers agreed "to take the number of shares set opposite our names respectively, and thereon to pay the amount in cash named,

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to wit, ten per cent of the amount of stock by us subscribed, to B., treasurer of said corporation," opposite the name of each subscriber, under the words "Stock Subscribed," was written "two thousand dollars," and under the words "Amount of Cash" was written "two hundred dollars paid." Held, that the obligation on the subscription was not limited to the two hundred dollars, but this amount was to be paid contemporaneously with the subscription, and the balance on call.—Ventura etc. Ry. Co. v. Collins (Cal.), 46 Pac. 287.

FOR AUTHORITIES FROM OTHER STATES:

Stock subscriptions and distinction between subscriptions and offers or agreements to subscribe: 81 Am. Dec. 392, note.

Liability of subscribers to stock of corporations: 93 Am. St. Rep. 349, note. See, also, 10 Cyc. 380-404; 12 Cent. Dig., cols. 291-348, §§ 197-243.

§ 85. —— Consideration.

[a] Mutual promise of subscribers, one to the other, is sufficient consideration for promise of each.—West v. Crawford, 80 Cal. 32, 21 Pac. 1136.

§ 86. —— Construction and Operation.

[a] Terms of statutes in force become part of contract of subscription.—Glenn v. Sexton, 68 Cal. 358, 9 Pac. 420.

[b] Agreement to subscribe to stock in corporation to be formed does not make subscriber member of corporation. To become member corporate articles must be subscribed.—West v. Crawford, 80 Cal. 29, 21 Pac. 1136.

[c] The subscribers present at the organization of the corporation are not the agents of absent subscribers for the formation of the corporation, except for the formation of such a corporation as has been agreed upon, and there is no implied authority from a nonconsenting subscriber to go beyond the bounds agreed upon for the formation of the corporation.—Marysville Electric Light etc. Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

[d] In case of ambiguity, an agreement of one taking stock from a corporation to pay one dollar per month, for thirty-four months, will be held merely to be an arrangement to avoid necessity for calls and assessment, rather than a sale for less than par; the directors not being shown to have authority to so sell.—Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 404; 12 Cent. Dig., cols. 304-348, §§ 210-243; cols. 555, 556, § 455.

§ 87. —— Validity.

[a] An agreement by a subscriber to the stock of a proposed corporation to pay the amount of his subscription upon the formation of the company and the issuance of its stock, and not as the same might be called for under section 322 of the Civil Code, is valid, and the measure of his liability is not fixed by that section of the code, but by the terms of his subscription, which may be enforced, regardless of the inability of the corporation to meet its liabilities or to satisfy the claims of creditors.—Marysville Electric Light and Power Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

[b] Honest expressions of opinion as to the happening of future events affecting the business of a corporation, made by a stockholder and officer of the company, as an inducement to others to give a note for stock in the corporation, do not render the note voidable on the failure of the events to happen, when the happening of the events is not made a condition of payment.—Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772.

§ 88. —— Rescission for Misrepresentation.

[a] Where the purchaser is induced by the fraudulent representations of the seller to make a purchase of mining stock, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract, and resist the payment of the note given for the property.—Gifford v. Carvill, 29 Cal. 589.

[b] Offer to rescind a corporate stock subscription, claimed to have been induced by fraud, and to return all benefits received thereunder, as required by Civil Code, section 1691, subdivision 2, is vitiated by the purchaser's demand for the return of the amount of an assessment voluntarily paid after the discovery of the fraud alleged.—Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107.

[c] The cancellation or rescission of a subscription for corporate stock may be proved by circumstantial evidence, but, where such rescission is a necessary part of the plaintiff's case, the burden devolves upon plaintiff to prove such rescission, and, where the plaintiff fails to sustain such burden, a finding of the court against the rescission will not be disturbed.—Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

§ 89. —— Conditions Precedent to Rescission.

[a] Under Civil Code, section 1691, subdivision 2, providing that a party desiring to rescind a contract must return, or offer to return, everything of value received by him under it, a purchaser of corporate stock from the corporation cannot rescind the purchase unless he returns or tenders dividends on the stock received from the corporation.—Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107.

§ 90. —— Estoppel to Rescind.

[a] Plaintiff cannot rescind a purchase of stock of defendant corporation on the ground

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that he was induced to take the stock by false and fraudulent representations, where it appears that on the day that he claimed to have discovered the fraud he attended a stockholders' meeting, and voted for an assessment on the stock, and that afterward, before attempting to rescind, he attended another stockholders' meeting, and voluntarily paid the assessment on the stock.—Marten v. Paul O. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107.

§ 91. Conditional Subscriptions.

[a] Subscription to railroad stock upon a prospectus for organization after a certain amount is subscribed, leaves subscriber at option, if organization is upon a less sum.—Santa Cruz R. Co. v. Schwartz, 53 Cal. 106, 110.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 411-420; 12 Cent. Dig., cols. 365-393, §§ 266-295.

§ 92. Conditions Precedent to Liability.

[a] Several persons signed a paper purporting to be an agreement to take stock in a corporation which, as the paper recited, was about to be formed. Afterward the paper was signed by the president and secretary, and the corporate seal affixed, and an action brought to recover from one of said subscribers the price named in the paper. The complaint did not state when the company was incorporated, and it was not shown that any of the subscribers joined in its formation or membership, or was authorized to sell any of the stock. Held, that the action could not be maintained.—California Sugar Mfg. Co. v. Schafer, 57 Cal. 396.

[b] Where subscribers agree that certain amount of stock shall be subscribed before corporation is formed, subscriber is under no obligation to pay subscription until condition is complied with.—California So. Hotel Co. v. Russell, 88 Cal. 280, 26 Pac. 105.

[c] Defendant agreed, in a contract of subscription to corporation stock, that he would pay his subscription upon the call of the board of directors. Held, in an action to recover a balance alleged to be due on the subscription, that it was unnecessary to defendant's ownership that a stock certificate should have been issued to him, it not being due till his subscription is fully paid, nor that the directors should have levied assessments on the stock.—California So. Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

[d] When the capital stock and the number of shares in a private corporation are fixed in the articles of association by general law or act of incorporation, no valid assessments can be made against a subscriber until all the shares are taken, unless there is a provision to that effect in the articles, or in the general law under which the corporation is formed, or unless there is a waiver.—(Cal. 1895) San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

[e] An opera house company sued defendant to recover a subscription to its capital stock. Defendant had signed a prospectus which stated that the building was "to be built by a corporation with a capital stock of twenty thousand dollars, consisting of one thousand shares at twenty dollars per share." Held, that it was not a condition precedent to defendant's liability that twenty thousand dollars of plaintiff's stock should be first subscribed for.—Auburn Opera House etc. Assn. v. Hill, 32 Pac. 587.

§ 93. Estoppel to Deny Liability.

[a] Where a subscriber for corporate stock sought to enforce subscriptions made under the same circumstances as his own, he could not repudiate his liability thereon under Civil Code, section 359, providing that no corporation shall issue stock except for money paid, labor done, or property received.—Richardson v. Chicago Packing etc. Co., 131 Cal. xviii, 63 Pac. 74.

[b] In an action by an opera house company to recover a subscription to its capital stock, it appeared that defendant was one of plaintiff's directors for two months, during which time he signed the articles of incorporation, was present at meetings of the board when the calls for the first two installments were ordered, and voted in favor of accepting the building lot, and that he served as a member of the building committee, prepared several plans for building, and consulted various architects and contractors about the same. Held that, though the subscription for the full amount of stock mentioned in such contract was a condition precedent to defendant's liability, he had waived any objection on the ground that such amount was not subscribed.—Auburn Opera House etc. Assn. v. Hill, 32 Pac. 587.

§ 94. Cancellation.

[a] A subscription for capital stock of a corporation cannot be canceled, except for fraud or mistake, without the consent of all the stockholders.—Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

[b] Though the cancellation of a subscription for corporate stock may be shown by circumstantial evidence, the mere recitals in the minutes of the stockholders' meetings that so many shares of stock were represented "out of five thousand issued" is insufficient, when ten thousand shares were originally subscribed, and not enough was represented to constitute a lawful meeting, unless that alleged to have been canceled, or a large amount of other stock, had in fact been canceled.—Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

FOR AUTHORITIES FROM OTHER STATES:

33 L. R. A. 593, 721, notes. See, also, 10 Cyc. 373, 439-442, 449-460; 12 Cent. Dig., cols. 426-432, §§ 328-336.

§ 95. Release or Discharge.

[a] To an application for a writ of mandate to compel county supervisors to subscribe to

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the capital stock of plaintiff railroad company, the pendency of proceedings in quo warranto to oust the corporation from exercising corporate franchises is no defense.—Oroville etc. R. Co. v. Plumas County Supervisors, 37 Cal. 354.

[b] A promissory note executed for the purchase of a certain number of shares of a homestead association about to be formed, under a name and with a number of shares agreed upon when the note is given, does not fail for want of consideration because the association when formed has a name or number of shares of stock different from that agreed on, provided the land is the same, and the lots are of the same value as the promisor had reason to expect. The giver of the note in such case is, however, at liberty to stand on the terms of his contract; and, if it was understood that the shares of stock he is to receive should not cost, in the aggregate, more than a certain sum per share, he is at liberty to refuse the stock, if it will cost more than that sum, and the note is then void for want of consideration.—Mahan v. Wood, 44 Cal. 462.

[c] Release of a subscription for stock may be proved as well by the acquiescence of the stockholders, and the fact that the corporation did not regard it as binding, as by the records.—Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 405-411, 449-460; 12 Cent. Dig., cols. 394-425, §§ 296-327.

§ 96. —— Changes in Nature of Business.

[a] A corporation formed for the "purpose of producing electricity and power" cannot maintain an action on a subscription to a corporation to be formed "for the purpose of furnishing the incandescent system of electric lighting."—Marysville Electric Light etc. Co. v. Johnson, 109 Cal. 192, 50 Am. St. Rep. 34, 41 Pac. 1016.

§ 97. Payment.

[a] Where directors are the only holders of corporate stock, payment by them for stock subscribed by transfer of land was not invalid.—Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377.

[b[Directors cannot extend time for payment more than thirty days.—National P. O. Co. v. Chapellett (Cal. App.), 88 Pac. 506.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 395-399, 460-484; 12 Cent. Dig., cols. 433-452, §§ 337-366.

§ 98. —— By Notes or Checks.

[a] Treasurer of a company about to form a railroad corporation may receive from the subscribers payment of the ten per cent required by law, in bank checks drawn by the subscribers, and payable at once, provided they are drawn against a sufficient fund, and the banks will pay them on presentation, and they are drawn in good faith and with no intention to evade the law.—People v. Stockton etc. R. Co., 45 Cal. 306, 13 Am. Rep. 178.

[b] A note given by a subscriber in payment of a first assessment on a certificate which was thereupon issued is not void under act of April 1, 1876 (Stats. 1875-76, p. 729), requiring corporations to publish semi-annual statements of their paid-up capital, and that nothing shall be counted as capital except money.—(1886) Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49, 13 Pac. 148.

[c] A note given by a subscriber in payment of stock which was thereupon issued to the maker is not void under Constitution, article 12, section 11, providing that no corporation shall issue stock except for money paid.—(1886) Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49, 13 Pac. 148.

[d] A note given by a subscriber to the capital stock of a bank, in payment of a first assessment, the certificate for the stock being issued thereupon, is not void under Constitution, article 12, section 11, providing that "no corporation shall issue stock except for money paid," etc., nor under Statutes of 1875-76, page 729, section 1, which prohibits promissory notes to be computed as paid-in capital, or Penal Code, section 560, making it a misdemeanor to receive notes in payment of installments actually called.—Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49.

[e] The payment of a judgment obtained on the personal liability of a stockholder by a corporate creditor under Civil Code, section 322, cannot be considered as payment on unpaid corporate stock.—Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

[f] A note given by a subscriber in payment of a certificate which was thereupon issued is not void under Penal Code, section 560, providing that any director of a corporation voting to receive a note in payment of an assessment on stock subscriptions shall be guilty of a misdemeanor.—Pacific Trust Co. v. Dorsey, 13 Pac. 148.

§ 99. —— Custody of Money Paid.

[a] Person to whom subscriptions of stock are payable is trustee of express trust and authorized to collect money agreed to be paid.—West v. Crawford, 80 Cal. 31, 21 Pac. 1123.

[b] Where, by a stock subscription contract, the subscribers agreed to pay a certain proportion of their stock before incorporation, and authorized defendants to draw on the person to whom such payments were made for property purchased for the corporation, defendants were not entitled to the custody of the money, nor to any part thereof, no property having been purchased by them prior to the organization of the company.—San Joaquin Land etc. Co. v. West, 94 Cal. 399, 29 Pac. 785.

[c] When the agents appointed to draw and invest the funds repudiated their agency before any money was paid on the subscriptions, and refused to act under their appointment, and wholly abandoned the same, the corporation is entitled, as against their claim, to the custody of the money collected from

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the subscribers, and may maintain an action to recover the same from the collecting agent.—San Joaquin etc. Co. v. West, 94 Cal. 399, 29 Pac. 785.

[d] In an action by the corporation to recover the money which the agent had collected from the subscribers to the stock it is not necessary to make the parties named as agents of the corporation for the investment of the money in the purchase of land parties to the action, nor is the right of the corporation to recover the money in any respect affected by the substitution of two of such parties as defendants in place of the agent who collected it, and who has paid it into court, nor can such substituted defendants, after having repudiated their agency, claim that the presence of the third agent is essential to a determination of the plaintiff's right.—San Joaquin etc. Co. v. West, 94 Cal. 399, 29 Pac. 785.

§ 100. Actions on Subscriptions—Call or Assessment as Condition Precedent.

[a] Call made by chancery court has same effect as call made by president and directors.—Glenn v. Sexton, 68 Cal. 358, 9 Pac. 420.

[b] Where persons subscribe for a certain number of shares of stock in a corporation, and agree to pay one hundred dollars for each share, in such installments and at such times as, under the laws of the state, they may be required to pay the same, a decree in chancery or an assessment by the board of directors is not necessary in order to sustain an action to recover on the contract of subscription against nonresidents.—Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 510-538; 12 Cent. Dig., cols. 471-520, §§ 383-434.

§ 101. —— Right of Corporation to Sue.

[a] Corporation cannot sue upon a subscription to its stock.—California etc. Co. v. Schafer, 57 Cal. 396.

[b] Corporation may maintain action on contract of subscription against a subscriber to its stock to recover calls made in pursuance to the terms of the contract; and it is not necessary that such calls should be made in the mode prescribed by the Civil Code for the levy of assessments upon the stock.—California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 28 Pac. 859.

[c] In an action by an opera house company to recover a subscription to its capital stock, it appeared that a "prospectus" recited in detail the objects of the intended corporation, the amount of stock, etc., and that the subscriptions were to be called in on installments; that defendants signed the prospectus for a certain number of shares; that four calls had been ordered by the board of directors, and payment demanded; and that defendant had failed to pay. Held, that plaintiff was entitled to recover.—Auburn Opera House etc. Assn. v. Hill, 32 Pac. 587.

[d] Right of corporation to sue exists solely by virtue of Civil Code, sections 331-349.—National P. O. Co. v. Chapellett (Cal. App.), 88 Pac. 506.

§ 102. —— Defenses.

[a] Fraudulent representations as to the value of the mine of a corporation, made by the seller of the stock of the company to the purchaser, as an inducement for the purchaser to buy, may be given in evidence, under a proper state of the pleadings, to defeat the collection of a promissory note given for the stock.—Gifford v. Carvill, 29 Cal. 589.

[b] In order that delay in the completion of the road may be available as a defense to a promissory note given upon a subscription for shares, the time of completion must be shown to have been a condition agreed upon by the parties as a term of the subscription.—Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772.

§ 103. —— Time to Sue and Limitations.

[a] Statute does not begin to run against suit for unpaid subscription until call is made.—Glenn v. Sexton, 68 Cal. 358, 9 Pac. 420.

[b] Action must be brought within two years on subscription contract made out of state.—Glenn v. Sexton, 68 Cal. 358, 9 Pac. 420.

FOR AUTHORITIES FROM OTHER STATES:

Limitation of actions against stockholders of corporations: 96 Am. St. Rep. 972, note.

§ 104. —— Pleading.

[a] In an action by a corporation to enforce an agreement to subscribe to its capital stock, entered into before its organization, a complaint which does not show that the articles of incorporation failed to state that defendant was a subscriber to the capital stock, or the amount of such subscription, is good against a general demurrer.—Marysville Electric Light etc. Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

[b] An action against the subscriber to stock upon his subscription, according to its terms, is not an action, under the statute, to recover assessments upon the subscribed capital stock, and the complaint need not aver an equal demand upon all of the subscribers, nor show a liability to an assessment under the statute, and any averments in regard to assessment or calls by the corporation upon the subscribers to its stock may be disregarded as surplusage.—Marysville Electric Light etc. Co. v. Johnson, 93 Cal. 538, 29 Pac. 126.

§ 105. —— Findings Construed.

[a] A finding of fact that a mine owned by a corporation is valueless does not necessarily show that the stock of the corporation is valueless.—Gifford v. Carvill, 29 Cal. 589.

§ 106. —— Attachment.

[a] Under Code of Civil Procedure, section 537, providing for an attachment where the

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contract is unsecured by any lien or pledge, an attachment will lie in an action by a corporation to recover an unpaid call on defendant's subscription to the capital stock, though a paid-up certificate to the stock had not been issued to him, and remained in the possession of the corporation, it not having a lien thereon.—Lankershin Ranch Land etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

§ 107. Action to Set Aside Subscription.

[a] In an action to set aside a stock subscription, held not error to permit defendant to amend its answer to conform to the proof. Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

§ 108. Forfeiture of Stock for Nonpayment.

[a] A stipulation in the agreement in this case that C., who was to superintend the erection of a sugar refinery for the contemplated business of the corporation, should continue his services for five years at a certain annual salary, was held not to be a condition precedent to the vesting of his title to his shares of stock; and the fact that, from paralysis, he was rendered unable to discharge his duties as superintendent, except for a limited period, was held not to forfeit his stock.—Chater v. San Francisco etc. Co., 19 Cal. 219.

FOR AUTHORITIES FROM OTHER STATES:

When subscription for stock becomes void by nonpayment: 11 Am. Dec. 609, note; 27 L. R. A. 305, note. See, also, 10 Cyc. 499-509; 12 Cent. Dig., cols. 485-491, §§ 396-402.

§ 109. Subscription Book.

[a] The code does not require that there shall be a subscription book kept by the corporation, nor direct how subscriptions shall be made, and, where it does not appear that the corporation had any other book showing who the subscribers were than the stock books offered in evidence, and the suit is by strangers of the corporation against its stockholders, the books kept by the corporation, together with the testimony of the secretary, that they contained the names of all the stockholders, are sufficient proof of the stock subscribed and outstanding.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:

Conclusiveness of records of corporations and power to amend: 13 Am. St. Rep. 550, note.

C. ASSESSMENT OF STOCK.

POWER TO LEVY, § 110.
—— DE FACTO DIRECTORS, § 111.
—— BEFORE PAYMENT OF PREVIOUS ASSESSMENT, § 112.
—— BEFORE ONE-FOURTH OF CAPITAL STOCK IS SUBSCRIBED, § 113.
ASSESSABLE STOCK—PAID-UP STOCK, § 114.
PERSONS LIABLE, § 115.
NOTICE OF ASSESSMENT, § 116.
—— SERVICE, § 117.
VALIDITY OF ASSESSMENT, § 118.
SALE FOR DELINQUENT ASSESSMENT, § 119.
—— NOTICE OF SALE, § 120.
—— REMEDIES FOR WRONGFUL SALE, § 121.
ACTION TO RECOVER ASSESSMENT, § 122.
—— DEFENSES, § 123.
—— LIMITATION OF ACTION, § 124.
—— PLEADING, § 125.
—— EVIDENCE, § 126.
—— TRIAL, § 127.
ACTION TO SET ASIDE ASSESSMENT, § 128.

Assessment as condition precedent to suit on subscription contract. See ante, § 100.

Assessment of stock of insurance companies. See Insurance, § 8.

§ 110. Power to Levy.

[a] The trustees of a mining company have power to levy and collect for the purpose of paying the legal and proper expenses of the company assessments on the capital stock thereof, even though the amount of such assessments is greater than the sum to which they are limited by the by-laws of the company in incurring indebtedness, if the assessment does not exceed the amount allowed by law.—Sullivan v. Triunfo etc. Min. Co., 29 Cal. 585.

[b] Statutory phrase, "proper and legal expenses" of a corporation, for which assessments are authorized to be made, includes debts incurred in the transaction of ordinary business.—Sullivan v. Triunfo Gold etc. Min. Co., 39 Cal. 459.

[c] In the absence of fraud, a corporation is liable for money borrowed from one of its stockholders for the payment of expenses which were collateral, and but incidental to an act which may have been ultra vires, such expenses not being inseparably connected with the main act. Being liable for such money, the corporation could levy an assessment to pay it.—Taylor v. North Star Gold Min. Co., 79 Cal. 285.

[d] Assessment for repairs to machinery without which company would be unable to meet business demands upon it is clearly authorized by section 331. of the Civil Code. Younglove v. Steinman, 80 Cal. 377, 378, 22 Pac. 189.

[e] It is no defense to an action against a stockholder by a corporation authorized to levy assessments to meet outstanding obligations, and whose directors were given discretion to require assessments or to resort to the corporate property in payment of such obligations, that the corporation had sufficient property to meet the obligations forming the basis of the assessment.—Visalia etc. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 484-498; 12 Cent. Dig., cols. 452-470, §§ 367-382.

§ 111. —— De Facto Directors.

[a] Where the board of directors of a corporation have been nominally elected, organ-

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ized as a board of directors, and acted as such, their acts as de facto officers in levying an assessment upon the subscribed capital stock are valid.—San Joaquin Land and Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

§ 112. —— Before Payment of Previous Assessment.

[a] Under Civil Code, section 333, providing that no assessment must be levied while any portion of a previous one remains unpaid, unless the power of the corporation has been exercised for its collection, where a stockholder paid a previous assessment by offsetting his fraudulent salary as president, a subsequent assessment was void, as such offsetting was not a payment.—Strouse v. Sylvester, 134 Cal. xx, 66 Pac. 660.

§ 113. —— Before One-fourth of Capital Stock is Subscribed.

[a] In the absence of any provision to the contrary, a corporation cannot levy an assessment upon its capital stock until after the whole amount thereof has been subscribed; but, under section 331 of the Civil Code, the subscription of one-fourth of the capital stock is a condition precedent in this state to the exercise of the power given by the statute to levy an assessment.—San Bernardino Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

[b] A mere agreement to "subscribe and take" the amount of capital stock set opposite the subscriber's name does not bind him to pay an assessment levied before one-fourth of the capital stock has been subscribed, in violation of Civil Code, section 331.—Ventura etc. Ry. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65.

§ 114. Assessable Stock—Paid-up Stock.

[a] Corporation may levy assessments for corporate purposes on paid-up stock.—Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661.

[b] Act of March 26, 1866, authorized assessment of full-paid stock.—Sayre v. Gaslight Co., 69 Cal. 208, 7 Pac. 437, 10 Pac. 408.

[c] Where all the stock of a corporation is fully paid up it is assessable; and as between stockholders who have obtained paid-up shares at one-fourth of their par value in exchange for property conveyed to the corporation, and those who have obtained paid-up shares at the same rate by purchase, for cash, of stock reserved for working capital, the effect of an assessment upon all the stockholders is equal and just.—Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100.

§ 115. Persons Liable.

[a] Under code, sections 290-293, requiring articles of incorporation to state the amount of stock subscribed, the names of the subscribers, and the amount actually paid by each, a subscriber does not incur liability for assessments levied after incorporation by merely signing a prior agreement to take stock in the corporation.—Monterey etc. R. Co. v. Hildreth, 53 Cal. 123.

[b] Under code, sections 290-293, requiring articles of incorporation to state the amount of stock subscribed, the names of the subscribers, and the amount actually paid by each, only the subscribers whose names were contained in the articles filed are liable for assessments levied after incorporation.—Monterey etc. R. Co. v. Hildreth, 53 Cal. 123.

[c] Defendant sold a manufacturing plant to plaintiff corporation, taking in part payment four hundred shares of the corporation's stock, at fifty dollars per share. There was no indorsement on the certificate that the stock was fully paid and nonassessable, nor was there such an agreement between the parties. At the time of the transaction, fifty dollars a share had been paid on the stock. Held, that defendant's stock was subject to the same assessments to which it would have been subject in the hands of an original subscriber.—Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809.

[d] One who purchases unpaid stock in a corporation, and causes a transfer thereof to himself to be entered upon the books of the corporation, is substituted for the original subscriber of the stock as a stockholder of the corporation, and thereafter holds the stock on the same conditions and subject to the same obligations as the original stockholder prior to the transfer; and he is liable for an assessment upon the unpaid shares, of which liability he cannot devest himself by an assignment of the shares subsequent to the levy of the assessment.—Visalia etc. R. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

[e] For the purpose of ascertaining those who are liable to the corporation for the amount of an assessment, the corporation may look only to the list of stockholders as their names are registered upon its books.—Visalia etc. R. R. Co. v. Hyde, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10.

[f] In an action to recover an assessment on corporate stock, evidence that the assessment was made on the same day that defendant purchased the stock is sufficient to show that it was made while defendant was the owner of the stock, as it will not be presumed that the assessment was made a fraction of a day before the purchase.—San Gabriel Valley Land etc. Co. v. Dennis, 34 Pac. 441.

§ 116. Notice of Assessment.

[a] Under Civil Code, section 331, authorizing directors, when one-fourth of the stock is subscribed, to levy and collect assessments on the "subscribed capital stock," a notice describing the assessment, in conformance with section 335, as "levied upon the capital stock," will sustain a collection on the stock subscribed.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; San Joaquin Land etc. Co. v. Belding, 35 Pac. 353;

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San Joaquin Land etc. Co. v. Hewlett, 35 Pac. 353; San Joaquin Land etc. Co. v. Hitchcock, 35 Pac. 353.

§ 117. —— Service.

[a] A notice for a call for the unpaid portion of the capital stock of a corporation held sufficiently served.—People's Home Sav. Bank v. Rauer (Cal. App.), 84 Pac. 329.

§ 118. Validity of Assessment.

[a] Assessment levied at special meeting not properly called is invalid.—Harding v. Vandewater, 40 Cal. 78.

[b] Assessment of stock levied at special meeting of which two directors had no notice is void.—Thompson v. Williams, 76 Cal. 155, 9 Am. St. Rep. 187, 18 Pac. 153.

§ 119. Sale for Delinquent Assessment.

[a] Levying of an assessment on mining stock to pay a debt which the company does not owe is not of itself fraud, so as to invalidate a sale of stock made thereunder, where it was not shown that the money was used for such purpose.—Johnson v. Kirby, 65 Cal. 482, 4 Pac. 458.

[b] Where a stockholder fails to pay an assessment lawfully made, and his stock is advertised for sale, a complaint setting forth that the company refused to show plaintiff its bills and vouchers, as required by Civil Code, section 377, and that it was a worthless concern, and desired to get plaintiff's stock for the assessment, shows no ground for an injunction on the sale.—Burnham v. San Francisco Fuse Mfg. Co., 76 Cal. 24, 17 Pac. 940.

[c] Section 346 of the Civil Code makes irregular proceedings to collect delinquent assessment void only as against owner who tenders assessment.—Burnham v. San Francisco Fuse Mfg. Co., 76 Cal. 28, 17 Pac. 939.

[d] Proceedings herein for sale of stock for unpaid assessment held to comply with code.—Burnham v. San Francisco Fuse Mfg. Co., 76 Cal. 25, 17 Pac. 940.

[e] A sale of stock as delinquent by a board of directors illegally elected, and under an invalid assessment made in violation of law is ineffective to determine the relations of the stockholders to the corporation.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[f] Corporation cannot waive right to sell delinquent stock and sue stockholder.—National P. O. Co. v. Chappellett (Cal. App.), 88 Pac. 506.

§ 120. —— Notice of Sale.

[a] Where the secretary of a corporation is not otherwise ordered by the board of directors, it is his duty to publish the notice of sale for delinquent assessments at least fifteen days prior to the day appointed by the board of directors of such sale, and by failure to make publication of a delinquent sale for such period, the board loses all jurisdiction to sell the stock for the delinquent assessment, unless they shall begin anew all previous proceedings and publication subsequent to the levy of an assessment as authorized by section 346 of the Civil Code.—San Bernardino Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

[b] Under Civil Code, section 337, which provides that, if any portion of the assessment levied against the capital stock of a corporation shall remain unpaid on the day specified in the assessment notice, the secretary must, unless otherwise ordered by the board of directors, cause to be published, "in the same papers" in which the notice of assessment was published, a notice of sale, etc., the board may order such notice of sale to be published in a paper other than that in which the notice of assessment appeared.—Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809.

§ 121. —— Remedies for Wrongful Sale.

[a] One whose stock is improperly sold may maintain suit for its recovery.—Smith v. Maine Boys Tunnel Co., 18 Cal. 111.

[b] Whether a stockholder, whose stock is about to be sold under an assessment which he alleges to be illegal and void, would suffer such injury by the sale of his stock as would entitle him to relief by injunction in a court of equity, not decided.—Sullivan v. Triunfo Min. Co., 39 Cal. 459.

[c] Complaint to set aside sale of stock for a fraudulent assessment must aver facts showing the fraud with certainty.—Johnson v. Kirby, 65 Cal. 487, 4 Pac. 458.

[d] Right to set aside sale of stock for nonpayment of assessment may be barred by delay and acquiescence.—Sayre v. Gaslight Co., 69 Cal. 213, 7 Pac. 437, 10 Pac. 408.

[e] A stockholder wrongfully deprived of his shares under a void assessment may either sue the corporation in trover for the value of the shares, or may apply for a mandamus to the corporation to compel it to open its books and allow the registry, or to pay damages if registry is impossible, or he may sue in equity to vacate the sale, and to have the shares sold ordered to be delivered up and canceled, and for other relief. A court of equity has jurisdiction to give full relief to the stockholder in such case.—Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143.

[f] A complaint in a suit to restrain the sale of corporate stock for nonpayment of an assessment levied by three directors held fatally defective for failure to aver that defendant was a corporation organized for profit within Civil Code, section 290, subdivision 5.—Humphrey v. Buena Vista Water Co. (Cal. App.), 84 Pac. 296.

§ 122. Action to Recover Assessment.

[a] Civil Code, section 332, providing for the recovery of assessments on the subscribed stock of a corporation, does not apply to an action brought by a corporation on an agreement to subscribe for its stock, entered into before its organization.—Marysville Electric Light etc. Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, distinguishing California Sugar Mfg. Co. v. Schafer (1881), 57 Cal. 396.

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[b] A subscriber to stock becomes liable to suit for delinquent assessment thereon by the directors, under Civil Code, section 349, where a majority of the subscribers have met and organized for the objects and with the capital and number of shares specified in the subscription agreement, and have elected the directors who levy the assessment.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; San Joaquin Land etc. Co. v. Belding, 35 Pac. 353; San Joaquin Land etc. Co. v. Hewlett, 35 Pac. 353; San Joaquin Land etc. Co. v. Hitchcock, 35 Pac. 353.

[c] A subscription for shares of the capital stock of a corporation, subsequently to be formed, will sustain an action by the company on its complete incorporation against the subscribers to recover calls duly made upon the stock.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

[d] Where a corporation seeks to recover the amount of an assessment levied, not by virtue of any contract of subscription on the part of the defendant, but solely by virtue of the obligation against him which is created by the estate, a strict observance of the statutory mode and provision is essential to its recovery.—San Bernardino Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

[e] Where the board of directors has lost jurisdiction to take further proceedings for the collection of a delinquent assessment by failure to make publication of the delinquent sale, the condition under which the statute authorizes it to elect to proceed by action to collect the delinquent assessment does not exist, and there are no further proceedings which the board can waive under section 349 of the Civil Code, and there can be no cause of action to recover an assessment in such case.—San Bernardino Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

[f] A resolution by the board of directors "that the president and secretary are hereby ordered to commence suit for the collection of assessment" on stock sufficiently shows a waiver of further proceedings under the chapter for the collection of delinquent assessments to entitle the corporation to sue for them.—San Gabriel Valley Land etc. Co. v. Dennis, 34 Pac. 441.

§ 123. —— Defenses.

[a] Where a corporation is authorized to levy assessments to meet its outstanding obligations, a stockholder cannot defend an action on an assessment on the ground that the obligation was created before he became a stockholder.—Visalia etc. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10.

§ 124. —— Limitation of Action.

[a] An original call for payment of subscriptions upon shares made pursuant to the oral agreement of the original stockholders, under which the shares were issued, upon payment of twenty dollars per share, did not set the statute of limitations in motion as against subsequent calls for the residue of the par value made upon a creditor's bill against the original stockholders.—Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057.

[b] Statute of limitation does not commence to run against an action to enforce the liability of corporate stockholders on unpaid stock, under Civil Code, section 332, subdivision 1, until levy of an assessment.—Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

[c] The levy of an assessment on unpaid corporate stock, and notice thereof to the stockholder, which was afterward rescinded, did not commence the running of limitation against the liability of the stockholder, so as to prevent the enforcement of a subsequent assessment.—Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

§ 125. —— Pleading.

[a] Civil Code, section 331, provides that "a corporation . . . . after one-fourth of its capital stock has been subscribed, may . . . . levy and collect assessments" thereon. Held that, in an action to collect an assessment on certain shares of stock, a complaint that does not show one-fourth of the capital stock to have been subscribed is demurrable as failing to show a cause of action.—San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

[b] Allegations and findings that certain persons owned stated amounts of stock, that an assessment of a given amount was levied on such stock and not paid, and that said owners were indebted to the corporation in the amount of said assessment, were not sufficient to show a personal liability of such owners for the amount of the assessment, since none of the facts required by statute to constitute a personal liability for the assessment were alleged or found.—Shively v. Eureka T. G. M. Co., 129 Cal. 293, 61 Pac. 939.

§ 126. —— Evidence.

[a] In action by private corporation organized in this state for commercial and manufacturing purposes, to recover an assessment which exceeds ten per cent of capital stock, burden of proving valid assessment is on plaintiff; and where there is no evidence to prove that its subscribed capital stock had not been fully paid, an assessment exceeding ten per cent of the amount of the capital stock named in the articles of incorporation must be presumed to be void, and cannot be enforced.—Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

§ 127. —— Trial.

[a] A finding that a meeting of directors of a corporation was "duly and regularly convened," and that an assessment made thereat was "lawfully and rightfully" levied, includes a finding that the necessary notice was given.—Younglove v. Steinman, 80 Cal. 375, 22 Pac. 189.

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§ 128. Action to Set Aside Assessment.

[a] In an action to set aside a stock assessment, refusal to permit plaintiff to amend her complaint, so as to allege that the assessment was not levied to pay debts or expenses of the corporation, or to conduct its business, held not an abuse of discretion.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

[b] In an action to vacate a corporate stock assessment, it having been alleged that more than one-fourth of the corporation's stock had been subscribed, as required by Civil Code, section 331, it was not an abuse of discretion to refuse to permit plaintiff to file a second amended complaint alleging the contrary.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

D. ISSUE OF STOCK AND CERTIFICATES.

NECESSITY FOR ISSUE OF CERTIFICATES, § 129.
POWER TO ISSUE STOCK, § 130.
—— BEFORE FULL PAYMENT, § 131.
—— AS PLEDGE, § 132.
CONTRACT TO ISSUE STOCK, § 133.
ISSUANCE FOR UNAUTHORIZED CONSIDERATION, § 134.
ISSUE FOR LESS THAN PAR VALUE, § 135.
ESTOPPEL TO DENY SUFFICIENCY OF CONSIDERATION, § 136.
FICTITIOUS ISSUE OF STOCK, § 137.
OVERISSUE, § 138.
RATIFICATION OF UNAUTHORIZED ISSUE, § 139.
ESTOPPEL TO ALLEGE INVALIDITY, § 140.
RIGHTS AND LIABILITIES OF PERSONS RECEIVING INVALID STOCK, § 141.

§ 129. Necessity for Issue of Certificates.

[a] To constitute the subscribers to an agreement for the formation of a corporation stockholders of the corporation it is not necessary that the certificates of stock should have issued to them.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349.

[b] The issuance of a certificate of corporate stock is not a necessary preliminary to the ownership or assessability of such stock.—Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 588-593; 12 Cent. Dig., cols. 521-523, § 435.

§ 130. Power to Issue Stock.

[a] The question whether corporations can issue certificates of stock, except to subscribers therefor who have paid up for their subscriptions, is not decided.—Brewster v. Hartley, 37 Cal. 15.

[b] First clause of article 11, section 12, of the new constitution, providing that no corporation shall issue stock except for certain purposes, is prohibitory.—Ewing v. Oroville Mining Co., 56 Cal. 649.

§ 131. —— Before Full Payment.

[a] Corporation for profit may give credit to subscribers to its capital stock for the stock, and issue certificates to such subscribers before full payment.—Lankershim etc. Co. v. Herberger, 82 Cal. 602.

§ 132. —— As Pledge.

[a] Corporation cannot issue stock as a pledge.—Brewster v. Hartley, 37 Cal. 16, 99 Am. Dec. 237.

§ 133. Contract to Issue Stock.

[a] Where an agreement between a corporation and a corporator provided that the corporator should act as superintendent, for a term of years, at a named annual salary, and should receive certain stock, the performance of the services was not a condition precedent to the corporator's right to receive the stock, in the absence of such a provision in the contract.—Chater v. San Francisco Sugar Refining Co., 19 Cal. 219.

[b] In an action against a corporation and the officers controlling the same, to compel the specific performance of a contract to issue a portion of the stock to plaintiff, and for an account of the dividends and profit of the stock, it is erroneous to give the plaintiff a portion of the stock, and also the same proportion of the undivided profits of the company, as the stock of the company represents its undivided profits, and one who receives a share of the stock acquires, by virtue thereof, his due interest in the undivided profits.—Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

§ 134. Issuance for Unauthorized Consideration.

[a] Under Civil Code, section 359, prohibiting the issue of stock except for money paid, labor done, or property actually received, a stock certificate issued in exchange for a note conditioned upon the completion of the road in a given time is void, and such note is without consideration.—Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

[b] Public policy is not violated by organizers of corporation issuing stock to themselves in consideration of transfer by them to corporation of property which can be used for purposes for which it was incorporated.—Kellerman v. Maier, 116 Cal. 423, 48 Pac. 377.

[c] Where the directors, who are all the stockholders, of a corporation, cause to be issued to themselves and others all the unsubscribed for shares of capital stock, in exchange for certain franchises and stock of other corporations, such issue is not without consideration or invalid, under Constitution, article 12, section 11, providing that no corporation shall issue stock, except for money paid, labor done, or property actually received.—Smith v. Martin, 135 Cal. 247, 67 Pac. 779.

[d] Where directors of a corporation purchased of another corporation, of which they were the stockholders, property of the value

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of one million two hundred thousand dollars, and in payment therefor issued to themselves twenty-four thousand seven hundred and fifty shares of stock, of the par value of two million four hundred and seventy-five thousand dollars, and assumed an indebtedness of one million fifty thousand dollars, a stockholder of the former corporation is not entitled to have such issue of stock declared void and fictitious, without setting aside the whole transaction. By divided court.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

FOR AUTHORITIES FROM OTHER STATES:
38 L. R. A. 490, note; 12 Cent. Dig., cols. 534-539, §§ 444-446.

§ 135. Issue for Less than Par Value.

[a] When by consent of all the stockholders of a corporation reserved stock is sold by the corporation for less than its par value it is to be considered as fully paid-up stock; and when the equitable owners of all the unsold stock, who are the legal owners of all the stock issued, and who control the board of directors, procure the sale by the corporation of the reserved stock for one-fourth of its par value, and the issuance of certificates, in accordance with the by-laws, certifying to the purchasers that the price paid was full payment, and that the stock purchased was fully paid stock, the stockholders who are the real sellers, as well as the corporation, are estopped from denying that the stock sold was fully paid-up stock, and from claiming that any sum is due or owing from the purchasers or holders thereof to the corporation. Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100.

[b] Contract for sale of reserved stock below par as paid-up stock is not unlawful, and is not in violation of section 323 of the Civil Code, which does not prohibit the issuing of certificates before the stock is fully paid up, but enjoins the duty of issuing certificates for fully paid-up stock, and authorizes the stockholders to enact by-laws in accordance with which the corporation may issue certificates before full payment.—Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100.

§ 136. Estoppel to Deny Sufficiency of Consideration.

[a] Plaintiffs held a majority of the stock of a corporation, which they had taken at the rate of fifty cents a share, in return for property turned into the hands of the corporation. Afterward the board of directors, which plaintiffs controlled, sold the balance of the stock, to raise working capital, at the same rate per share which plaintiffs had paid, and gave certificates which stated that the stock so sold was fully paid and unassessable, being the same kind which plaintiffs held. After having acquiesced for three years in this sale, plaintiffs claimed that the shares so sold for working capital were subscribed for at the par value of two dollars a share, and that the difference between that and the price paid was still due. Held, that plaintiffs were estopped from denying that the price paid was full payment.—Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100.

§ 137. Fictitious Issue of Stock.

[a] Complainant alleged that a corporation purchased property of another corporation worth at least one million two hundred thousand dollars, and as the price assumed an indebtedness of one million fifty thousand dollars, and issued to the latter corporation's stockholders twenty-four thousand seven hundred and fifty shares of stock, of the par value of two million four hundred and seventy-five thousand dollars. He did not allege that the former corporation had any property before such purchase. Held, that there was no fictitious issue of stock, within Constitution, article 12, section 11, providing that all "fictitious" issues of stock shall be void.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

§ 138. Overissue.

[a] There is not an overissue of stock where there was to be five hundred shares of stock, and no more than this was issued, though when the articles of incorporation were drawn, all the stock subscription lists not being at hand, L., the organizer, put himself down in the articles for one hundred and eighty-three shares, to make up the full total of five hundred, he in so doing regarding himself as the agent of the subscribers whose names were not at hand, and the sum of the subscription lists and the amounts set down in the articles exceeded five hundred shares, the shares being issued to such subscribers from the amount put down to L., with the acquiescence of him and all the other stockholders.—Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

FOR AUTHORITIES FROM OTHER STATES:
Overissued stock: 87 Am. St. Rep. 847, note. See, also, 10 Cyc. 373, 443-449; 12 Cent. Dig., cols. 549-552, § 452.

§ 139. Ratification of Unauthorized Issue.

[a] Though the unanimous consent of stockholders cannot cure the illegality of issuing certificates in violation of law, yet they may ratify an unauthorized issuance of certificates.—Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 552, 553, § 453.

§ 140. Estoppel to Allege Invalidity.

[a] Where a corporation issues capital stock, and represents it as fully paid, and causes it to be so listed on the stock and bond exchange, it is estopped to claim that the stock is invalid, as against a bona fide purchaser, even if the stock was in fact issued without consideration.—Smith v. Martin, 135 Cal. 247, 67 Pac. 779.

FOR AUTHORITIES FROM OTHER STATES:
See 12 Cent. Dig., cols. 553-555, § 454.

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§ 141. Rights and Liabilities of Persons Receiving Invalid Stock.

[a] Parties receiving void stock do not become stockholders of corporation nor make themselves liable to creditors for unpaid subscriptions.—Kellerman v. Maier, 116 Cal. 424, 48 Pac. 377.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 437-442; 12 Cent. Dig., cols. 556-563, §§ 456-460.

E. TRANSFER OF SHARES.

NEGOTIABILITY OF CERTIFICATES, § 142.
LAW GOVERNING, § 143.
FORMAL REQUISITES IN GENERAL, § 144.
ASSIGNMENT OF CERTIFICATE, § 145.
PLEDGE, § 146.
—— LIABILITY OF PLEDGEE TO PLEDGOR, § 147.
SALE, § 148.
EXECUTION SALE—RIGHTS AND LIABILITIES OF PURCHASER, § 149.
REGISTRATION OR TRANSFER ON CORPORATE BOOKS—NECESSITY, § 150.
—— NECESSITY TO CREATION OR VALIDITY OF PLEDGE OR MORTGAGE, § 151.
—— RIGHTS OF CREDITORS OF TRANSFERRER, § 152.
—— DUTY TO MAKE OR ALLOW, § 153.
—— PERSONS ENTITLED, § 154.
—— PLEDGEES, § 155.
—— MAKING AND SUFFICIENCY, § 156.
—— LIABILITY AND REMEDIES FOR REFUSAL, § 157.
—— LIABILITIES AND REMEDIES FOR ERRONEOUS OR WRONGFUL TRANSFER, § 158.
—— LIABILITY OF OWNER OF STOCK REGISTERED IN ANOTHER'S NAME, § 159.
—— RATIFICATION OF INVALID TRANSFER, § 160.
COMPELLING TRANSFER, § 161.
EVIDENCE OF TRANSFER, § 162.
EFFECT OF TRANSFER—RIGHT AND LIABILITIES INCIDENT TO TRANSFER IN GENERAL, § 163.
—— LIABILITY FOR UNPAID SUBSCRIPTION, § 164.
—— LIABILITY FOR CORPORATE DEBTS, § 165.
—— LIABILITY TO ASSESSMENT, § 166.
—— TRANSFER TO ENABLE TRANSFEREE TO QUALIFY AS DIRECTOR, § 167.
—— LOST OR STOLEN CERTIFICATES, § 168.
—— BONA FIDE PURCHASERS, § 169.

Necessity for acknowledgment to conveyance of shares of stock. See Acknowledgment, § 11.
Necessity that contract for sale of corporate stock be in writing. See Frauds, Statute of, § 32.

§ 142. Negotiability of Certificates.

[a] Certificates of corporate stock are not negotiable instruments, but mere evidences of the holder's title to shares in the franchises, property, and profits of the corporation.—Sherwood v. Meadow Valley Min. Co., 50 Cal. 412.

[b] A certificate of stock of a corporation is not a negotiable instrument within the definition of the Civil Code.—Barstow v. Savage Min. Co., 64 Cal. 388, 1 Pac. 349.

[c] Certificate of stock is transferable by delivery.—Moore v. Boyd, 74 Cal. 170, 15 Pac. 670.

[d] Stock certificates are not negotiable in commercial sense or within definition of Civil Code.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 325, 22 Pac. 665.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 568, 569, §§ 464, 465.

§ 143. Law Governing.

[a] If a contract for the assignment of corporate stock is entered into in one state, but the certificates are afterward delivered in another state, the validity of the contract will be determined by the law of the state where the stock is delivered.—Dow v. Gould & Curry Silver Min. Co., 31 Cal. 629.

§ 144. Formal Requisites in General.

[a] Placing certificates of stock indorsed in blank in envelope directed to assignor, in safe of assignee, will not revest title.—O'Neil v. Donahue, 57 Cal. 226.

[b] When shares in a corporation belonging to decedent are sold by his executor or his administrator, the title of the purchaser is complete when the certificate has been indorsed and delivered.—Brown v. San Francisco Gaslight Co., 58 Cal. 426.

[c] Certificates of stock indorsed in blank by owner pass by mere delivery without further indorsement.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 325, 22 Pac. 665.

[d] Stock can only be transferred by indorsement by signature of owner or his attorney or representative.—Taft v. Presidio etc. R. R. Co., 84 Cal. 137, 18 Am. St. Rep. 166, 24 Pac. 436.

[e] Stock cannot be transferred or canceled by indorsement by signature of agent without stating name of principal.—Taft v. Presidio etc. R. R. Co., 84 Cal. 138, 18 Am. St. Rep. 166, 24 Pac. 436.

[f] The lack of the owner's indorsement on the certificate was not inconsistent with the right of his attorney in fact, empowered to deal generally with corporate stock, and in possession of the certificate, to cause the stock to be transferred to himself.—Taft v. Presidio etc. R. Co., 22 Pac. 485.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 593-597; 12 Cent. Dig., cols. 576-585, §§ 470-478.

§ 145. Assignment of Certificate.

[a] Delivery of a certificate of stock, with a blank assignment signed and indorsed on the back thereof, is a good assignment. Order (1896), 44 Pac. 339, 112 Cal. 1, affirmed.—Brittan v. Oakland Bank of Savings, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 594, 595, 597; 12 Cent. Dig., cols. 576-585, §§ 470-478.

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§ 146. Pledge.

[a] Pledgee of stock after transfer on books of company must be regarded as owner as to third parties.—Strout v. Natoma W. & M. Co., 9 Cal. 80.

[b] If one who holds mining stocks in secret trust for another pledges the same for his debt, without notice to the pledgee of the interest of the cestui que trust, and the pledgee sells the stock without previous demand and notice, the right of action for the conversion is in the pledgor, and not in the cestui que trust. If the cestui que trust has a cause of action outside of the contract of pledge, he must first pay or tender the money for which the stocks were pledged.—Thompson v. Toland, 48 Cal. 99.

[c] Rule that shares of stock cannot be pledged without written transfer of title applies only where rights of third parties are involved.—Hall v. Cayot, 141 Cal. 17, 18, 74 Pac. 299.

[d] Delivery of certificate of stock, by way of pledge without indorsement vests equitable title in pledgee enforceable between the parties.—Hall v. Cayot, 141 Cal. 18, 74 Pac. 299.

[e] Under Civil Code, section 2889, one to whom a certificate of shares of corporate stock is issued as security for a debt does not, as against the pledgor, obtain the legal title to the stock.—Cross v. Reid, 14 Pac. 885.

§ 147. Liability of Pledgee to Pledgor.

[a] Where corporate stock was pledged to secure a debt, and remained in the hands of the pledgee until he had received from dividends more than enough to pay the debt, the pledgor is entitled to an accounting and a decree directing a retransfer and delivery of the stock.—Smith v. '49 & '56 Quartz Min. Co., 14 Cal. 242.

[b] B held A's shares of mining stock as collateral for a loan. A charged B with having sold the shares without A's knowledge or consent, and with afterward obtaining from him a power of attorney to sell—A being ignorant that the shares then had been sold—and then selling an equal number of shares, which he claimed to be A's, for a less price than that for which the earlier sale was made. B denied this, and contended that the shares last sold were the identical shares pledged. Held that if B was at all times ready and willing to transfer shares to A on payment of the loan, he was not liable for the higher price obtained for the shares first sold.—Hayward v. Rogers, 62 Cal. 348.

[c] Where a bailee unlawfully sold pledged stock, he may be compelled to convey to the bailor similar stock owned by himself in the same corporation.—Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084.

§ 148. Sale.

[a] Where one is entitled to a certain number of shares of stock issued to another, a demand is satisfied by a transfer of the requisite number of shares of the same corporation, though not the identical stock demanded, the shares transferred being of the same value and serving the same purposes.—Hardenbergh v. Bacon, 33 Cal. 356.

[b] By a contract for the sale of stock the seller warranted that the stock should be worth two hundred dollars a share in one year from the date of the sale, and the buyer agreed to keep "said stock until that time." Held, that a transfer of the stock on the books of the company, and the issue of new certificates to the buyer on the surrender of the old certificates which stood in the name of the seller, was not a breach of the buyer's contract to keep the stock.—Hawley v. Brumagim, 33 Cal. 394.

[c] If one delivers number of shares of stock to another upon the consideration of the performance of certain acts by the other, and such other does not comply with his contract, and refuses to comply, he is bound to reassign the stock, and becomes a trustee as to such stock.—Johnson v. Kirby, 65 Cal. 482, 486, 4 Pac. 458.

[d] The right of a seller of corporate stock to recover the purchase price held unaffected by the buyer's use of the stock of the corporation.—Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257.

[e] A contract of sale of corporate stock held a contract for the conditional sale thereof.—Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257.

FOR AUTHORITIES FROM OTHER STATES:

53 L. R. A. 153, note; 12 Cent. Dig., cols. 615-627, §§ 493-506.

§ 149. Execution Sale—Rights and Liabilities of Purchaser.

[a] A party who purchases, at sheriff's sale, stock of an incorporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice of the fact, and takes subject to the claim of the pledgee.—Weston v. Bear River etc. Min. Co., 6 Cal. 425.

[b] Execution purchaser without notice of pledge of untransferred stock takes it discharged of lien.—Farmers' etc. Bank v. Wilson, 58 Cal. 600.

[c] One who purchases at execution sale shares of a corporation standing on the books of the corporation in the name of the judgment debtor is entitled to have the certificate of such shares reissued to him as such purchaser, if, at the time of the purchase, he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor.—West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

§ 150. Registration or Transfer on Corporate Books—Necessity.

[a] Under the twelfth section of the act concerning corporations, passed April 22, 1850,

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no transfer of stock is good against third parties unless the transfer be made upon the books of the company.—Weston v. Bear River Co., 5 Cal. 186.

[b] Neither the incorporation act of 1850 nor that of 1853 was intended to cover the case of one purchasing stock at sheriff's sale, knowing it had been hypothecated, but to apply only to transfers and purchases in good faith without notice.—Weston v. Bear River etc. Min. Co., 6 Cal. 425.

[c] An assignment of stock in a corporation established under the act of 1852, merely by a transfer of the certificate, without a transfer on the books of the corporation, is not valid against the claim of a bona fide purchaser, without notice, of the same stock at a sale under an execution against the assignor. Naglee v. Pacific Wharf Co., 20 Cal. 529.

[d] Transfers of stock which have not been entered on the books of the company as provided in Statutes of 1853, page 87, section 9, are nevertheless valid as against all the world, except subsequent purchasers in good faith without notice.—(1868) People v. Elmore, 35 Cal. 653; (1871) Parrott v. Byers, 40 Cal. 614.

[e] Transfers of stock must be entered upon books of company to be valid against bona fide purchasers.—Farmers' etc. Bank v. Wilson, 58 Cal. 604.

[f] Section 324, Civil Code, applies to distributees of shares of stock.—People's H. S. Bank v. Stadmuller, 88 Pac. 280.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 609, 621; 12 Cent. Dig., cols. 670, 671, § 535.

§ 151. —— Necessity to Creation or Validity of Pledge or Mortgage.

[a] A mortgage of shares of stock is valid without a transfer thereof upon the books of the company.—Ede v. Johnson, 15 Cal. 53.

[b] A transfer of stock upon the books of the corporation is not essential to the creation of a valid pledge of the stock, but the pledgee has the right to cause a proper entry of the transaction between himself and his pledgor to be entered upon the books of the corporation for his protection, under section 324 of the Civil Code, though he is not authorized to devest the pledgor of the rights incident to his ownership of the pledge, by surrender and cancellation of the pledged certificate, and the issuance of a new certificate in the name of the pledgee.—Spreckels v. Nevada Bank of San Francisco, 113 Cal. 272, 54 Am. St. Rep. 348, 45 Pac. 329.

[c] Pledge of stock may legally exist independent of any transfer upon books of corporation from pledgor to pledgee.—Hurlburt v. Arthur, 140 Cal. 107, 98 Am. St. Rep. 17, 73 Pac. 734.

[d] Entry on corporate books is not essential to validity of transfer, except as to bona fide purchasers and transferees.—Hall v. Cayot, 141 Cal. 17, 74 Pac. 299.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 593, 594, 597-629; 12 Cent. Dig., cols. 586-614, §§ 479-492; cols. 637-656, §§ 513-528; cols. 672-674, § 538.

§ 152. —— Rights of Creditors of Transferrer.

[a] Under act of April 22, 1850, transfer of stock not entered on books of corporation is void as against attachment creditor of assignor.—Weston v. Bear River etc. Co., 5 Cal. 186, 63 Am. Dec. 117.

[b] Acts of 1853, page 88, section 9, providing that no transfer of stock shall be valid except between the parties, unless entered on the books of the company, does not render a purchase at sheriff's sale of stock of a corporation valid, when made by one who knew that the certificate of such stock had been previously hypothecated, though it had not been transferred on the books.—Weston v. Bear River etc. Min. Co., 6 Cal. 425.

[c] Pledge of stock as security for a debt, made without transferring the shares on the books of the company, is good as between the parties, but not as against creditors of the pledgor.—Strout v. Natoma Water etc. Min. Co., 9 Cal. 78.

[d] Assignee of stock as collateral security for a debt, who has not had the stock transferred to him on the books of the company, as the assignor had authorized him to do, is not entitled to an injunction against the sale, under execution in favor of another creditor, of whatever interest in the stock may remain in the assignor.—Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600.

§ 153. —— Duty to Make or Allow.

[a] If a railroad company has no interest or lien on stock when a transfer is made, then it is good between the parties, and the company cannot rightfully object to the demanded transfer.—People v. Crockett, 9 Cal. 112.

[b] Company cannot refuse to enter transfer of stock on books on ground that assignor of stock is indebted to it, unless company had a lien upon stock at date of its transfer. People v. Crockett, 9 Cal. 112.

[c] It is not the duty of the officers of a corporation to inquire into the motives of an attorney in fact, having full power to transfer stock, for desiring it to be transferred to himself.—Tafft v. Presidio etc. R. Co., 22 Pac. 485.

[d] An owner's right to have his stock transferred, and a new certificate issued to the purchaser, is not defeated by the fact that there is an unpaid assessment against the shares.—Craig v. Hesperia Land etc. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 619, 620; 12 Cent. Dig., cols. 606-610, §§ 488-489.

§ 154. —— Persons Entitled.

[a] Power of attorney herein held not to authorize agent to transfer stock of principal. Quay v. Presidio etc. R. Co., 82 Cal. 4, 5, 22 Pac. 925.

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[b] Where a certificate of stock in a banking corporation is issued to a person named therein, and the certificate remains unindorsed until after his death, the mere possession of the certificate by a firm of which the deceased was a member, and by other firms succeeding thereto, is insufficient to establish transmission of title from the deceased holder of the certificate, his representatives or heirs, and no subsequent holder of the certificate can compel a transfer of such stock on the books of the bank.—Nicholls v. Reid, 109 Cal. 630, 42 Pac. 298.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 610-613, §§ 490-491.

§ 155. —— —— Pledgees.

[a] A pledgee of the stock of a corporation, when the contract is silent upon the subject, has no right to have the stock transferred to his name before maturity of the debt; and an injunction will lie at suit of the pledgor to prevent such transfer.—Spreckels v. Nevada Bank of San Francisco, 113 Cal. 272, 54 Am. St. Rep. 348, 45 Pac. 329.

§ 156. —— Making and Sufficiency.

[a] A notation by the secretary of a corporation on the margin of the stubs of certain certificates that such certificates are held by a certain person "as security for money loan," when made without authority from either pledgee or pledgor, does not amount to a transfer of the stock on the books of the corporation, as against creditors of the pledgor.—McFall v. Buckeye Grangers' Warehouse Assn., 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 602-606, §§ 486-487.

§ 157. —— Liability and Remedies for Refusal.

[a] A transferee of corporate stock has an adequate remedy at law in a suit against a corporation for damages for its refusal to transfer the stock on its books, and hence mandamus will not lie against the company to compel such transfer.—Kimball v. Union Water Co., 44 Cal. 173, 13 Am. Rep. 157.

[b] A party entitled to stock in a corporation may sue it for damages for the refusal of its officers to transfer the stock to him on its books.—Kimball v. Union Water Co., 44 Cal. 173, 13 Am. Rep. 157.

[c] Complaint against corporation for refusal to transfer stock must aver damage, and show a right to the transfer.—Edwards v. Sonoma Valley Bank, 59 Cal. 136.

[d] In an action to recover stock claimed to be unlawfully held and transferred, the corporation is a proper party defendant to compel a transfer on its books to plaintiff, and the issuance of a certificate of shares to him, to which, under the facts alleged, he is entitled.—Johnson v. Kirby, 65 Cal. 482, 4 Pac. 458.

[e] Where a rule of the bank forbids a transfer of stock while the stockholder is indebted to the bank, a refusal of the bank to transfer the stock on that ground is not a conversion; but, if the bank transfers its claim of indebtedness against the stockholder, it loses its lien upon the stock, and it is no longer authorized to refuse the transfer, and is liable for conversion of the stock upon a subsequent demand and refusal to transfer it upon the books.—Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476.

[f] Where corporation has refused to transfer stock upon its books, assignee may elect to treat this as a conversion of the shares by it, and sue for their value, or he may sue in equity to compel registration of the transfer, and recover damages as an alternative; nor is the latter remedy exclusive of the former. Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476.

[g] The plaintiff cannot recover dividends upon the stock converted by refusal to register transfer when he has not alleged any demand for such dividends, nor sought to recover them as a separate cause of action, and they cannot be added to the measure of damages for conversion of the stock.—Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476.

[h] A corporation is liable for a conversion of stock which it refuses to transfer on the books of the corporation to a purchaser thereof; and the existence of unpaid delinquent assessments upon the stock is no defense to an action for such conversion, though proof of them is admissible as affecting the value of the stock.—Craig v. Hesperia L. & W. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 605-614; 12 Cent. Dig., cols. 637-645, §§ 513-520.

§ 158. —— Liabilities and Remedies for Erroneous or Wrongful Transfer.

[a] Corporation is bound to know whether agent's power of attorney authorizes him to transfer stock of principal, before making transfer on its books and canceling certificate.—Quay v. Presidio etc. R. R. Co., 82 Cal. 3, 22 Pac. 925.

[b] Corporation is liable for conversion of stock illegally canceled by its secretary upon surrender of certificate by another person without indorsement.—Taft v. Presidio etc. R. R. Co., 84 Cal. 138, 18 Am. St. Rep. 166, 24 Pac. 436, 11 L. R. A. 125.

[c] If the attorney in fact of a stockholder presents the certificate of stock, together with a power of attorney from the stockholder giving him full authority to deal with the stock, and the corporation's officers are ignorant of any intention on the part of the attorney to misappropriate the stock, the corporation will not be guilty of conversion simply by issuing another certificate in the name of the attorney, who appropriates the

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stock wrongfully.—Tafft v. Presidio etc. R. Co., 22 Pac. 485.

[d] The fact that the attorney in fact of a stockholder to transfer his stock was also a director of the corporation does not warrant the presumption that the corporation had notice of his intention to convert the stock to his own use, as he assumed to act, not for the corporation, but for his principal.—Tafft v. Presidio etc. R. Co., 22 Pac. 485.

FOR AUTHORITIES FROM OTHER STATES:

15 L. R. A. 643, note. See, also, 10 Cyc. 614-619, 625-629; 12 Cent. Dig., cols. 645-656, §§ 521-528.

§ 159. ——Liability of Owner of Stock Registered in Another's Name.

[a] Where mining stock was placed by owner in name of another person as "trustee," on the books of corporation, and such trustee hypothecated it to bankers, who had no notice of who owner was, for moneys advanced by them to him, held, that owner was bound by the acts of the trustee.—Brewster v. Sime, 42 Cal. 139.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 620-625; 12 Cent. Dig., cols. 672-674, § 538.

§ 160. —— Ratification of Invalid Transfer.

[a] Where a corporation transfers stock on the indorsement of the certificate by B., the agent of the owner, who was not authorized to make such indorsement for the purpose of a transfer, the fact that the owner afterward tells another of his agents that he will not hold him responsible for delivering the certificate to B. is not a ratification of the transfer by the corporation.—Quay v. Presidio etc. R. Co., 82 Cal. 1, 22 Pac. 925.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., col. 656, § 526.

§ 161. Compelling Transfer.

[a] Corporation is not necessary party to suit to compel individual to transfer shares of stock.—Sayward v. Houghton, 82 Cal. 629, 630, 23 Pac. 120.

§ 162. Evidence of Transfer.

[a] The transfer of stock by original stockholder was not sufficiently proved to escape liability for calls where there is no evidence that the transferee accepted the transfer, or authorized anyone to act for him, by evidence merely that a third party asked to have the shares transferred on the books to the transferee, which was not in fact done.—Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., col. 570, § 467; cols. 575, 576, § 469.

§ 163. Effect of Transfer—Rights and Liabilities Incident to Transfer in General.

[a] Where defendant took an assignment of certain corporate stock, giving notice of indebtedness to the corporation for balance due thereon, defendant assumed the same liability to the corporation as his assignors, under Civil Code, section 1531, subdivision 2. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[b] Certificates of stock assigned by the person to whom they were issued were surrendered by the assignee, and new certificates were issued to him in his own name. Held, not to change the identity of the stock.—Hawley v. Brumagim, 33 Cal. 394.

[c] Where partners form a corporation to carry on the business of the firm, and a portion of the shares are issued to the partners individually, though by agreement between themselves they are interested therein as partners, and the remainder to the firm, a purchaser of shares in such corporation from the firm, or from any of the partners, without notice, is not bound by such agreement.—Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509.

[d] Certificates of stock, assigned as security for an indebtedness, give the holder, as pledgee of the stock, a right to maintain an action to compel defendant corporation to recognize it as a stockholder, after an illegal levy of assessment on the stock and sale thereof for delinquency.—Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143.

[e] It is sufficient, prima facie, to sustain a recovery against the stockholder, to show the transfer to an insolvent transferee, knowing the corporation to be insolvent; and the burden is upon the stockholder to allege and prove, as matter of defense, that the insolvent transferee had subsequently transferred the stock to a responsible person.—People's Home Savings Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

[f] The vendor of stock in a corporation has no vendible interest in the goodwill of the business carried on by the corporation, and cannot transfer any part thereof, but such goodwill is the property of the corporation alone.—Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 601-604, 619, 620, 629-637; 12 Cent. Dig., cols. 564-567, § 462; cols. 649, 650, § 522; cols. 657-688, §§ 529-546.

§ 164. —— Liability for Unpaid Subscription.

[a] Participation in the proceedings of a corporation, and receipt of dividends, etc., by an assignee of stock, held a sufficient consideration for his agreement to pay the balance due thereon.—People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[b] Where the secretary of a corporation testified that a person applied to have the

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shares of a stockholder transferred to a third person, saying that the stockholder had transferred such stock, but showed no authority from such third person to act, and there was no evidence that such third person ever accepted or consented to the transfer, which was never, in fact, made on the books, there was not such a transfer as would exempt the stockholder from liability for unpaid subscription after insolvency of the corporation. Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057.

[c] Where, in an action to recover unpaid stock subscriptions on a call made to pay creditors after the corporation's insolvency, the court found that defendant had transferred her stock to an insolvent for the purpose of avoiding liability, a finding that she was a stockholder at the date of the call was unnecessary to sustain a judgment against her for the unpaid balance.—People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

[d] A suit by a corporation for unpaid capital stock held properly brought against a pledgee, notwithstanding Civil Code, section 322.—People's Home Sav. Bank v. Rauer (Cal. App.), 84 Pac. 329.

For Authorities from Other States:
12 Cent. Dig., cols. 657-659, § 529.

§ 165. —— Liability for Corporate Debts.

[a] Where a corporation assigned all of its assets to a stockholder in consideration of her agreement to pay its debts, and such stockholder, knowing the corporation's insolvency, transferred her stock to an insolvent for the purpose of relieving herself of liability, she is liable for such debts, notwithstanding the transfer.—National Carriage Mfg. Co. v. Story & Isham Commercial Co., 111 Cal. 531, 44 Pac. 157.

[b] In general, the law places no restriction upon the right of a stockholder to transfer his stock, so long as the corporation is solvent. But, after the corporation has become insolvent to the knowledge of the stockholder, he cannot, by a transfer of his stock, to an irresponsible person, escape liability for an unpaid subscription to stock, as against a creditor's bill to enforce such liability filed by the creditors of the insolvent corporation, who are entitled to have all such transfers canceled, and to have judgment entered against the transferrers.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

[c] Where a note given by a corporation is paid by a surety thereon, such surety may recover the amount paid from the stockholders at the time the payment was made, but not from the stockholders at the time the note was given who had parted with their stock, since the debt is not on the note, but for money paid for the corporation's benefit. Judgment (1900) 62 Pac. 68, reversed.—Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094.

[d] Where defendant transferred her shares to an insolvent for the purpose of avoiding a stock liability, and he transferred the stock to another, who was also insolvent, the fact that defendant had no knowledge of the financial condition of such subsequent transferee did not exonerate her from liability on the stock.—People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

§ 166. —— Liability to Assessment.

[a] An assignment of corporate stock after the levy of an assessment on the same will not relieve the assignor from liability on the assessment, where no formal transfer was made on the books of the company.—Visalia etc. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10.

[b] After a transfer of corporate stock has been duly made on the books of the company, the transferee becomes liable on assessments. Visalia etc. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10.

[c] Fact that purchaser did not know of delinquent assessment at time of demanding transfer does not affect validity of assessment, nor liability of stock therefor.—Craig v. Hesperia L. & W. Co., 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10.

For Authorities from Other States:
Liability of transferee of stock for subsequent calls: 6 Am. St. Rep. 838, note; 12 Cent. Dig., cols. 659-665, §§ 530, 531.

§ 167. —— Transfer to Enable Transferee to Qualify as Director.

[a] Stock assigned merely to qualify as director is property of assignee until retransferred. Estate of assignee may maintain trover against assignor.—O'Neil v. Donahue, 57 Cal. 226.

[b] Transfer of stock to enable party to act as director makes him liable as stockholder. Moore v. Boyd, 74 Cal. 174, 15 Pac. 670.

§ 168. —— Lost or Stolen Certificates.

[a] A bona fide purchaser from a finder of a certificate of stock in a corporation, duly indorsed by the owner, and transferable on the books of the company by indorsement and surrender of the certificate, acquires no title to the stock.—Sherwood v. Meadow Val. Min. Co., 50 Cal. 412.

[b] If A causes his shares of stock to be transferred on the company's books to B, to whom the certificate is duly issued, and B indorses it in blank and delivers it to A, from whom, while it is so indorsed, but the stock still standing registered to B, B steals it and puts it on the market, C, purchasing it in good faith and without notice, will acquire a valid title to the stock as against A.—Winter v. Belmont Min. Co., 53 Cal. 428.

[c] The true owner of shares of stock, from whom, without his fault, they have been stolen, loses no rights in them as against one who, in good faith, and for value, buys them from the thief, they having been regularly indorsed by a former owner, in whose name they stand on the corporation books.—(1883) Barstow v. Savage Min. Co., 64 Cal. 388, 49

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Am. Rep. 705, 1 Pac. 349; (1884) Swim v. Bernard, 4 Pac. 1172.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 619, 620; 12 Cent. Dig., cols. 564-567, § 462.

§ 169. —— Bona Fide Purchasers.

[a] The mere fact that a person holding the legal title of stock, and apparently having the right of disposition, is styled "trustee," raises no implication that he has not authority to sell or hypothecate it in the usual course of business.—Brewster v. Sime, 42 Cal. 139.

[b] The addition of the word "trustee," in a certificate of stock, to the name of the person to whom it is issued, does not show that such person has not the full right to deal with it as his own, nor give the person dealing with him notice that any other person has any interest in the same.—Thompson v. Toland, 48 Cal. 99.

[c] If the owner of mining stocks allows his broker, who purchases for him, to hold the certificates in such a manner that they will pass by delivery on the indorsement of the broker, with nothing on the face of the certificates to indicate that the real owner has any interest in the stock, a purchaser in good faith from the broker, without notice of the rights of the real owner, acquires a good title to the same, even if the broker, by a contract with his principal, had no right to sell or hypothecate the stocks without the consent of his principal.—Thompson v. Toland, 48 Cal. 99.

[d] California mining stocks, properly indorsed, pass by delivery, and if the true owner places them in the hands of another, on some secret trust between them, without anything on the face of the certificates to show his ownership, he, and not an innocent purchaser or pledgee, must bear the loss.—Thompson v. Toland, 48 Cal. 99.

[e] The existence of a by-law prohibiting the transfer of stock of a stockholder indebted to the corporation is not enough to charge a bona fide purchaser with notice; and this, though the purchaser, which is also a corporation, has a similar by-law, which is printed on each of its certificates of stock.—Anglo-California Bank v. Grangers' Bank, 63 Cal. 359.

[f] A transfer of stock to a bona fide purchaser for value vested the title in such purchaser, free of equities between the seller and the corporation, of which the purchaser was then ignorant, though provided for by a by-law of the corporation.—Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

[g] A bona fide purchaser of certificates of stock from one who has no title and no authority to sell cannot rely for his protection upon the negligence of the owner, unless he shows that he was misled by such negligence. Barstow v. Savage Min. Co., 64 Cal. 388, 1 Pac. 349.

[h] One to whom stocks are indorsed and delivered for safekeeping may vest in a bona fide pledgee the right to retain the stocks as security for the loan to the original bailee. (1884) Ambrose v. Evans, 66 Cal. 74, 4 Pac. 960; (1885) Arnold v. Johnson, 66 Cal. 402, 5 Pac. 796.

[i] One who purchases stock from a bailee who, by the indorsed assignment, is made the apparent owner thereof, will be protected as against the bailor, though the stock stood on the corporation's books in the latter's name. Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1085.

F. DIVIDENDS.

DIVISION OF PROFITS IN GENERAL, § 170.
"PROFITS," "NET EARNINGS" AND "SURPLUS PROFITS," DEFINED, § 171.
PERSONS ENTITLED, § 172.
—— PLEDGORS, § 173.
STOCK DIVIDENDS, § 174.
CONTRACTS RELATING TO DIVIDENDS CONSTRUED, § 175.

Dividends of savings banks. See Banks and Banking, § 114.

§ 170. Division of Profits in General.

[a] The apportionment of net earnings of a corporation to the payment of cash dividends, stock dividends, increase of capital, reserve or contingent fund, or to provide for future obligations, is largely one of policy, intrusted to the discretion of the directors, which, when honestly and intelligently exercised, will not be slightly overruled.—Excelsior Water etc. Co. v. Pierce, 90 Cal. 131; Zellerbach v. Allenberg, 99 Cal. 57, 27 Pac. 44.

[b] The inhibition of section 309 of the Civil Code in regard to the payment of dividends, except from "surplus profits," does not prohibit the payment of a dividend by a mining corporation from the net proceeds of its mining operations, to be ascertained by deducting the gross outlay of current expenses from the gross receipts; and the balance, less a reasonable reserve to meet contingencies, would be the legitimate subject of a dividend.—Excelsior Water etc. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 483, 484, 582, 624, 625, 629-637; 12 Cent. Dig., cols. 674-688, §§ 539-546.

§ 171. "Profits," "Net Earnings" and "Surplus Profits" Defined.

[a] "Profits," "surplus profits" and "net earnings" out of which dividends are payable defined.—People v. San Francisco Savings Union, 72 Cal. 202, 203, 13 Pac. 498.

§ 172. Persons Entitled.

[a] Where stock was assigned with a transfer of "all dividends made after the morning of the 23d of September," both parties at the time expecting that the dividend would be made on the 22d of the month, but in fact it was not made until after the morning of

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the 23d, the dividend anticipated on September 22d did not pass to the assignee.—Brewster v. Lathrop, 15 Cal. 21.

[b] One seeking to recover dividends on stock must own it when the dividends accrued. Mere possession of the stock, or special property in it, is not sufficient.—Dow v. Gould & Curry Silver Min. Co., 31 Cal. 630.

[c] A person, in order to recover dividends on stock, is bound to show that he was the owner of the stock at the time the dividends accrued. He cannot rest on mere possession, or on proof of special property in the stock that falls short of the legal title.—Dow v. Gould & Curry Silver Min. Co., 31 Cal. 629.

[d] Executors, pursuant to decree of distribution, delivered certificates of stock to distributee, and, pending an appeal from the decree, the stock was transferred on the corporate books to distributee, and again to her assignees. The transfer was made with knowledge of the appeal and the rights of the estate on the part of the corporation, and after reversal defendant was served with notice of the executor's claim to the stock and of the dividends thereon. The dividends thereafter declared were paid to the distributee's assignees. Held, that the executors were entitled to recover the amount thereon from the corporation.—Ashton v. Zeila Min. Co., 134 Cal. 408, 66 Pac. 494.

§ 173. —— Pledgors.

[a] A dividend declared upon pledged stock is the property of the pledgor, the same as the stock, but the pledgee has the right to collect it if he can and apply it upon the secured note, yet this failure to collect it does not cast upon him the duty of crediting it upon the note.—McAulay v. Moody, 128 Cal. 202, 60 Pac. 778.

§ 174. Stock Dividends.

[a] In an action against a corporation and its officers to recover or have issued to the plaintiff a certain proportion of the stock of a corporation, and to have an account taken of the profits and dividends on the stock, if a dividend of the company has been paid to the stockholders by an increase in the capital stock and an issuance of new shares to those to whom the dividend was due, the plaintiff, in taking the account, cannot recover in money the dividend thus declared, especially if he also recover his proportion of the stock thus divided.—Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

FOR AUTHORITIES FROM OTHER STATES:

Dividends and rights and remedies of stockholders with respect thereto: 99 Am. Dec. 761, note.

Right of life tenant to stock dividends: 24 Am. Rep. 169, note. See, also, 10 Cyc. 555, 556; 12 Cent. Dig., cols. 719-722, §§ 584-586.

§ 175. Contracts Relating to Dividends Construed.

[a] Defendant corporation agreed that plaintiff should receive all dividends on certain shares of its capital stock on which he held an option, during the period the option was to run, and that it would make good any deficiencies in said dividends below four per cent per annum; but there was no guaranty that the dividends should be paid annually or at any stated period. The dividend paid for the first year exceeded four per cent for the whole period, but no dividend was declared thereafter. Held, that defendant's liability was discharged by the payment of the first dividend declared.—Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580.

G. LIEN OF CORPORATION ON STOCK.

NATURE AND EXTENT, § 176.
CREATION, § 177.
VALIDITY AND EFFECT OF BY-LAWS CREATING LIEN, § 178.
RIGHT TO RESTRICT TRANSFER, § 179.
—— ASSENT TO RESTRICTION, § 180.
RIGHTS OF PURCHASER OF STOCK SUBJECT TO LIEN, § 181.
WAIVER, § 182.
ENFORCEMENT, § 183.

§ 176. Nature and Extent.

[a] A corporation's lien on its stock for unpaid subscriptions held not a mortgage, within Code of Civil Procedure, section 726, precluding the corporation from suing to enforce a stockholder's liability.—People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

[b] The lien of a corporation on the stock of a stockholder indebted to it, by a provision restricting transfer until payment of all indebtedness to the corporation, extends to all advances made prior to notice of transfer.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

[c] In the absence of contract, a corporation has no special seller's lien on shares of its capital stock for unpaid installments of the purchase price, as the only lien not dependent on possession given by statute (Civil Code, sec. 331) is to secure the payment of assessments levied for the purpose of paying debts and expenses incurred in conducting the business of the corporation.—Lankershin Ranch Land etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

[d] A subscriber for shares of the capital stock of a corporation, who has received a transferable certificate showing his payment of all installments due on his shares, as well as his agreement to pay for installments not yet due, is the owner of the shares, subject to the unpaid installments; and, as the certificate gives him complete possession of the shares, the corporation has no seller's lien thereon.—Lankershin Ranch Land etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

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FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 580; 12 Cent. Dig., cols. 733-738, §§ 604-608.

§ 177. Creation.

[a] Corporation may, by contract with stockholders, obtain lien for unpaid stock, not dependent on possession of certificate of stock.—Ranch Land etc. Co. v. Herberger, 82 Cal. 603.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 580-584; 12 Cent. Dig., cols. 733-738, §§ 604-608.

§ 178. Validity and Effect of By-laws Creating Lien.

[a] A by-law passed two days after transfer, to the effect that no transfer of stock should be made upon the books of the company until all indebtedness of the assignor was paid, would not give the company such lien, or a right to refuse to enter the transfer on their books.—People ex rel. Bosqui v. Crockett, 9 Cal. 112.

§ 179. Right to Restrict Transfer.

[a] A corporation may prescribe in a certificate of its stock that such stock will not be transferred until all indebtedness due it from the stockholder has been paid, although the terms on which such stock may be transferred are prescribed by statute; and where a person accepts a certificate containing such provision, and thereafter becomes indebted to the corporation, he is bound thereby, and the corporation is entitled to a lien on the stock for the amount of the debt.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

[b] Where a provision restricting the transfer of corporate stock while the stockholder is indebted to the corporation was inserted by the president, cashier, and secretary without authority of the board of directors, a stockholder who borrowed money from the corporation is estopped to deny the authority of such officers to insert such provision.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

§ 180. —— Assent to Restriction.

[a] Charter authority to make by-laws regulating the transfer of stock does not empower the corporation to adopt a by-law creating a lien on shares for debts due by the holder.—Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

[b] When a stockholder, without objection, accepts a certificate containing a condition against transfer of stock before payment of debts owing to the corporation, and thereafter borrows money from the corporation, a bank, he assents to the condition, and the bank has an equitable lien on the stock for the amount due it.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

§ 181. Rights of Purchaser of Stock Subject to Lien.

[a] A purchaser of shares from one indebted to the corporation acquires a good title, as against it, notwithstanding the charter prohibiting the transfer of shares until the payment of all debts due by the holder, where the corporation had no authority to adopt such by-law, and where the purchaser had no notice thereof.—Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359.

[b] Power of corporations to make by-laws for the transfer of their stock does not include the power to create liens thereon affecting purchasers for value without notice.—Anglo-Californian Bank v. Grangers' Bank of California, 63 Cal. 359.

[c] By virtue of condition in a certificate of stock, a bank had a lien on the stock for debts owing by the stockholder. Civil Code, section 324, provides that a transfer of stock by the indorsement and delivery of the certificate "is not valid, except between the parties, until the same is entered on the books." Held, that an assignee of the certificate takes subject to the bank's equity, and, as the condition is sufficient to put him on inquiry, he is not a bona fide purchaser.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

[d] Under Civil Code, section 324, providing that a transfer of stock is not valid except between the parties, until transferred on the books of the corporation, a provision in a stock certificate restricting its transfer until all the stockholder's indebtedness to the corporation is paid, is sufficient to put a purchaser on inquiry, and hence does not entitle him to claim himself a bona fide purchaser.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

[e] A purchaser of a stock certificate, by its terms nontransferable until all the stockholder's indebtedness to the corporation is paid, cannot recover against it for its refusal to transfer the stock while his assignor's indebtedness to it remains unpaid.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

[f] An assignee of a stock certificate, nontransferable until all the stockholder's indebtedness to the corporation was paid, takes subject to the corporation's lien for all advances made to the stockholder prior to notice of sale.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

§ 182. Waiver.

[a] A by-law of a corporation, providing that its stock should be transferable by delivery and indorsement, the transfer to be complete and binding on the corporation only when recorded on its books, is not a waiver of a stipulation previously inserted in a certificate of its stock by its president and cashier, without the authority of the board of

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directors, to the effect that such stock would not be transferred by the corporation until all the indebtedness of the holder to the corporation was paid, nor of the lien created thereby.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

[b] Where, on the sale of bank stock to a depositor, the president and cashier inserted a stipulation in the certificate that the stock would be transferred only on payment of all the stockholder's indebtedness to the bank, evidence of the cashier, in an action for the bank's refusal to transfer the stock while its former holder was indebted to it, that, "if a party is in good standing, we do not question his right to transfer," and that the stockholder was allowed to make large overdrafts, does not show that the loan was made on his personal credit, alone, so as to waive the bank's lien on the stock created by the provisions of the certificate.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 586, 587; 12 Cent. Dig., cols. 748, 749, §§ 615-617.

§ 183. Enforcement.

[a] Where, by a stipulation in stock certificates of a corporation, a lien was created in its favor on the stock of members indebted to it, the fact that there was no usage from which such lien could arise is no defense to its enforcement, no contrary usage appearing.—Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. 852, 5 L. R. A. 233.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 752, 753, §§ 620-623.

V. MEMBERS AND STOCKHOLDERS.

A. Rights and Liabilities as to Corporation, §§ 184-200.

B. Meetings, §§ 201-216.

C. Suing or Defending on Behalf of Corporation, §§ 217-225.

D. Liability for Corporate Debts or Acts, §§ 226-267.

Stockholders of state banks. See Banks and Banking, §§ 21-23.

Status of stockholder in national bank. See Banks and Banking, § 93.

Relation between stockholders in joint stock companies. See Joint Stock Companies, § 2.

A. RIGHTS AND LIABILITIES AS TO CORPORATION.

WHO ARE MEMBERS OR STOCKHOLDERS, § 184.
EVIDENCE OF OWNERSHIP OF SHARES, § 185.
WITHDRAWAL, § 186.
TITLE TO CORPORATE PROPERTY, § 187.
RIGHT TO INSPECT BOOKS AND RECORDS, § 188.
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MANAGEMENT OF CORPORATE AFFAIRS — POWERS IN GENERAL, § 190.
—— RIGHTS OF MINORITY, § 191.
—— IMPUTATION OF NOTICE OF CUSTOMS AND USAGES OF CORPORATION, § 192.
—— ACQUIRING ADVERSE TITLE OR INTEREST, § 193.
—— HOLDING MORTGAGE ON CORPORATE PROPERTY, § 194.
—— SALE OF PROPERTY TO CORPORATION, § 195.
MEMBERSHIP IN DIFFERENT CORPORATIONS, § 196.
ACTIONS AGAINST CORPORATIONS, § 197.
ACTIONS BETWEEN MEMBERS, § 198.
—— PARTIES, § 199.
—— PLEADING, § 200.

§ 184. Who are Members or Stockholders.

[a] Under code, sections 290-293, requiring articles of incorporation to state the amount of stock subscribed, the names of the subscribers, and the amount actually subscribed by each, a subscriber does not become a stockholder by signing an agreement to take stock prior to the incorporation of the company.—Monterey etc. R. Co. v. Hildreth, 53 Cal. 123.

[b] Civil Code, section 322, held not to make one a stockholder whose name appeared as such without his knowledge or consent on the books of the corporation.—Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 754-760, §§ 624-632.

§ 185. Evidence of Ownership of Shares.

[a] Evidence that a person subscribed for stock is not sufficient proof that he actually owns the shares, when it does not appear that he bought them on credit, but rather that he was to pay for them at once, and it also appears that he did not pay or offer to pay for them, and that no certificate of them was ever issued to him.—Bank of Yolo v. Weaver, 31 Pac. 160.

[b] Fact that the cashier of a bank permitted dividends on stock standing in his name to be included in checks to the bank did not show that the bank owned the stock.—Chemical Nat. Bank v. Havermale, 120 Cal. 601, 52 Pac. 1071.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 760-765, §§ 633-636.

§ 186. Withdrawal.

[a] By-law that stockholder of corporation may surrender stock and withdraw amount paid in thereon at any time upon notice is invalid.—Vercoutere v. Golden State L. Co., 116 Cal. 412, 48 Pac. 375.

[b] The question whether the incorporating members withdrew from the association and abandoned their rights and interests therein is a question of fact, depending largely upon the intention of the parties. They could not

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withdraw therefrom without giving up all their interest in its property; and the course pursued by them indicated an intention not to abandon such interest.—Strong v. Los Nietos and Ranchito Walnut Growers' Association, 137 Cal. 607, 70 Pac. 734.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 765, 766, §§ 637-639.

§ 187. Title to Corporate Property.

[a] Stockholders have no legal title to property of corporation.—Kohl v. Lilienthal, 81 Cal. 385, 22 Pac. 689.

[b] A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation; but he has a direct interest in the corporation, and a right to participate according to the amount of his stock in the surplus profits on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts.—Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077.

§ 188. Right to Inspect Books and Records.

Mandamus to compel access to corporate records. See Mandamus, § 59.

[a] Stockholder has the right to inspect books, records and journals of corporation, and it is no defense in mandamus proceeding to compel secretary to allow inspection to allege that the objects and purposes of the inspection are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the constitution and statute cannot be defeated by inquiry into motives.—Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

FOR AUTHORITIES FROM OTHER STATES:
45 L. R. A. 446, note. See, also, 10 Cyc. 770, 954-962; 12 Cent. Dig., cols. 805-814, §§ 674-685.

§ 189. Rights as Creditors of Corporation.

[a] Where a creditor has the right to be subrogated to the rights of a corporation to claim unpiad balances due on shares, he does not lose that right by reason of the fact that he is a stockholder.—Richardson v. Chicago Packing etc. Co., 131 Cal. xviii, 63 Pac. 74.

[b] Where stockholders agreed that shares should be deemed fully paid by payment of a stated amount less than the par value, a creditor, who was also a stockholder, could not compel the payment of the par value of shares owned by other stockholders, the creditor being a party to the agreement.—Richardson v. Chicago Packing etc. Co., 131 Cal. xviii, 63 Pac. 74.

§ 190. Management of Corporate Affairs—Powers in General.

[a] When the president of a corporation interested in the mortgage debt sells property under foreclosure by collusion with trustees to defraud a stockholder, such stockholder may redeem in behalf of corporation.—Wright v. Oroville etc. Co., 40 Cal. 20.

[b] Majority vote of stockholders of turnpike company, levying an assessment paid by two-thirds of the stockholders, does not ratify a mortgage requiring a two-thirds vote.—Forbes v. San Rafael Turnpike Co., 50 Cal. 340.

[c] A resolution of the members concerning the disbursement of money, if not adopted or ratified by the directors (where no money could be appropriated or drawn from the treasury without their order), is ineffective, as a corporation can only act or speak through its board of trustees.—La Solidarite Mut. Ben. Assn., In re, 68 Cal. 392, 9 Pac. 453.

FOR AUTHORITIES FROM OTHER STATES:
Sale of all the property of corporations and the right of minority stockholders to assail: 103 Am. St. Rep. 548, note. See, also, 10 Cyc. 936; 12 Cent. Dig., cols. 787-805, §§ 665-673.

§ 191. —— Rights of Minority.

[a] The right of minority stockholders to attack transactions between other stockholders and the corporation, as fraudulent, is not affected by the fact that they are completely "executed," where such transactions were not merely beyond the powers of the corporation, but procured by the fraud of defendants, who controlled it. Nor need the minority stockholders offer to place defendants in statu quo.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

[b] Under the facts, held, that the approval of such sale at the stockholders' meeting did not affect the rights of the minority stockholders, who did not consent thereto.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

§ 192. —— Imputation of Notice of Customs and Usages of Corporation.

[a] Officer and member of a corporation is, from his position, prima facie chargeable with knowledge of the customs and usages of such corporation.—Fraylor v. Sonora Min. Co., 17 Cal. 594.

§ 193. —— Acquiring Adverse Title or Interest.

[a] One of several associates in a mining claim received some seven thousand dollars of the common property, and then bought in divers judgments against the company, and the sheriff's certificate of a sale of their land for taxes. Held, that, if the company chose to assume and affirm his acts as if done for their benefit, the amount paid by him should be credited on his indebtedness, and the title go to or remain in the company, unaffected by this arrangement.—Bradbury v. Barnes, 19 Cal. 120.

[b] The owners of a majority of the stock of a corporation, who persuade their "implements and representatives" on the board of directors to convey to them the property

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of the corporation for a grossly inadequate consideration, in fraud of the minority stockholders, must be held to have participated in the fraud of the directors.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 374; 12 Cent. Dig., col. 818, § 691.

§ 194. —— Holding Mortgage on Corporate Property.

[a] A mortgage executed by a corporation, if valid when executed, is not invalidated by the fact that certain persons, who, at that time, had a right to receive some of its stock on surrender of the stock of another company, did subsequently make the exchange.—Donohoe v. Mariposa Land etc. Co., 66 Cal. 317, 5 Pac. 495.

[b] Where a corporation pays a debt due its principal stockholder before maturity, as a consideration for his guaranteeing its note, repayment to the corporation will not be enforced by a court of equity at the suit of other stockholders, without a showing that the corporation or its stockholders were injured in some way.—Wills v. Porter, 61 Pac. 1109.

§ 195. —— Sale of Property to Corporation.

[a] Defendants, having a contract for land at five dollars an acre, employed agents to organize a corporation to purchase it at twenty-five dollars. It was represented to the subscribers for stock in such corporation that the contract held by defendants was for the purchase of the land at twenty-five dollars an acre, the lowest price at which it could be obtained; and it was concealed from them that one of defendants, a large subscriber to the corporation, was interested in the contract, and that the organizers were defendants' agents. The corporation gave a mortgage for part of the price, which was foreclosed, defendants buying in the land, and obtaining a deficiency judgment. Held, that in an action to set aside the foreclosure decree and the judgment, and to cancel the notes and mortgage, the fact that defendants purchased the land before they put themselves in a position of trust toward the corporation by its organization did not prevent it from recovering the secret profits made by them.—Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

§ 196. Membership in Different Corporations.

[a] Stockholders of a corporation, who do not control its directors, owe no duty to the corporation not to conceal from the directors the fact that they are interested in another corporation with which the directors of the former are about to make a contract, and hence such a contract is valid, notwithstanding such concealment.—Fox v. Mackay, 125 Cal. 57, 57 Pac. 670.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 375; 12 Cent. Dig., cols. 827, 828, §§ 704, 705.

§ 197. Actions Against Corporation.

[a] Right of member of incorporated company to sue corporation is undoubted.—Barnstead v. Empire Min. Co., 5 Cal. 299.

[b] Where a corporation and its officers do an act, even within the scope of their authority, which amounts to a breach of the trust on which the authority was conferred, a court will relieve an injured stockholder from loss, if in the meantime no superior equity has intervened, and no rights of innocent third parties have attached.—Wright v. Oroville Gold, Silver etc. Min. Co., 40 Cal. 20.

[c] Where a temperance society incorporated "for the purpose of promoting the cause of temperance" disposes of all its property and distributes the proceeds of the sale among its members in good standing, any member not a party to the transaction may bring an action to recover the money so distributed.—Ashton v. Dashaway, 84 Cal. 61, 22 Pac. 660.

[d] Where a suit by stockholders of a water company to enjoin the sale of additional shares of stock, under an amendment of the articles of incorporation, is based on the theory that the amendment is absolutely void, there need be no offer to return money paid for such shares.—McDermont v. Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 963-1000; 19 Cyc. 1345, 1346; 12 Cent. Dig., cols. 828-845, §§ 706-722.

§ 198. Actions Between Members.

[a] Where part of the stockholders of a corporation induced it by fraudulent representations to convey property to a third person, who, under a prearrangement, conveyed the same to such stockholders, the nonassenting stockholders cannot maintain a suit in equity against such stockholders to compel a conveyance to them of their portion of the property.—Gorham v. Gilson, 28 Cal. 479.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 963-1000; 12 Cent. Dig., cols. 845-851, §§ 723-731.

§ 199. —— Parties.

[a] In action by stockholder against directors for fraud only those interested in fraud need be joined as defendants.—Woodroof v. Howes, 88 Cal. 201, 26 Pac. 111.

[b] A corporation has no interest in the individual ownership of its shares, and is not a proper party to a controversy between the claimants to a portion of its capital stock.—Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509.

§ 200. —— Pleading.

[a] A complaint which alleges that plaintiffs and defendants are stockholders in a corporation, that the directors are the "implements and representatives" of defendants, who own a majority of the stock, and that the directors conveyed to defendants land of the corporation at one-tenth of its real value,

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in fraud of the other stockholders, states facts constituting actual fraud, and is sufficient on demurrer.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

[b] Defendants acquired land, which they conveyed to a corporation of which they were stockholders in consideration of stock issued to them, and agreed to pay the deferred purchase price of the land at maturity, and afterward agreed to sell the stock and apply the proceeds in payment of the land, which they failed to do. Held, that the fact that defendants on the sale of the stock received only part of the purchase price in cash, and that the complaint in an action by stockholders contained no allegation that they converted to their own use notes received for the balance, did not create a presumption that such notes were turned over to the corporation.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

[c] Civil Code, section 1691, provides that one party cannot rescind a contract without the consent of the other party unless he restores to the latter everything of value which he has received from him thereunder. A corporation which owed forty-six thousand six hundred and fifty dollars to its principal stockholder borrowed money from a bank, and, in consideration of his guaranteeing its note, paid its indebtedness to him before maturity. Held, in an action by other stockholders to compel repayment to the corporation, that the action could not be maintained without releasing the principal stockholder from his guaranty.—Wills v. Porter, 61 Pac. 1109.

B. MEETINGS.

STATUTORY PROVISIONS, § 201.
MAJORITY RULE, § 202.
NECESSITY FOR QUORUM, § 203.
WHAT CONSTITUTES QUORUM, § 204.
CALLING AND NOTICE, § 205.
—— SPECIAL MEETINGS, § 206.
PERSONS ENTITLED TO VOTE, § 207.
—— CRITERION FOR DETERMINING RIGHT, § 208.
—— EXECUTORS, § 209.
—— SURVIVING PARTNERS, § 210.
—— TRUSTEES, § 211.
—— PLEDGORS AND PLEDGEES, § 212.
—— STOCK HELD BY CORPORATIONS, § 213.
PROXIES, § 214.
AGREEMENTS TO VOTE AND VOTING TRUSTS, § 215.
CUMULATIVE VOTING, § 216.

Meetings of directors. See post, § 280.
Laws regulating proceedings at corporate meeting. See Parliamentary Law.
Meetings of religious corporations. See Religious Societies, § 3.

§ 201. Statutory Provisions.

[a] "Corporate body" referred to in section 315 of the Civil Code is the corporation itself, and not the board of directors.—Wickersham v. Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., col. 865, § 748.

§ 202. Majority Rule.

[a] The rule of stockholders' meetings is that the majority governs; and every stockholder contracts that such shall be the rule.—San Diego v. Pacific Beach R. R. Co., 112 Cal. 53, 44 Pac. 333.

§ 203. Necessity for Quorum.

[a] To adopt resolution, majority of quorum must vote for it.—Smith v. Los Angeles etc. Assn., 78 Cal. 292, 12 Am. St. Rep. 53.

§ 204. What Constitutes Quorum.

[a] A person to whom stock has been issued as trustee, without the knowledge or consent of the owners, is not a bona fide stockholder within the meaning of section 312 of the Code of Civil Procedure; and where, without stock thus issued, a majority of the stock is not represented at a meeting for the election of trustees, the election is void.—Stewart v. Mahoney Min. Co., 54 Cal. 149.

FOR AUTHORITIES FROM OTHER STATES:

21 L. R. A. 174, note. See, also, 10 Cyc. 329, 330; 12 Cent. Dig., cols. 859-861, §§ 744.

§ 205. Calling and Notice.

[a] Notice of day, hour, and place of annual meeting of the stockholders of a corporation to elect a board of trustees must be given, or such meeting cannot be legally held, unless the stockholders are all present and consenting, either in person or by proxy.—San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 534.

[b] In an action to set aside a stock assessment levied at a meeting called by the vice-president, refusal to require the president to answer questions tending to show that his presence could have been obtained to call the meeting, if desired, held not error.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

FOR AUTHORITIES FROM OTHER STATES:

Corporate meetings not properly called, validity of acts done at: 18 Am. Dec. 102, note.

Notice to attend special meetings, when may be omitted: 3 Am. St. Rep. 69, note. See, also, 10 Cyc. 323-328; 12 Cent. Dig., cols. 853-859, §§ 734-743.

§ 206. —— Special Meetings.

[a] A corporate by-law, together with Civil Code, section 320, required that notices of special meetings of a corporation should be given on "the order of the president, or, if there be none, on the order of two directors." Held, that the action of a majority of the directors at a special meeting called by them on the refusal of the president to do so, though competent to act, declaring the offices vacant, electing new officers, and authorizing them to sell the corporate property, was void.—Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

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[b] Where the by-laws of a corporation, adopted by virtue of Civil Code, section 303, authorizing a corporation by its by-laws to provide for the time, place, and manner of calling and conducting its meetings, provided that the president or two directors might call special meetings of directors, and that notice should be given of each called meeting to each director one day before the meeting, and a special meeting was held, no notice having been given either of two directors, who were absent from the meeting, and the minutes of the meeting were not approved at any subsequent meeting of the board of directors, a mortgage on the corporation's property executed by the directors at such meeting was invalid.—Curtin v. Salmon River Hydraulic Gold Min. etc. Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

[c] A notice of a special meeting of a corporation held a sufficient compliance with the corporation's by-laws, and with Civil Code, section 320.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

§ 207. Persons Entitled to Vote.

[a] Semble, upon the principle that the real owner of stock in corporations formed under our laws is entitled to represent it at the meetings of the corporations, and the mere fact that he does not appear as the owner upon the books of the company should not absolutely exclude him from the privilege of so doing.—People ex rel. Allen v. Hill, 16 Cal. 113.

[b] When the qualifications of persons who may vote for directors of a corporation are definitely prescribed by statute, the corporation cannot extend or limit the right to vote. A resolution of the board declaring that a certain person is recognized as the one entitled to vote on certain stock is inoperative, if his right cannot be established under the statute.—Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

[c] Under the requirement of Civil Code, section 312, that, to entitle a person to vote for directors, he must be "a bona fide stockholder," one is not entitled to vote stock in which he has never had any interest, but which is registered in his name for the purpose of enabling the real owner to avoid statutory liabilities. (Beatty, C. J., dissenting.)—Smith v. San Francisco etc. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309.

[d] The stockholders of a corporation do not hold a fiduciary relation to each other by which one is precluded from voting at a stockholders' meeting on a question in which he has an individual interest adverse to any of the other stockholders.—Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

[e] Under the act of 1853, section 9, declaring a transfer of stock invalid, except as between the parties, until entered on the books of the corporation, the person in whose name the stock stands on the books is, as between himself and the corporation, the owner for all purposes, and particularly for those of an election.—People v. Robinson, 64 Cal. 373, 1 Pac. 156.

FOR AUTHORITIES FROM OTHER STATES:

15 L. R. A. 665, 683, notes. See, also, 10 Cyc. 331-343; 12 Cent. Dig., cols. 863-879, §§ 747-766.

§ 208. —— Criterion for Determining Right.

[a] The "stock and transfer book," which, under Civil Code, section 378, is required to be kept by corporations, is the criterion, under section 312, for determining the amount of stock held by any person, and for which he is entitled to cast a vote for any purpose at a stockholders' meeting; and hence the statement by the secretary, in his record of a stockholders' meeting, of the amount of stock held by a stockholder, made under section 377, requiring a record to be kept by corporations of every act done or ordered to be done, and of who were present and who absent at any meeting, must yield to the evidence derived from the "stock and transfer book."—Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

[b] The testimony of a stockholder as to the number of shares held by him at the time of an annual meeting of stockholders of a corporation, though subject to be overcome by the production of the stock-book required by Civil Code, section 378, to be kept by corporations, must, in the absence of evidence therefrom, prevail over the unsupported recital of the secretary of the corporation in his minutes of the meeting made under section 377, requiring a record to be kept by corporations of every act done or ordered to be done, and who were present and who absent at any meeting.—Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

§ 209. —— Executors.

[a] The executors of a deceased person may represent the stock standing on the books of a corporation in his name, and may vote such stock for the purpose of consolidation, without the necessity of a transfer of the stock to them.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

§ 210. —— Surviving Partners.

[a] Surviving partner has right to vote at election for officers of a corporation formed under the general incorporation act of this state of 1853 the stock in his hands as assets of the partnership, the business of the firm being unsettled.—People ex rel. Allen v. Hill, 16 Cal. 113.

[b] The fact that a portion of the stock voted by such surviving partner stood upon the books of the corporation, at the time of the election, in the name of the deceased partner alone, did not affect the right to vote, if in fact the stock belonged to the partnership.—People ex rel. Allen v. Hill, 16 Cal. 113.

§ 211. —— Trustees.

[a] One to whom stock has been issued as trustee without the knowledge or consent of

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the owner is not a "bona fide stockholder," within code, section 312, as to qualification to vote, etc.—Stewart v. Mahoney Min. Co., 54 Cal. 149.

[b] A trustee of stock is the legal owner of the stock, and as against the corporation and all the world, except his cestui que trust, he may vote the stock for all purposes, including the purpose of consolidation of the corporation.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

§ 212. —— Pledgors and Pledgees.

[a] Certificates of stock of a corporation issued to a creditor of the corporation, or to a trustee for him as a pledge to secure his debt, are illegally issued, and cannot be voted by any person.—Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

[b] Pledgee of stock owned by a corporation has no right to vote the stock.—Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

[c] The pledgor of stock has the right to vote it, where the pledgee does not claim the right to vote it under an agreement with the pledgor.—Dulin v. Pacific Wood and Coal Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

§ 213. —— Stock Held by Corporation.

[a] Stock belonging to a corporation cannot be voted upon by any person, even if held in the name of a person as trustee.—Brewster v. Hartley, 37 Cal. 15.

§ 214. Proxies.

[a] It is the legal right of a stockholder to vote his stock as he pleases in the election of directors, and though he may confer upon another stockholder the right to vote his stock by a written proxy for that purpose, yet the court cannot compel him to do so in the absence of an agreement upon or for a valuable consideration that he would give such proxy.—Dulin v. Pacific Wood etc. Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

[b] Under Civil Code, section 312, providing that stockholders of corporations may be represented at all corporate elections by proxies, a stockholder may choose any person to cast his vote, and a by-law providing that no proxy shall be voted by one not a stockholder is unreasonable and invalid.—People's Home Sav. Bank v. Superior Court of City and County of San Francisco, 104 Cal. 649, 43 Am. St. Rep. 147, 38 Pac. 452, 29 L. R. A. 844.

[c] Under section 312 of the Civil Code stockholders of a corporation may be represented at all elections by proxies of their own selection; and a by-law of a banking corporation providing that no proxy should be voted by anyone not a stockholder of the corporation is void as being an infringement upon the statute.—People's Home Savings Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, 38 Pac. 452.

[d] Stock brokers who have purchased stock of a corporation upon orders from dealers and speculators upon deposit of the customary margin, which stock has been transferred to the trustees of the brokers as security for their advances, if authorized to vote the stock at all, are bound to vote it in the interest of those for whom they have purchased it, and they should not give proxies as a mere matter of favor or professional comity, or for a consideration, to anyone who may choose to make a contest for the control of the board of directors.—Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

[e] A corporation may by its by-laws provide that the stockholders may vote by proxy at any meeting of the stockholders, and in pursuance of such by-laws the stockholders may be represented by proxy at a meeting of the stockholders at which a bonded indebtedness is authorized.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[f] A corporation which is a stockholder in the consolidated corporation may authorize its secretary to vote its stock, and where a portion of its stock stood on the books of the company in the names of pledgees who authorized the stock to be voted by proxy, it may ratify and confirm the acts of the proxy, and such ratification is equivalent to previous authority.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[g] It is not illegal or against public policy to separate the voting power from the ownership of stock by an irrevocable proxy given upon a sufficient consideration, when it is not appointed for an unlawful purpose, or where no unlawful end is attempted to be effected by the exercise of the voting power.—Smith v. San Francisco etc. Ry. Co., 115 Cal. 584, 56 Am. St. Rep. 119, 47 Pac. 582.

FOR AUTHORITIES FROM OTHER STATES:

Irrevocable proxies: 56 Am. St. Rep. 138, note; 15 L. R. A. 683; 29 L. R. A. 844, notes. See, also, 10 Cyc. 338; 12 Cent. Dig., cols. 879-887, §§ 767-776.

§ 215. Agreements to Vote and Voting Trusts.

[a] A verbal agreement among the stockholders of a corporation accompanying a division of stock and a loan of money, to the effect that one of the stockholders who loaned money to another to purchase stock should be president for two years, and should receive a salary of one hundred and twenty-five dollars a month so long as he should retain an interest in the corporation, there being no agreement that such stockholder should be elected as a director, and no means being provided for the carrying out of the agreement, is void, and cannot be specifically enforced.—Dulin v. Pacific Wood etc. Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

[b] A written agreement between purchasers of stock that they will for five years "retain the power to vote the shares in one body, and that the vote which shall be cast by said shares shall be determined by ballot between them or their survivors," is a proxy, authorizing the vote of all the stock to be cast in accordance with the determination of

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the majority.—Smith v. San Francisco etc. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309.

[c] It is sufficient consideration for an agreement between purchasers of stock to have it voted in one block for five years, the vote to be determined by ballot between the parties, that in their agreement among themselves to purchase they had stipulated for such a voting agreement; and it is immaterial that the voting agreement was not executed till after their bid for the stock was made, it having been executed before they had completed the purchase and become the owners by paying the purchase money; and it is likewise immaterial that a certificate for part of the stock was issued to each party.—Smith v. San Francisco etc. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309.

FOR AUTHORITIES FROM OTHER STATES:

Agreements to control future voting of stock at meetings: 56 Am. St. Rep. 138, note. See, also, 10 Cyc. 341; 12 Cent. Dig., cols. 877, 878, § 764.

§ 216. Cumulative Voting.

[a] Under Constitution of 1879, article 12, section 12, a qualified stockholder of a corporation may, at an election for directors, vote at one time the whole number of his shares for the whole number of directors to be elected, or cumulate his shares by casting for one candidate as many votes as shall equal the number of his shares, multiplied by the number of directors to be elected, or by distributing them among as many candidates for director as he shall see fit; and, where qualified stockholders are denied the right to so vote, the election is illegal.—Wright v. Central California Water Co., 67 Cal. 532, 8 Pac. 70.

[b] Where a stockholder had in his own hands enough stock to have elected himself and another director by cumulation of his shares in voting, but neglected to do so, on account of a verbal agreement among the stockholders that he should be president, and accordingly scattered his votes, expecting the agreement to be performed, and as the result of the election was defeated as director, the court has no power to relieve him from his own error, or do that for him which he had the power to do for himself, and cannot declare him elected, nor order a new election.—Dulin v. Pacific Wood etc. Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 337; 12 Cent. Dig., cols. 865-867, § 749; cols. 1237-1239, § 1213.

C. SUING OR DEFENDING ON BEHALF OF CORPORATION.

RIGHT TO SUE OR DEFEND, § 217.
WHAT CONSTITUTES SUIT ON BEHALF OF CORPORATION, § 218.
DEMAND AND REFUSAL OF DIRECTORS TO SUE AS CONDITION PRECEDENT, § 219.
TIME TO SUE, § 220.
PARTIES, § 221.
PLEADING—ALLEGATION AS TO CORPORATE RIGHT OF ACTION, § 221½.
—— ALLEGATIONS AS TO INTEREST OF OR INJURY TO PLAINTIFF, § 222.
—— JOINDER OF CAUSE, § 223.
—— ISSUES AND PROOF, § 224.
REVIEW, § 225.

Right of stockholder to appeal from judgment against corporation. See Appeal and Error, § 196.

§ 217. Right to Sue or Defend.

[a] Various actions which stockholder may bring against directors and others on behalf of corporation set forth.—Ashton v. Dashaway, 84 Cal. 67, 24 Pac. 111.

[b] Any stockholder has right to sue in equity to prevent or set aside any departure from chartered purposes of corporation by act of majority.—Ashton v. Dashaway, 84 Cal. 65, 22 Pac. 660.

[c] Stockholder may sue on behalf of corporation on its refusal to sue, where acts of directors are fraudulent.—Woodroof v. Howes, 88 Cal. 195, 26 Pac. 111.

[d] A corporation represents and binds its stockholders in all matters within the limits of its corporate powers, so long as it acts in good faith and without fraud upon their rights; and, in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts; and with its right to maintain and defend actions concerning its corporate rights or liabilities the stockholders cannot interfere, except when the directors refuse to act, or are guilty of fraud in the maintenance or defense of the action.—Baines v. Babcock, 95 Cal. 581, 30 Pac. 776.

[e] If a corporation refuses to answer to an action against it to foreclose a mortgage, or to prosecute its defense in good faith, the stockholders may intervene, and prove all facts essential to a complete defense, and cause the necessary parties to be brought in. Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646, 44 Pac. 1086.

[f] In an action brought against a corporation by an assignee for the use of the president and two directors thereof, constituting a majority of the board, in which the answer of the corporation admits all the causes of action alleged, a stockholder may intervene to assert the rights of the corporation against the plaintiff, and need not aver a request to the corporation officers to defend the action. Shively v. Eureka Tellurium Gold Min. Co., 129 Cal. 293, 61 Pac. 939.

FOR AUTHORITIES FROM OTHER STATES:

Actions by stockholders on behalf of corporations: 97 Am. St. Rep. 29, note.

When stockholders may maintain suits against officers and agents to call them to an accounting or to set aside their acts: 41 Am. Dec. 367, note. See, also, 10 Cyc. 963-975; 12 Cent. Dig., cols. 888-890, §§ 777-782.

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§ 218. What Constitutes Suit on Behalf of Corporation.

[a] An action brought by a stockholder to recover money paid to the president of the corporation on account of salary is brought for the account of the corporation, and not for the individual benefit of the stockholder; and whatever would have estopped the corporation from recovering a judgment against its president is equally a defense against the action by the stockholder.—Wickersham v. Crittenden, 110 Cal. 332, 42 Pac. 893.

[b] An action by a shareholder to enforce corporate rights must be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation could enforce; and the essential character of the cause of action remains the same, whether the suit be brought by the corporation or by a shareholder.—Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704.

[c] After corporate stock has been issued in good faith by agreement of all the stockholders in payment for leases transferred to the corporation, the remedy of a subsequent stockholder, who was misled by false representations of some of the stockholders, is personal to himself, and not in the name and for the benefit of the corporation, whose transaction was valid when made.—Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838.

§ 219. Demand and Refusal of Directors to Sue as Condition Precedent.

[a] Action against trustees of a corporation for misappropriation of funds should be in name of corporation, unless stockholder avers demand and refusal to sue.—Cogswell v. Bull, 39 Cal. 320.

[b] Averment in stockholders' suit that board is composed nearly, if not entirely, of unfaithful trustees, is not sufficient to excuse want of demand.—Cogswell v. Bull, 39 Cal. 320.

[c] When trustees repudiate the trust and claim title to corporate property, stockholders may sue to stay waste without demand, or election of new trustees.—Parrott v. Byers, 40 Cal. 623.

[d] In an action by the stockholders against the trustees of a corporation, a denial, in the answer, that the relation of trustee and cestui que trust exists between the parties dispenses with the necessity of averring in the complaint, or proving, a prior demand and refusal.—Parrott v. Byers, 40 Cal. 614.

[e] Stockholders cannot maintain suit where request made on directors to bring action was simulated and did not disclose real nature of action sought to be brought.—Bacon v. Irvine, 70 Cal. 225, 11 Pac. 646.

[f] Stockholders may commence suit on behalf of corporation without first demanding that directors do so, when such demand would be useless.—Moyle v. Landers, 83 Cal. 582, 23 Pac. 794.

[g] Stockholder may sue for wrong to corporation without previous demand on directors when such demand would be useless.—Ashton v. Dashaway, 84 Cal. 69, 70, 22 Pac. 660.

[h] Where, in an action by a stockholder to set aside a sale of property of a corporation by the directors on the ground of fraud, it appears that any demand on the corporation, or on its controlling directors, for any remedy for the alleged wrongs, would have been useless, and this is, in substance, stated in the complaint, plaintiff, as a mere stockholder, is entitled to maintain the action without having first sought a remedy through the board of directors.—Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

[i] Where it is alleged in the complaint that the majority of the directors participated and assisted in the acts complained of, and have ever since controlled the action of the board, and that it would therefore be useless to make a demand upon the corporation or the directors to bring the action, which allegations are not denied, and the answer of the corporation shows that any demand upon it or upon its directors would have been useless, no demand is necessary to be alleged or shown.—Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

[j] In an action by a stockholder of a corporation on behalf of himself and other stockholders against certain other stockholders and an officer of the corporation, for damages for injury to the corporation, and for an accounting, a finding that the demand of the plaintiff upon the corporation to bring the action, and its refusal to do so, were simulated, and not in good faith, negatives the right of the plaintiff to maintain the action. Morrison v. Stone, 103 Cal. 94, 37 Pac. 142.

[k] Where the evidence shows, in an action by a stockholder against a bank, that a request of the directors to bring the action would have been useless, defendant cannot object that the stockholder made no such request.—Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603.

[l] A suit by stockholders to enjoin the foreclosure of a trust deed securing bonds issued by the corporation, on the ground of illegality in the bonds and trust deed, cannot be maintained in the absence of a showing that the corporation has refused to assert the validity of the bonds and trust deed in the foreclosure action.—Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646, 44 Pac. 1086.

[m] A suit for relief for the misappropriation of the funds of a corporation is properly brought by the stockholders, without any demand on the directors to bring such suit, where the complaint alleges that the corporation is under the control of the defaulting directors, and that such demand would be useless.—Moyle v. Landers, 21 Pac. 1133.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 975-983; 12 Cent. Dig., cols. 894-899, §§ 791-796.

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§ 220. Time to Sue.

[a] Civil Code, section 1691, provides that a party entitled to rescind a contract must do so promptly. A corporation which owed forty-six thousand six hundred and fifty dollars to its principal stockholder borrowed money from a bank, and, in consideration of his guaranteeing its note, paid its indebtedness to him before maturity. Held, that an action brought by other stockholders two years thereafter to compel repayment to the corporation could not be maintained, no excuse being shown for the delay.—Wills v. Porter, 61 Pac. 1109.

§ 221. Parties.

[a] When the corporation, on a proper demand from a stockholder, refuses to institute action, the stockholders may sue in their own names.—Cogswell v. Bull, 39 Cal. 320.

[b] Corporation is necessary defendant in suit by stockholders in its behalf.—Beach v. Cooper, 72 Cal. 103, 13 Pac. 161.

[c] Suit may be brought by a stockholder, on behalf of his corporation, against the directors and others, for frauds, wrongs, and breaches of trust, and for the recovery from them of money of which the corporation has been defrauded, and the corporation be joined as a defendant.—Beach v. Cooper, 72 Cal. 99, 13 Pac. 161.

[d] Defendants, having a contract for land at five dollars an acre, employed agents to organize a corporation to purchase it at twenty-five dollars. It was represented to the subscribers for stock in such corporation that the contract held by defendants was for the purchase of the land at twenty-five dollars an acre, the lowest price at which it could be obtained, and it was concealed from them that one of defendants, a large subscriber to the corporation, was interested in the contract, and that the organizers were defendants' agents. The corporation gave a mortgage for part of the price, which was foreclosed, defendants buying in the land and obtaining a deficiency judgment. Held, that, in an action to set aside the foreclosure decree and the judgment, and to cancel the notes and mortgage, the corporation was the proper plaintiff, rather than the individual subscribers to stock.—Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

[e] The directors who are charged with having connived at the misappropriation of corporate funds are proper parties defendant in an action by stockholders for relief.—Moyle v. Landers, 21 Pac. 1133.

[f] A suit for relief for the misappropriation of the funds of a corporation may be brought by any one or any number of stockholders.—Moyle v. Landers, 21 Pac. 1133.

§ 221½. Pleading—Allegations as to Corporate Right of Action.

[a] Defendants acquired land which they conveyed to a corporation, of which they were stockholders, in consideration of stock issued to them, and agreed to pay the deferred purchase price of the land at maturity, and afterward agreed to sell the stock, and apply the proceeds in payment of the land, which they failed to do. Held, that a complaint by stockholders to enforce such agreement was not defective for failure to allege that the corporation had sustained damage by defendants' failure to perform their agreement, since such payment was essential to protect the corporation's rights to the property, and damage would be inferred.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

[b] In such case the allegation in the complaint that defendants applied the cash proceeds of the stock to their own use, and did not pay the debt, was a sufficient allegation of breach of contract.—Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

For Authorities from Other States:
12 Cent. Dig., cols. 910-919, §§ 814-825.

§ 222. —— Allegations as to Interest of or Injury to Plaintiff.

[a] An averment that plaintiffs, in an action on behalf of the corporation, were owners of the stock of the corporation before suit brought, and ever since 1881, sufficiently alleges ownership of the stock.—Moyle v. Landers, 21 Pac. 1133.

[b] A stockholder alleged that the directors purchased property of another corporation worth at least one million two hundred thousand dollars, and in payment therefor issued shares of stock of the par value of two million four hundred and seventy-five thousand dollars, and assumed an indebtedness of one million and fifty thousand dollars. He did not allege that the corporation owned any property before such purchase. Held, he did not show that he was injured. By divided court.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

§ 223. —— Joinder of Causes.

[a] In an action by a stockholder to restrain the misappropriation of corporate funds, plaintiff's allegations in reference to actions brought by another stockholder and himself to determine the rights of certain defendants to hold the offices of directors, were not separate causes of action on behalf of plaintiff, and did not vitiate the cause of action alleged.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

§ 224. —— Issues and Proof.

[a] In an action by stockholder to set aside a sale of property of a corporation by the directors on the ground of fraud, it appeared that it was recited in the resolution authorizing the sale, and also in the deed, that the sale was made because the corporation was unable to pay its debts. The complaint negatived these recitals, and alleged specifically the means and ability of the corporation to meet its indebtedness, and these allegations were denied in the answer. Held, that the issues raised by the pleadings were material, and evidence pertinent thereto offered by

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plaintiff was properly admitted.—Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

§ 225. Review.

[a] Where an appeal is taken by a corporation from a large judgment against it, it will not be dismissed on the ground that the attorney who took it acted without authority, nor will a motion be granted to substitute another attorney for the appellant for the purpose of consenting to a dismissal of the appeal, where the showing made by the moving parties is not strong and clear, but are conflicting affidavits, and the evidence considered as a whole does not affirmatively establish the alleged facts upon which the motions are based, or show who among contesting stockholders have the control of the corporation appellant.—Woodbury v. The Nevada Southern Ry. Co., 115 Cal. 85, 46 Pac. 864.

D. LIABILITY FOR CORPORATE DEBTS AND ACTS.

NATURE OF LIABILITY, § 226.
—— JOINT AND SEVERAL, § 227.
RIGHT TO VARY STATUTORY LIABILITY BY CONTRACT, § 228.
LAW GOVERNING, § 229.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 230.
—— EXEMPTING CERTAIN CORPORATIONS, § 231.
NOTES GIVEN IN PAYMENT, § 232.
EXTENT OF LIABILITY IN GENERAL, § 233.
EXTENT OF LIABILITY ON SUBSCRIPTIONS—LIABILITY FOR UNPAID SUBSCRIPTIONS, § 234.
DEBTS TO WHICH LIABILITY EXTENDS—DEBTS INFECTED WITH FRAUD, § 235.
—— INTEREST, § 236.
—— NOTE GIVEN FOR PRE-EXISTING DEBT AFTER TRANSFER OF STOCK, § 237.
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—— PURCHASER OF STOCK ON CREDIT, § 241.
—— REGISTERED HOLDERS NOT ACTUAL OWNERS, § 242.
—— OWNERS OF STOCK REGISTERED IN ANOTHER'S NAME, § 243.
—— PLEDGEES, § 244.
—— TRUSTEES, § 245.
—— NONRESIDENTS, § 246.
WAIVER OR RELEASE OF LIABILITY, § 247.
—— POWER TO WAIVE BENEFIT OF CONSTITUTIONAL PROVISION, § 248.
—— RELEASE OF ONE PARTY AS RELEASE OF OTHERS, § 249.
—— SUFFICIENCY OF CONTRACT OF WAIVER, § 250.
PAYMENT OR SATISFACTION OF LIABILITY, § 251.
—— RECOVERY OF VOLUNTARY PAYMENT OF DEBT NOT OWNING, § 252.
—— EFFECT OF SATISFACTION OF JUDGMENT, § 253.
NECESSITY FOR EXHAUSTING REMEDY AGAINST CORPORATION, § 254.
ACTIONS TO ENFORCE LIABILITY, § 255.
—— ELECTION OF REMEDIES, § 256.
—— PROCEEDINGS IN EQUITY, § 257.
—— DEFENSES, § 258.
—— EQUITY JURISDICTION, § 259.
—— TIME TO SUE AND LIMITATIONS, § 260.
—— PARTIES, § 261.
—— PLEADING, § 262.
—— EVIDENCE, § 263.
—— CORPORATE BOOKS AS EVIDENCE, § 264.
—— JUDGMENT AND ENFORCEMENT THEREOF, § 265.
CONTRIBUTION BETWEEN STOCKHOLDERS, § 266.
—— TIME TO SUE FOR, § 267.

Right to attach in suit to enforce stockholders' liability. See Attachment, § 8.
Actions to enforce liability of stockholders of national banks. See Banks and Banking, § 103.
Liability of stockholders of savings banks. See Banks and Banking, § 113.
Liabilities of members of joint stock companies. See Joint Stock Companies, § 5.

§ 226. Nature of Liability.

[a] Each corporator is principal debtor, and not mere surety for the corporation, and, in relation to the creditors of the corporation stands on the same footing as if it were an ordinary partnership.—Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265.

[b] Liability of stockholders for subsisting debt against corporation is primary, and not conditional or contingent, and is unaffected by a suspension of the remedy against the corporation.—Young v. Rosenbaum, 39 Cal. 646; Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354.

[c] Liability of stockholders is purely statutory, and is governed as to limitation by section 359 of the Code of Civil Procedure.—Green v. Beckman, 59 Cal. 545.

[d] Obligations of stockholders to pay their respective proportions of debts of the corporation is direct and primary.—Faymonville v. McCollough, 59 Cal. 285.

[e] Stockholders of corporation are not sureties as regards the creditors of a corporation.—Sonoma Valley Bank v. Hill, 59 Cal. 107; Young v. Rosenbaum, 39 Cal. 646; Hyman v. Coleman, 82 Cal. 650.

[f] Stockholder is liable for his proportion of corporate debts contracted while he was stockholder as principal, not as surety.—Hyman v. Coleman, 82 Cal. 653, 16 Am. St. Rep. 178, 23 Pac. 62.

[g] Stockholder's liability under code is substantially the same as under constitution. Bidwell v. Babcock, 87 Cal. 32, 25 Pac. 752.

[h] Liability of a stockholder in a corporation is primary, in the sense that he is not a surety.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:
Liability of stockholders for debts of corporations: 49 Am. Dec. 308, 99 Am. Dec. 432, 9 Am. Dec. 96, notes.

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Enforcement of liability of stockholders in other states: 37 Am. St. Rep. 168, note.

Liability of stockholders to the creditors of the corporation: 3 Am. St. Rep. 806, note.

Personal liability of persons acting as corporations without authority: 29 Am. St. Rep. 600, note; 23 C. C. A. 315, 33 C. C. A. 23, notes. See, also, 10 Cyc. 374, 541-543, 649-736; 12 Cent. Dig., cols. 920-1218, §§ 826-1186.

§ 227. —— Joint and Several.

[a] In this state each member of incorporated company is answerable, personally, for his proportion of the debts and liabilities of the company.—Mokelumne Hill Canal Co. v. Woodbury, No. 2339, 14 Cal. 265.

[b] Joint or several action may be brought against stockholders of a corporation for corporate debts.—Larrabee v. Baldwin, 35 Cal. 155.

[c] Corporation and stockholders are jointly and severally liable.—Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427-n.

[d] Corporation and its stockholders are primarily liable for company's debts.—In re California Mut. Life Ins. Co., 81 Cal. 368, 22 Pac. 869.

[e] Stockholders in this state are not jointly and severally liable for the debts of the corporation; but each stockholder has a several liability proportionate to the amount of his stock.—Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557.

[f] Liability of stockholders of corporation is several, and a stockholder who is creditor of corporation may sue other stockholders.—Herman v. Hecht, 116 Cal. 560, 48 Pac. 611.

§ 228. Right to Vary Statutory Liability by Contract.

[a] Subscriber may by terms of his subscription vary his liability from that which exists merely by virtue of statute.—Ventura etc. Co. v. Hartman, 116 Cal. 263, 48 Pac. 65.

§ 229. Law Governing.

[a] The liability of a stockholder of a corporation for the debts of the corporation on its becoming insolvent, created by the statutes of one state, cannot be enforced in another state.—Russell v. Pacific Ry. Co., 113 Cal. 258, 45 Pac. 323.

[b] A special statutory remedy given by the laws of another state, for enforcing the statutory liability of the stockholders of a corporation organized under its laws, limits the liability, and where such remedy is not afforded by the laws of this state, the liability of the stockholders of such corporation cannot be enforced in this state against resident stockholders thereof.—Russell v. Pacific Ry. Co., 113 Cal. 258, 45 Pac. 323.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 650-652.

§ 230. Constitutional and Statutory Provision.

[a] The legislature has the power to say, not that the stockholder shall not be liable for any of the debts of the corporation, but that he shall be liable for his portion, and what that portion shall be.—French v. Teschemaker, 24 Cal. 518.

[b] Legislature must impose same rate of liability upon all stockholders, and the law must operate alike upon all corporations.—French v. Teschemaker, 24 Cal. 518.

[c] Act of legislature authorizing formation of corporations, without attaching to stockholders an individual liability, would be unconstitutional, and persons organized under such act would acquire none of the rights of a corporation.—French v. Teschemaker, 24 Cal. 518.

[d] While the constitution requires the debts of corporations to be secured by the personal liability of the corporators, and makes each stockholder liable for his proportion of such debts, it leaves to the legislature the power to regulate such liability, and to prescribe the rule by which each stockholder's proportion of such debts shall be ascertained. Larrabee v. Baldwin, 35 Cal. 155.

[e] An act of the legislature making each stockholder of a corporation liable for his share of all its debts contracted while he is a stockholder is sufficient to answer the requirements of the constitution.—Larrabee v. Baldwin, 35 Cal. 155.

[f] Sections 32 and 36 of article 4 of the constitution of 1863, relating to the liability of stockholders in a corporation, are substantially the same as sections 2 and 3 of article 12 of the constitution of 1879.—Harmon v. Page, 62 Cal. 448.

[g] Neither section 2 nor section 3 of article 12 of the constitution of 1879, relating to the liabilities of stockholders in corporations, has any application to this case, because the liability of the stockholders accrued prior to the adoption of that constitution.—Harmon v. Page, 62 Cal. 448.

[h] The remedy given by section 322 of the Civil Code, fixing the personal liability of the stockholders of a corporation, is purely statutory, and furnishes to creditors of corporations additional security by making the stockholders directly liable for their proportion of the corporate debts, and was not intended to diminish the assets of the corporation by releasing the stockholder from his indebtedness to the corporation on account of his unpaid subscription for stock, or to take away from the creditor the right to resort to a court of equity to compel its payment.—Baines v. Babcock, 95 Cal. 581, 30 Pac. 776.

[i] The legal effect of the condition prescribed by section 3 of article 12 of the constitution of this state, regulating the individual liability of stockholders for debts contracted and liabilities incurred by the corporation, is, that a corporation when created becomes the agent of its stockholders to make such contracts and incur such lia-

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bilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named.—Kennedy v. California Savings Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 1 Pac. 846.

[j] Under constitution of 1849, article 4, section 31, liability of stockholders may be so changed as to impose obligations for which they were not liable when they became stockholders.—McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 663-700; 12 Cent. Dig., cols. 931-937, §§ 835-844.

§ 231. —— Exempting Certain Corporations.

[a] Constitution of 1849, and 1879, making stockholders individually liable for corporate debts, applied to all corporations; and legislature has no power to exempt savings banks from their provisions.—McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418.

[b] Laws of 1862, section 27, providing that corporations organized thereunder, and their members, shall not be subject to the conditions and liabilities contained in, and shall, be exempt from, the corporation act (Laws 1850, p. 347), is unconstitutional so far as it was intended to declare that the stockholders of a corporation formed under its provisions should not be individually and personally liable for any portion of its debts, within Constitution 1849, article 4, section 36, which was given practical effect by Laws of 1850, section 32, and Laws of 1853, section 16, each providing substantially that each stockholder of a corporation shall be individually liable for its indebtedness in an amount proportioned to his shares of stock.—McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418.

[c] Kansas constitutional provision exempting railroad stockholders from statutory liability does not apply to street railroad stockholders.—Ferguson v. Sherman, 116 Cal. 178, 47 Pac. 1023.

§ 232. Notes Given in Payment.

[a] Corporation has no power to extend liabilities of its stockholders, nor to represent them as to their individual obligation to pay a debt or liability at the time when it was first incurred, and it cannot bind them by a note subsequently executed in consideration of a prior liability of the corporation, for which alone the stockholders were responsible.—Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077.

[b] Under Civil Code, section 2831, persons who execute and indorse a note for the accommodation of a corporation of which they are members are primarily liable for their individual proportion of the debt, and secondarily liable as sureties for the proportions owed by the others.—Kellogg v. Lopez, 145 Cal. 497, 78 Pac. 1056.

§ 233. Extent of Liability in General.

[a] In order to find out how much any one stockholder is liable to pay to the plaintiff of the amount due from the corporation, it is necessary to find the whole amount of the indebtedness of the corporation created while he is a stockholder. If his share of personal liability, upon the whole indebtedness, is sufficient to pay the judgment of the plaintiff, the plaintiff may collect the whole out of him, leaving the stockholder, who has paid more than his share of the particular debt, to seek contribution out of his costockholders.—Larrabee v. Baldwin, 35 Cal. 155.

[b] Stockholder's liability runs from date of execution of corporate note, and is not extended by renewal of note.—Hyman v. Coleman, 82 Cal. 653, 16 Am. St. Rep. 178, 23 Pac. 62.

[c] A corporation is the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and by its articles of incorporation; and its contracts thus made bind the stockholders as respects their individual liability for its indebtedness and any admissions or declarations made by the corporation within the scope of its agency, and as part of the res gestae may be proved against the stockholders as principals.—McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

[d] Stockholders, who are such at time indebtedness was incurred by corporation are ratably liable therefor.—Danielson v. Yoakum, 116 Cal. 383, 384, 48 Pac. 322.

[e] The stockholders of a corporation are liable for their proportion of the whole of the debt of the incorporation, including the interest, which is as much a part of the debt as the principal; and a loan of money to the corporation is presumed to be upon interest, unless it is otherwise expressly stated at the time in writing.—Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 Pac. 439.

§ 234. Extent of Liability on Subscriptions—Liability for Unpaid Subscriptions.

[a] A court of equity will, for the benefit of a creditor of an insolvent commercial corporation, compel a stockholder to pay in the amount of capital stock which he has contracted with the corporation to take, there being nothing in the constitution to the contrary.—Harmon v. Page, 62 Cal. 448.

[b] Stockholders of a corporation are individually liable in equity for its debts to the amount of their unpaid stock subscriptions.—Harmon v. Page, 62 Cal. 448.

[c] Where persons take stock of a corporation from it, pay value therefor, and act in all respect as stockholders during the time debts of the corporation are contracted, it is immaterial, on the question of their liability to creditors for any balance due on the par value of the stock, whether they were original subscribers or not.—Tulare Sav. Bank v. Talbot, 131 Cal. 45, 63 Pac. 172.

[d] Where stock of corporation is sold at discount, but at highest market price, purchasers are not liable to creditors for unpaid

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balance.—Kellerman v. Maier, 116 Cal. 423, 48 Pac. 377.

[e] Right of creditors of a corporation to recover against stockholders to the extent of their unpaid subscriptions is not limited by other debts of the corporation.—Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

[f] Stockholders having paid thirty-three and a third per cent of the par value of their stock cannot, in an action against them by creditors of the corporation to enforce liability to the extent of their unpaid subscriptions, be treated as holding their stock as a mere gratuity.—Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

[g] Since Civil Code, section 322, declaring that, if any stockholder pays his proportion of any corporate debt, he is thereby released from any further personal liability therefor, does not affect the stockholder's liability to the corporation for unpaid subscriptions, a stockholder's payment to a corporate creditor of the amount due on his unpaid subscription, in reduction of the corporation's debt, he knowing it to be insolvent, will not relieve him from liability in an action by other creditors to recover such unpaid subscription, in the absence of evidence of a corporate act authorizing such creditor to make such application of the amount due.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

[h] Where the par value of corporate stock was one hundred dollars per share, for which there was no written subscription, but the incorporators agreed orally before the incorporation that they were to purchase the stock for twenty dollars per share, fully paid, which was done, such stockholders are liable for the unpaid balance to creditors of the corporation after its insolvency; they being deemed subscribers, and not purchasers; no formal agreement, in writing or otherwise, to pay the par value of the stock, being necessary, but their ownership of stock fixing their liability.—Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057.

FOR AUTHORITIES FROM OTHER STATES:

Liability of stockholders on subscription for stock: 40 Am. Dec. 358, note.

Liability of subscribers to stock to creditors in suits to enforce subscriptions; 3 Am. St. Rep. 808, note.

Liability for debts of pre-existing corporation or partnership: 59 Am. St. Rep. 547, note. See, also, 10 Cyc. 660, 661, 678; 12 Cent. Dig., cols. 960-964, § 874.

§ 235. Debts to Which Liability Extends—Debts Infected with Fraud.

[a] A stockholder may show that the corporate indebtedness which is sought to be enforced against her was incurred through fraud and collusion with the directors.—National Carriage Mfg. Co. v. Story & Isham Commercial Co., 111 Cal. 531, 44 Pac. 157.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 374, 683-692; 12 Cent. Dig., cols. 995-1009, §§ 907-933.

§ 236. —— Interest.

[a] When interest is added to a claim against a corporation, and a note given for the amount, it becomes a debt of the stockholders, though there was no agreement in writing to pay the interest.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[b] Stockholders liable for their proportion of the debt of a corporation are liable for the interest thereon.—Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 Pac. 439.

§ 237. —— Note Given for Pre-existing Debt After Transfer of Stock.

[a] Under Civil Code, section 322, providing that the liability of each stockholder is determined by the amount of stock owned by him at the time the debt was incurred, a stockholder is not liable on a note given by the corporation in payment of an antecedent indebtedness, but on the original debt.—Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077.

§ 238. —— Debts Contracted Before Membership.

[a] A stockholder of a mining corporation is liable for only those of its debts which were incurred since he became such, and obtaining a judgment against the corporation upon a debt incurred before he became a member does not make it a new debt, so as to render the stockholder liable.—Larrabee v. Baldwin, 35 Cal. 155.

[b] A judgment rendered against a corporation while a party is a stockholder, upon a contract entered into before the relation of stockholder existed, is not a contract within the meaning of the act which makes such stockholder liable for the corporate debts contracted while he was such stockholder.—Larrabee v. Baldwin, 35 Cal. 155.

[c] In an action against the stockholders of a corporation to recover the proportional share of each one of the corporate debts, the proof must show that the defendant was a stockholder when such debt was contracted. Proof of a judgment against the corporation does not show when the debt was contracted. Larrabee v. Baldwin, 35 Cal. 155.

§ 239. Persons Entitled to Enforce Liability—Stockholding Creditors.

[a] Stockholders may have the benefit of the statute of this state imposing liability on stockholders for their respective proportions of the debts of the corporation, as against other stockholders in the same corporation.—Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[b] A creditor, though a stockholder, can enforce the liability of the other stockholders for their proportion of his debt, and that right passes to his assignee.—(1895) Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047; (1897) Herman v. Hecht, 116 Cal. 553, 48 Pac. 611.

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FOR AUTHORITIES FROM OTHER STATES:

50 L. R. A. 273, note. See, also, 12 Cent. Dig., cols. 1009-1014, §§ 934-942.

§ 240. —— Persons Liable—Subscriber not Receiving Certificate.

[a] To render a subscriber to stock in a bank liable to creditors on his subscription, it is not essential that certificates of stock shall have been issued to him, for they are merely the proof of property, which may exist without them.—Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110.

FOR AUTHORITIES FROM OTHER STATES:

Liability of persons holding stock as collateral: 68 Am. St. Rep. 542, note.

Estoppel to deny liability of: 31 Am. Rep. 88, note. See, also, 10 Cyc. 678, 691-721; 12 Cent. Dig., cols. 1016-1061, §§ 943-980.

§ 241. —— Purchaser of Stock on Credit.

[a] To render a stockholder in a bank individually liable for its debts, it is not essential that he shall have paid for the stock for which he subscribed, for a corporation may give credit for its stock, as well as for any other property sold by it.—Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110.

§ 242. —— Registered Holders not Actual Owners.

[a] One to whom stock is issued, and in whose name it appears on the books of the corporation, is liable to the creditors of the corporation for the unpaid subscriptions, although he is not the owner of such stock. (1891) Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674; (1891) Baines v. Story, 27 Pac. 676; (1891) Potter v. Dear, 27 Pac. 676; (1892) Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776; (1892) Baines v. Story, 30 Pac. 777.

[b] All persons who appear to be stockholders on face of corporation books are liable as such.—Hurlburt v. Arthur, 140 Cal. 107, 98 Am. St. Rep. 17, 73 Pac. 734.

[c] One held not guilty of laches in having his name removed from the books of a corporation as a stockholder, so as to estop him to deny liability to creditors of the corporation.—Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248.

FOR AUTHORITIES FROM OTHER STATES:

Liability of holders of stock as collateral, for corporate debts: 1 Am. St. Rep. 783, note; 36 L. R. A. 139, note. See, also, 10 Cyc. 696-700; 12 Cent. Dig., cols. 1023-1030, §§ 946-959.

§ 243. —— Owners of Stock Registered in Another's Name.

[a] Under section 322 of the Civil Code, a stockholder is liable for his proportionate amount of the indebtedness of the corporation, not only for the stock standing in his name on the books, but also for all of the stock owned by him which stands on the books in the name of another person.—Duke v. Huntington, 130 Cal. 272, 62 Pac. 510.

§ 244. —— Pledgees.

[a] Where shares of the stock of a corporation are transferred in pledge as collateral security for the indebtedness of a stockholder, pledgee is not to be deemed a stockholder as respects personal liability for the indebtedness of the corporation.—Borland v. Nevada Bank of San Francisco, 99 Cal. 89.

§ 245. —— Trustees.

[a] Where stock is held in name of one person in trust for another the trust is only implied; and the seventeenth section of the corporation act of 1853, exempting from liability persons holding stock as trustees, applies only to the trustees of an express trust. Wolf v. St. Louis Independent Water Co., 15 Cal. 319.

[b] Under Civil Code, section 322, where shares appear on corporate books in name of trustee, he is liable for assessment.—Union Sav. Bank v. Willard (Cal. App.), 88 Pac. 1098.

§ 246. —— Nonresidents.

[a] Where statutory liability is simple personal liability growing out of contract of stockholder, it may be enforced in any state where jurisdiction of shareholder can be obtained.—Ferguson v. Sherman, 116 Cal. 173, 174, 47 Pac. 1023.

§ 247. Waiver or Release of Liability.

[a] Release of stockholder of his proportion of a particular debt, is a payment to extent of such release upon his share of aggregate indebtedness.—Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427-n.

[b] Where a corporation transferred all its assets to a stockholder, in consideration of her agreement to pay its debts, and she subsequently transferred her stock to an insolvent, with an intent thereby to escape liability, a judgment in favor of the assignee, for a subsequent conversion of the stock by the corporation, did not relieve her from liability for the corporate debts.—National Carriage Mfg. Co. v. Story & Isham Commercial Co., 111 Cal. 531, 44 Pac. 157.

[c] The liability of the stockholder for his proportion of a corporate debt may be modified or waived by contract.—Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 677, 691; 12 Cent. Dig., cols. 1063-1072, §§ 983-997.

§ 248. —— Power to Waive Benefit of Constitutional Provision.

[a] It was competent for parties to a contract with the corporation to waive the liability imposed by the constitution.—Robinson v. Bidwell, 22 Cal. 379.

[b] A clause of the constitution, providing for the personal liability of stockholders of

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corporations, may be waived by the insertion of a stipulation to that effect in all the contracts of the corporations.—French v. Teschemaker, 24 Cal. 518.

§ 249. —— Release of One Party as Release of Others.

[a] Release of one stockholder will be sufficient to support the plea of payment made by a stockholder in an action against him for his proportion of the debts of the corporation, under the sixteenth section of the act concerning corporations, as amended by act of 1863.—Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427-n.

[b] Though both the corporation and the stockholders are primarily liable to creditors, yet, as between themselves, the one being the principal debtor and the other only its sureties, a release of the corporation will release the stockholders; but a release of the latter will not discharge the former. (Per Crockett, J., dissenting.)—Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427-n.

[c] Suspension of remedy against corporation does not affect liability of stockholders. Hyman v. Coleman, 82 Cal. 653, 16 Am. St. Rep. 178, 23 Pac. 62.

§ 250. —— Sufficiency of Contract of Waiver.

[a] A waiver of stockholder's liability, classed as one of the by-laws of a banking corporation and printed with them in each depositor's book, and followed by a formal agreement to be signed, is of no effect unless actually signed by the depositor.—Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090.

§ 251. Payment or Satisfaction of Liability.

[a] Wherever the debt of a corporation is satisfied in part, there is also a pro tanto discharge of the liability of stockholders.—San Jose Sav. Bank v. Pharis, 58 Cal. 380.

[b] Money paid by stockholders to the president of a corporation, to discharge their proportionate liability for the entire indebtedness, if applied to the payment of a corporate debt to the extent of the proportionate shares of such stockholders, does not relieve other stockholders of their shares of the indebtedness.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 1072-1076, §§ 998-1001.

§ 252. —— Recovery of Voluntary Payment of Debt not Owing.

[a] A stockholder being liable only for debts of the corporation incurred after he acquired his stock (Const. art. 12, sec. 3; Civ. Code, sec. 322), his payment of debts incurred prior thereto is voluntary, and cannot be recovered of one who sold him the stock.—Danielson v. Yoakum, 116 Cal. 382, 48 Pac. 322.

§ 253. —— Effect of Satisfaction of Judgment.

[a] When the judgment against the stockholders of a corporation is once satisfied, the plaintiff can collect no more from the other stockholders, although his judgment may, before satisfaction, have authorized him to collect it from several stockholders.—Larrabee v. Baldwin, 35 Cal. 155.

§ 254. Necessity for Exhausting Remedy Against Corporation.

[a] Right of action against a stockholder of a mining corporation, on account of his individual responsibility for its debts and liabilities, as prescribed by section 16 of the act concerning mining corporations, accrues at the time as against the corporation, and is not contingent on a recovery against the corporation.—Davidson v. Rankin, 34 Cal. 503.

[b] Before adoption of code and new constitution creditor was not bound to exhaust remedies against company which law provided for his protection before proceeding against stockholder.—Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354.

[c] Fact that debt of corporation is secured by mortgage which the creditor holds and is unforeclosed does not affect liability of stockholder whose liability for the debt of the corporation is primary and not that of a surety, and he is not injured nor benefited by the fact that the corporation was given security, nor by the fact that the debt was renewed.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[d] Creditor who has obtained judgment against Kansas corporation in that state with execution returned nulla bona may pursue stockholder here without first obtaining judgment against stockholder here.—Ferguson v. Sherman, 116 Cal. 176, 47 Pac. 1023.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 724-733; 12 Cent. Dig., cols. 1087-1102, §§ 1016-1023.

§ 255. Actions to Enforce Liability.

[a] In an action by a creditor against a stockholder to recover a proportionate amount of a debt created by the corporation it is only necessary to determine (1) the whole amount of the capital stock of the company, (2) the amount of stock owned by the defendant, and (3) the amount of the indebtedness of the company to the creditor. These questions are not of equitable cognizance, and may be tried and determined in an action at law.—Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354.

[b] In action to enforce liability of stockholders of corporation it is incumbent upon plaintiff to prove whole amount of stock outstanding to enable court to determine liability.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[c] In suit in justice's court to enforce stockholder's liability under section 322 of the Civil Code, there may be as many diverse

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issues made and as many trials had resulting in several judgments as there are separate defendants and disposition of case as to one defendant does not operate as dismissal as to others.—Grimwood v. Barry, 118 Cal. 276, 50 Pac. 430.

[d] Where the holder of a corporate note holds no security, and the action thereon against the stockholders is not barred, it is not necessary for stockholders who pay the note as sureties to bring an action in equity to enforce contribution from the other stockholders; but their remedy must be by an action at law, under Civil Code, section 322, which gives a joint and several action against stockholders for their proportionate share of the corporate debt.—Myers v. Sierra Val. Stock etc. Assn., 122 Cal. 669, 55 Pac. 689.

[e] Actions by creditors of a corporation will lie against stockholders personally; remedy not being limited to sale of the stock.—Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

FOR AUTHORITIES FROM OTHER STATES:

Actions against stockholders for debts of corporations: 43 Am. Dec. 694, note. See, also, 12 Cent. Dig., cols. 1120-1208, §§ 1050-1170.

§ 256. —— Election of Remedies.

[a] Creditors of corporation are entitled to pursue either of two concurrent remedies against its stockholders—one equitable, to enforce their liability for unpaid subscriptions, and the other statutory, to recover their additional personal liability imposed thereby.—Harmon v. Page, 62 Cal. 448.

[b] Civil Code, section 322, giving to a corporate creditor a right to sue one or more stockholders for a proportionate part of his claim, does not exclude the creditor's equitable right to collect his claim from unpaid stock subscriptions, and his right is not dependent on the statutory remedy being inadequate, owing to insolvency or absence from the state of some of the stockholders.—Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

[c] Where a statute creates a liability against the stockholders of a corporation, and prescribes a remedy for its enforcement, that remedy is exclusive.—Russell v. Pacific Ry. Co., 113 Cal. 258, 45 Pac. 323.

§ 257. —— Proceedings in Equity.

[a] A court of equity will, for the benefit of a creditor of an insolvent commercial corporation, compel a stockholder to pay in the amount of capital stock which he has contracted with the corporation to take, there being nothing in the constitution to the contrary.—Harmon v. Page, 62 Cal. 448.

[b] It is not necessary for the judgment creditor of the corporation, who is seeking in equity to enforce payment of subscriptions to stock, to show that he had pursued his statutory remedy against the stockholders, and proof that the creditor had exhausted his legal remedies against the corporation is shown by the introduction in evidence of the judgment against the corporation with the return of the execution issued thereon unsatisfied.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158.

§ 258. —— Defenses.

[a] In action against stockholder to recover his ratable proportion of the debt of a corporation it appeared that the corporation had transferred to the plaintiff its personal property "as security for the indebtedness due." The court instructed the jury that it was no defense that a portion of the property given in pledge to the plaintiff remained in his hands undisposed of. Held, that the instruction was correct, and that other instructions embodying a contrary doctrine were rightly refused.—Sonoma Valley Bank v. Hill, 59 Cal. 107.

[b] The pendency of a suit by plaintiff against the corporation constitutes no defense to an action to enforce the liability of the stockholders.—Herman v. Hecht, 116 Cal. 553, 48 Pac. 611.

[c] In an action against the stockholders by an assignee of claims against the corporation, defendants claimed that one E. had purchased the claims and released them. E. and one S., attorney for the creditors, entered into an agreement, whereby S. was to become the owner of the claims by assignment, and, on payment of a consideration, transfer them and the corporate assets to E. The contract was not carried out, but at E.'s request S. sold the assets of the corporation, and received and applied the money according to the agreement, which defendants claim was a substantial compliance therewith, and entitled E. to the transfer of the claims. Held that, even if E. became the equitable owner, defendants, to sustain their claim, must show that S. was able to perform his part of the agreement.—Irish v. Sunderhaus, 122 Cal. 308, 54 Pac. 1113.

[d] Where guarantors are liable both as guarantors of a corporation and as stockholders, while they cannot be held liable for more than the corporate liability in either or both capacities, yet where the judgment against them is less than their liability as stockholders, it is immaterial in what capacity it was recovered.—London etc. Bank v. Parrott, 125 Cal. 472, 28 Am. St. Rep. 142, 58 Pac. 164.

[e] A subscriber to the stock of a corporation proposed to be formed, who, after its formation, partially paid for the stock therein, and received, and for upward of six years retained, the certificates evidencing the same, becomes a stockholder in the corporation and cannot escape from liability as such on the ground that the purposes of the corporation, as named in its articles of incorporation, differed from those stated in the subscription agreement.—Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 1137-1142, §§ 1076-1083.

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§ 259. —— Equity Jurisdiction.

[a] Constitution does not oust equity of jurisdiction to compel payment of stock subscribed, for benefit of creditors.—Harmon v. Page, 62 Cal. 448.

FOR AUTHORITIES FROM OTHER STATES:
34 L. R. A. 737, note.

§ 260. —— Time to Sue and Limitations.

[a] The right of action against a stockholder of a mining corporation, on account of his individual responsibility for its debts and liabilities as prescribed by section 16 of the act concerning mining corporations, accrues at the same time as against the corporation. Davidson v. Rankin, 34 Cal. 503.

[b] Where a creditor of a corporation seeks to make the stockholders thereof liable for his demand, he must bring his action against them within the time prescribed by the statute of limitations, which begins to run when the debt falls due, and is not extended, as to the right to sue the stockholders, by a judgment against the corporation.—Stilphen v. Ware, 45 Cal. 110.

[c] An action against stockholders to recover money had and received by the corporation is seasonably brought within three years.—Green v. Beckman, 59 Cal. 545.

[d] Where a person subscribed to the stock of a Virginia corporation, the laws of which state required that on every subscription for shares in any joint stock company there should be paid on every share two dollars at the time of subscribing, and the residue thereof when required by "the president and directors," a decree that such unpaid portion should be, and was thereby, called for, was equivalent to a call by the officers for the purpose of setting in motion the statute of limitations which would run against the subscriber's liability from the date of such call under the decree.—Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420.

[e] Liability of stockholder for debt of corporation is barred in three years.—Moore v. Boyd, 74 Cal. 171, 15 Pac. 670.

[f] Liability of stockholders is statutory, and must be enforced within three years after cause accrues.—Hyman v. Coleman, 82 Cal. 653, 16 Am. St. Rep. 178, 23 Pac. 62.

[g] Judgment against corporation does not create new liability nor extend time for bringing suit against stockholders.—Hyman v. Coleman, 82 Cal. 653, 16 Am. St. Rep. 178, 23 Pac. 62.

[h] The liability of a stockholder of a corporation upon a note given by the corporation is created, within the meaning of section 359 of the Code of Civil Procedure, at least as early as the date of the note, and the statute of limitations commences to run in favor of the stockholder from the date of its execution, and not from its maturity, regardless of how long the liability of the corporation to actions may be postponed by agreement of the creditor.—Hunt v. Ward, 99 Cal. 612, 34 Pac. 335.

[i] Liability of a stockholder of a corporation upon a note given by the corporation is created within the meaning of section 359 of the Code of Civil Procedure, at least as early as the date of the note, and the statute of limitations commences to run in favor of the stockholder from the date of its execution, and not from its maturity, regardless of how long the liability of the corporation to actions may be postponed by agreement of the creditor.—Bank of San Luis Obispo v. Pacific Coast Steamship Co., 103 Cal. 594, 37 Pac. 499.

[j] Where the liability of the directors of a corporation arises from negligence, the action must be commenced within two years after the cause of action accrues, whereas, if it arises out of fraud, it may be commenced within three years after the discovery of the facts constituting the fraud.—Fox v. Hale and Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 328.

[k] Code of Civil Procedure, section 359, providing that actions against stockholders of a corporation for corporate debts must be brought within three years, is not in conflict with constitution, article 12, section 3, which provides that each stockholder shall be liable for such proportion of the debts and liabilities as are contracted while he is a stockholder.—Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85.

[l] Code of Civil Procedure, section 359, limiting the time within which an action may be brought against stockholders, is not in conflict with Civil Code, section 309, which provides that there shall be no limitation of action against the directors of a corporation for liabilities incurred under that section, or with Code of Civil Procedure, section 348, providing for actions without limitation against persons with whom money has been deposited.—Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85.

[m] A surety who pays the note of a corporation before action thereon is barred as to the corporation has a right of action therefor against a stockholder of the corporation, although at the time of payment an action against the stockholder by the payee of the note would have been barred, under Code of Civil Procedure, section 359, limiting actions to enforce a stockholder's liability to three years after the liability accrued.—Ryland v. Commercial etc. Bank of San Jose, 127 Cal. 525, 59 Pac. 989.

[n] A corporation authorized the issuance of new notes on surrender of notes held by plaintiffs, or on receipt of their value from any other person; directed new notes to be made to him, and the proceeds applied to plaintiffs' claim. Plaintiffs presented K.'s check for the amount and the notes, and new notes were executed to K., who immediately indorsed them to plaintiffs. The corporation indorsed K.'s check to plaintiffs, who deposited it in a bank to their credit. At the time the check was drawn, K. did not have sufficient funds in his bank to meet it, and on the following day gave the bank his note for the amount of the check, which he paid

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on the next day by a check from plaintiffs. The entire transaction was between plaintiffs and the corporation, who knew nothing of K. except that the check was signed by, and the notes made payable to, him. Held, that such facts constituted a renewal of the old notes merely, and not the creation of a new debt, and hence plaintiffs were not entitled to maintain an action to enforce a stockholder's liability on the new notes more than seven years after the giving of the original notes.—Goodall v. Jack, 127 Cal. 258, 59 Pac. 575.

[o] Under Code of Civil Procedure, section 359, providing that actions against a stockholder of a corporation, to enforce statutory liability must be brought within three years after the liability is created, limitations begin to run, as against the demand of a surety who has been compelled to pay the debt of the corporation, from the day of such payment, and not from the date of the original obligation.—Ryland v. Commercial etc. Bank of San Jose, 127 Cal. 525, 59 Pac. 989.

[p] The liability of a stockholder of a corporation for his proportionate share of its debts is created by statute, and is barred within three years after the cause of action accrues.—Jones v. Goldtree Bros. Co., 142 Cal. 383.

[q] The corporation has no power, without the consent of the stockholders, to extend the time for the commencement of an action against them, by any subsequent renewal or extension of time for the payment of its original debt.—Jones v. Goldtree Bros. Co., 142 Cal. 383.

FOR AUTHORITIES FROM OTHER STATES:

Limitation of actions against stockholders of corporations: 96 Am. St. Rep. 972, note; 48 L. R. A. 637, note. See, also, 10 Cyc. 678, 12 Cent. Dig., cols. 1142-1157, §§ 1084-1098.

§ 261. —— Parties.

[a] In an action against the stockholders of a corporation by a judgment creditor of the corporation who has had execution against it returned unsatisfied, to enforce the amount due upon unpaid subscriptions for stock, the liability of the stockholders is several, and it is not necessary to make them all defendants.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 647, 30 Pac. 776; Baines v. Story, 27 Pac. 676, 30 Pac. 777; Potter v. Dear, 27 Pac. 676.

[b] A judgment creditor who has had an execution returned unsatisfied against a street railway corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to be made parties, the amount due upon unpaid subscriptions for stock.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Baines v. Story, 27 Pac. 676, 30 Pac. 777; Potter v. Dear, 27 Pac. 676.

[c] An action may be brought by a judgment creditor against several stockholders in a corporation to subject an alleged balance remaining unpaid to the corporation upon the stock held by the defendant in satisfaction of a judgment recovered by the plaintiff against the corporation; and a complaint averring the several amounts of stock held by each defendant, and of unpaid subscriptions due from each, does not show a misjoinder of parties or causes of action, and is sufficient as against a general demurrer.—Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186.

[d] An averment in the creditor's bill that plaintiff sued on behalf of other creditors who may come in and be made parties to the action is immaterial and redundant surplusage.—Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

[e] A bill to enforce a stockholder's liability for unpaid subscriptions may be filed against a single stockholder or any number of stockholders indebted for unpaid subscriptions, and the fund realized distributed ratably among all the creditors of the corporation.—Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136; Welch v. Sargent, 127 Cal. 72, 50 Pac. 319.

[f] Under section 322 of the Civil Code, the stockholders of a corporation may be joined in an action to enforce their individual liabilities for a corporate indebtedness. In such an action the corporation is not a necessary party.—Greenleaf v. Jacks, 133 Cal. 506, 65 Pac. 1039.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 678, 692; 12 Cent. Dig., cols. 1157-1175, §§ 1099-1125.

§ 262. —— Pleading.

[a] In an action to recover from the members of a plank or turnpike road company debts contracted before its final organization, the action being based on the theory that no final organization was ever had, the complaint must allege that the defendants commenced the formation of such company, and that, before the final organization thereof, debts were contracted which still remain unpaid, etc.—Blanchard v. Kaull, 44 Cal. 440.

[b] In an action against the stockholders of a corporation on its renewal notes, which are claimed to have extinguished the old notes, the complaint should allege that the defendants were stockholders of the corporation when the renewals were made.—Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62.

[c] Each court must state existence of corporation or refer to this statement in first count.—Bidwell v. Babcock, 87 Cal. 33, 25 Pac. 752.

[d] Complaint in action to enforce several debts of corporation against stockholder must show number of shares subscribed at time each debt was contracted.—Bidwell v. Babcock, 87 Cal. 33, 25 Pac. 752.

[e] Complaint in suit to enforce stockholder's liability must show proportion which his stock bears to entire subscribed stock or

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state facts from which this can be deduced. Bidwell v. Babcock, 87 Cal. 32, 25 Pac. 752.

[f] If the defendants had purchased the stock, without notice, under such circumstances as to relieve them from liability for the amount paid upon the shares, it is matter of defense to be pleaded and proved by them, and the plaintiff is not bound to anticipate and negative such defense.—Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186.

[g] Where it is alleged that the stock held by each of the defendants was held as original subscribers, it will not be presumed that they sold the stock after paying nine dollars and a half per share, and that the purchasers paid the remainder and then sold the stock back to the defendants; and any facts showing that the defendants were not liable for the remainder of the subscription price must be pleaded to exonerate them from liability.—Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186.

[h] Where a judgment creditor of a corporation improperly intervenes in an action by another judgment creditor against a stockholder of the corporation for an unpaid subscription of stock, and his complaint states a good cause of action against the stockholder, the allegations as to intervention will be regarded as redundant, and the complaint treated as an independent and original one.—Baines v. Babcock, 104 Cal. 1, 37 Pac. 767.

[i] Stockholders of corporation are perhaps not strictly liable on contract of corporation, but on the statute creating the liability; but, if the debt of the corporation was created by a written contract, the debt of the corporation based on the contract must be pleaded in the usual mode.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[j] A complaint, in an action to enforce a stockholder's liability on a note given by the corporation, which failed to allege that defendant was a stockholder at the time the original indebtedness was created is sufficient.—Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077.

[k] In an action against a stockholder for his proportionate share of a corporate debt, it must be alleged in the complaint what the whole number of subscribed shares was, the liability of the stockholder being dependent upon the proportion which his own holding bears to the total number of subscribed shares; and, in default of such allegation, the complaint is subject to a general demurrer.—John A. Roebling's Sons Co. v. Butler, 112 Cal. 677, 45 Pac. 6.

[l] A complaint in an action to enforce the liability of a stockholder in a corporation, which shows that defendant was a stockholder therein, when the original indebtedness of the corporation to the plaintiff was created, is not rendered subject to demurrer, nor to a motion to strike out, because it also sets forth a subsequent account stated with the corporation for the purpose of showing that the original debt was reduced by agreement; and in such case the cause of action is upon the original indebtedness, and not upon the account stated which served merely to establish a reduction of the indebtedness of the corporation and of its stockholder, the stockholder being at liberty to repudiate the reduction if he saw fit, and also at full liberty to assail the original indebtedness.—Partridge v. Butler, 113 Cal. 326, 45 Pac. 678.

[m] In an action to enforce the individual liability of a stockholder for his proportionate share of a corporate debt, the complaint must show affirmatively that the indebtedness was incurred while the defendant was a stockholder; and the mere allegation that on a certain day, while the defendant was a stockholder, the corporation made its promissory note, is not sufficient, in the absence of an averment that the indebtedness was then for the first time incurred, or that the corporation then became indebted to the plaintiff.—J. I. Case Plow Works v. Montgomery, 115 Cal. 380, 47 Pac. 108.

[n] The requirement that an action to enforce the liability of stockholders for the corporation's debt must be on the original debt is substantially complied with where the complaint sets out a note of the corporation alleged to have been executed for money borrowed on the date of its execution.—Herman v. Hecht, 116 Cal. 553, 48 Pac. 611.

[o] A complaint in an action to enforce a stockholder's liability for a corporate debt alleged that on a certain date the corporation became indebted to F. for a certain sum for money loaned and advanced by him to it, and that it agreed to repay said sum, and that he had assigned said claim to plaintiff. The evidence showed that a stockholder solicited a loan for the corporation from plaintiff; that plaintiff drew a check for the amount of the loan, and left it with such stockholder. The corporation executed a note to F., its attorney, for the amount of the loan, and he indorsed it to plaintiff without recourse, whereupon the stockholder to whom plaintiff had previously given the amount of the note gave a check therefor to the corporation's manager, who thereupon indorsed it to F., and he indorsed it to the corporation. Held, that a motion for a nonsuit on the ground that the evidence did not sustain the material allegations of the complaint was properly denied, it not appearing that the defendants were in any way misled or prejudiced by the allegations of the complaint. Spreckles v. Butler, 128 Cal. 645, 61 Pac. 378.

[p] A complaint to enforce a stockholder's liability set forth the existence of the corporation and its capital stock, and alleged that the corporation, for value received, executed the note set forth in the complaint, which was due and unpaid, and that, during the time said debts and liabilities of the corporation were contracted, defendant was a stockholder (giving the number of shares of stock held by him). Held, that the allegations of the complaint were sufficient to support a judgment by default, as against the objection that it did not allege when the indebtedness for which the notes were given was incurred, which was waived by failure

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to demur.—Whitehurst v. Stuart, 129 Cal. 194, 61 Pac. 963.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 692; 12 Cent. Dig., cols. 1177-1193, §§ 1129-1148.

§ 263. —— Evidence.

[a] In an action against the stockholders of a corporation by a judgment creditor of the corporation who has had execution against it returned unsatisfied, to enforce the amount due upon unpaid subscriptions for stock, evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776; Baines v. Story, 30 Pac. 777, affirming (1892) 95 Cal. 581, 27 Pac. 674.

[b] In an action against the stockholders of a corporation by a judgment creditor of the corporation who has had execution against it returned unsatisfied, to enforce the amount due upon unpaid subscriptions for stock, proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and the execution thereon returned unsatisfied.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Baines v. Story, 30 Pac. 777.

[c] In an action by a judgment creditor of a corporation for an unpaid subscription to stock, a judgment in an action by another judgment creditor against the same stockholder, rendered two years before, is not evidence of the indebtedness of the stockholder to the corporation.—Baines v. Babcock, 104 Cal. 1, 37 Pac. 767.

[d] The liability of a stockholder for corporate debts is primary, and evidence competent and sufficient to show the liability of the corporation is competent against the stockholder.—McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418.

[e] In action against stockholders of corporation upon note of corporation, evidence that plaintiff's assignors are stockholders is inadmissible.—Herman v. Hecht, 116 Cal. 561, 48 Pac. 611.

[f] It is not material error to exclude general questions asked of the payee of the note, not purporting to relate to the transactions set forth in the complaint and testified to by the plaintiff, but generally as to whether such payee had at any time loaned any money to the corporation, or whether the corporation had borrowed any money from him. The further question as to whether he assigned the note to the plaintiff, after he had admitted that was properly excluded as immaterial.—Spreckles v. Butler, 128 Cal. 645, 61 Pac. 378.

[g] In an action to enforce a stockholder's liability where it was shown that she had transferred her shares to an insolvent for the purpose of avoiding liability, and that such insolvent had transferred the stock to another, the burden of proving that such subsequent transferee was responsible, and that defendant's liability was therefore destroyed, was on her.—People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

[h] A resolution of the board of directors authorizing the secretary to borrow money for the corporation is sufficient, though not entered on the minute-book, and, therefore, in an action against stockholders to recover the money so borrowed, the admission in evidence of a resolution adopted by the board and entered on its minutes is immaterial.—Bank of Yolo v. Weaver, 31 Pac. 160.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 1193-1201, §§ 1149-1159.

§ 264. —— Corporate Books as Evidence.

[a] The presumption created by entries in the stock and transfer books of a corporation that the party therein named is a stockholder is impeached and overcome by oral testimony that the party sought to be charged had never accepted, but refused to accept, any of the stock of the company, and that he never in fact became a stockholder in the company.—Mudgett v. Horrell, 33 Cal. 25.

[b] In an action by a creditor of a corporation against a party claimed to be a stockholder, the stock-book of the corporation is not admissible in evidence to prove that he is a stockholder.—Mudgett v. Horrell, 33 Cal. 25.

[c] A stock certificate-book, stock ledger, and stock journal of the corporation, together with the testimony of the secretary of the corporation that they contain the names of all the stockholders, and that no other persons appeared on the books of the company as having owned stock during any of the times mentioned in the complaint, are sufficient to prove the whole amount of stock outstanding, and the dates of the ownership of stock by the defendants.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[d] In a creditor's action to recover a stockholder's proportion of the indebtedness of the corporation, entries in its books are not admissible in the plaintiff's behalf.—Neilson v. Crawford, 52 Cal. 248.

[e] A corporation's books are competent to prove the number of shares issued, and the shareholders at the time of an indebtedness arose, but articles of incorporation dated a year or more previous to that time do not necessarily show those facts, and are not admissible for that purpose.—Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089.

[f] Where the stock certificate-book offered in evidence appears to have been designed for a stock and transfer book, and its contents, so far as set out in the record, correspond with what is required by the code, in respect of a stock and transfer book, the fact that the book is not named as the code requires is not material.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

[g] Books of corporation are admissible in action to enforce stockholder's liability for

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his proportion of corporate debt.—San Pedro etc. Co. v. Reynolds, 121 Cal. 85, 53 Pac. 410.

§ 265. —— Judgment and Enforcement Thereof.

[a] The sale of property belonging to an incorporated company under a judgment recovered against the individual members thereon in an action to which the company was not a party passes no title.—Bracia v. Nelson, 42 Cal. 107.

[b] A judgment recovered against a corporation is conclusive against the company and its stockholders, and they cannot show, in an action for unpaid subscriptions, that the indebtedness for which the judgment was recovered arose upon a contract which was ultra vires.—Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674; Baines v. Story, 27 Pac. 676; Potter v. Dear, 27 Pac. 676.

[c] A provision in the judgment for relief to other judgment creditors, if valid under the pleadings, refers only to persons who were judgment creditors at the time of the judgment, and not to those who may afterward become such.—Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

[d] The creditors appearing in the action, whether as plaintiffs or as interveners, are entitled to have several judgments against each stockholder made a party to the action, to the extent of his indebtedness to the corporation.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

FOR AUTHORITIES FROM OTHER STATES:

Judgment against corporations, effect of on stockholders: 97 Am. St. Rep. 463, note. See, also, 12 Cent. Dig., cols. 1202-1207, §§ 1162-1168.

§ 266. Contribution Between Stockholders.

[a] When a stockholder has paid his portion of any debt, or of all debts of corporation, he is freed from all liability, and has no cause of action against any other stockholder for money so paid.—Brown v. Merrill, 107 Cal. 446, 48 Am. St. Rep. 145, 40 Pac. 557.

[b] A stockholder of a distilling corporation paying more than his share of internal revenue taxes is entitled to contribution from the other stockholders.—Richter v. Blasingame, 110 Cal. 530, 42 Pac. 1077.

[c] Costs paid by stockholders for procuring a release of the distillery belonging to the corporation after seizure of it by officers of the United States government cannot be made the subject of contribution from other stockholders; but where they are not allowed in an action for contribution, the averment of them in the complaint is immaterial.—Wolters v. Henningsan, 114 Cal. 433, 46 Pac. 277.

[d] An action by stockholders against other stockholders of the corporation, to enforce their liability to contribute to the payment of a note upon which the plaintiffs were sureties, and which they have paid, does not arise out of the relation of surety, but is a statutory action to enforce the liability to them of the stockholders as principal debtors. Myers v. Sierra Valley Stock etc. Assn., 122 Cal. 669, 55 Pac. 689.

FOR AUTHORITIES FROM OTHER STATES:

Right of one who has paid more than his share of the corporate liabilities: 71 Am. St. Rep. 40, note. See, also, 12 Cent. Dig., cols. 1212-1218, §§ 1177-1185.

§ 267. —— Time to Sue.

[a] Where, in an action by one stockholder and director of a corporation, who had paid the whole of a corporate debt, for contribution from another stockholder, the stockholder asks to be subrogated to the rights and remedies of the creditor, the period of limitation is that defined by Code of Civil Procedure, section 359, providing that actions against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the creation of the liability.—Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

VI. OFFICERS AND AGENTS.

A. Election or Appointment, Qualification and Terms, §§ 268-277.

B. Authority and Functions, §§ 278-284.

C. Right, Duties and Liabilities as to Corporation and Its Members, §§ 285-311.

D. Liability for Corporate Debts and Acts, §§ 312-322.

A. ELECTION OR APPOINTMENT, QUALIFICATION AND TENURE.

Officers of state banks. See Banks and Banking, §§ 24-49.

Officers of religious corporations. See Religious Societies, § 4.

NECESSITY FOR OFFICERS — CORPORATION SOLE, § 268.
ELIGIBILITY, § 269.
APPOINTMENT OF OFFICERS, § 270.
APPOINTMENT OF AGENTS, § 271.
CONTEST OR JUDICIAL REVIEW OF ELECTION, § 272.
ESTOPPEL TO QUESTION APPOINTMENT, § 273.
DE FACTO OFFICERS, § 274.
—— VALIDITY OF ACTS IN GENERAL, § 275.
—— COLLATERAL ATTACK ON AUTHORITY, § 276.
REMOVAL, § 277.

§ 268. Necessity for Officers—Corporation Sole.

[a] Sole corporation has no need of a secretary or treasurer.—Roman Catholic Archbishop v. Shipman, 79 Cal. 288, 21 Pac. 830.

§ 269. Eligibility.

[a] One not elected as director is not eligible to the office of president, and neither the board that was elected nor the court can make him president.—Dulin v. Pacific Wood and Coal Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207.

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FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 736-739; 12 Cent. Dig., cols. 1220-1224, §§ 1189-1194.

270. Appointment of Officers.

[a] Under the by-law of a corporation, its manager held not authorized to appoint a superintendent, and the one appointed was chargeable with the limitation of the power of the manager.—Colpe v. Jubilee Min. Co. (Cal. App.) 84 Pac. 324.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 318-349, 923; 12 Cent. Dig., cols. 1225-1253, §§ 1195-1235.

§ 271. Appointment of Agents.

[a] In order to establish an agency in behalf of a corporation it is not indispensable to show a written authority, or a vote or resolution of the corporate authorities.—Crowley v. Genesee Min. Co., 55 Cal. 273.

[b] Corporation can confer authority upon agent to sell its lands only through its board of directors, when duly assembled, by resolution duly passed and recorded, and a ratification of such authority can only be made in the same manner required for the conferring of original authority.—Salfield v. Sutter County etc. Co., 94 Cal. 546, 29 Pac. 1105.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 933; 12 Cent. Dig., cols. 1253-1255, §§ 1236-1239.

§ 272. Contest or Judicial Review of Election.

[a] A county has a right through its board of supervisors to contest the election of the directors of a railroad company in which it owns stock.—Hornblower v. Duden, 35 Cal. 664.

[b] A proceeding to set aside an election for directors of a corporation may be instituted by a stockholder, although he has not had the stock standing in his name on the corporation books for a sufficient length of time to entitle him to vote at such election.—Wright v. Central California Colony Water Co., 67 Cal. 532, 8 Pac. 70.

[c] Section 315 of the Civil Code, providing for an action to determine the validity of an election held by any corporate body, has application only to elections which are, by the statute, authorized to be made by the stockholders, and does not include an appointment made by the directors to fill a vacancy.—Wickersham v. Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51.

[d] An "appointment" by the board of directors of a corporation is not an "election" by the corporation, within Civil Code, section 315, authorizing the district court to inquire into "any election held by any corporate body," on the application of any person aggrieved by such election.—Wickersham v. Brittan, 93 Cal. 34, 28 Pac. 792, 15 L. R. A. 106.

[e] The provisions of section 315 of the Civil Code are not intended to apply where the plaintiff does not claim to be aggrieved by any election of a corporate body, but complains that after he was regularly appointed to fill a vacancy caused by the resignation of an elected director of a corporation some of the remaining members of the board refused to acknowledge his rights, and that, together with the director who had resigned and who still claims to be a director, they had excluded him from participation in the action of the board.—Wickersham v. Murphy, 93 Cal. 41, 28 Pac. 793.

[f] In general, a court of equity has no inherent jurisdiction to review a corporate election, and oust the officers who claim to have been elected; but, in this state, under section 315 of the Civil Code, the superior courts have jurisdiction, as courts of equity, to inquire into the validity of the election of directors of a corporation, and to set it aside, if not in conformity with law.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[g] Where the complaint in an action by stockholders to review an alleged illegal election of directors, and to oust them from office, alleges that the corporation is controlled by the illegally elected directors, it need not allege a demand on the corporation that it bring the action, and its refusal to do so.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[h] Where the complaint in an action by stockholders to review the election of officers of a corporation, and to oust them from office, alleges that defendants are not the officers of the corporation, it need not allege a demand, on persons whom plaintiffs considered the officers de jure, that the corporation bring the action in its name, and a refusal so to do, where it appears that the defendants are exercising the functions of the offices they claim.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[i] A complaint in an action by stockholders to review an alleged illegal election of directors is not demurrable for ambiguity, where it refers to them as the "board of directors," when it clearly appears from the whole complaint that the claim is made that they are not the legal board.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[j] Stockholders whose stock has been sold to satisfy an assessment thereon, to carry into effect an illegal contract made by a board of directors illegally elected, may maintain an action to review the illegal election and oust them from office, and to have the illegal contract set aside.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

§ 273. Estoppel to Question Appointment.

[a] After allowing a person to act as its secretary, and causing its records to be authenticated by him as such, a corporation cannot object to the regularity of his appointment, or repudiate its obligations, signed by him under the direction of its board of directors.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

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FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 1261-1263, § 1244.

§ 274. De Facto Officers.

Power to levy assessment. See ante, § 111.

[a] A director of a corporation who ceases to be a stockholder during the term for which he was chosen, but continues to act as director, no judgment of ouster having been pronounced against him, is a director de facto.—San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179.

§ 275. —— Validity of Acts in General.

[a] The acts of de facto directors in levying assessments are valid, though they were not elected by ballot as required by law.—San Joaquin Land etc. Co. v. Belding, 35 Pac. 363; San Joaquin Land etc. Co. v. Hewlett, 35 Pac. 353; San Joaquin Land etc. Co. v. Hitchcock, 35 Pac. 353.

[b] The acts of officers de facto are valid as to third persons.—(1883) San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179.

§ 276. —— Collateral Attack on Authority.

[a] Acts of de facto directors of a corporation cannot be impeached by showing irregularity in their election.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

§ 277. Removal.

[a] Power of removing private or ministerial officers of a private corporation belongs to the corporation alone. Courts cannot remove such officers.—Neall v. Hill, 16 Cal. 145.

[b] A proceeding under statutes of 1871-72, page 443, to remove officers of a corporation, may be brought by the corporation itself.—Chollar Min. Co. v. Wilson, 66 Cal. 374, 5 Pac. 670.

[c] The words "majority of shareholders," as used in the act of March 21, 1872, mean a majority of the persons holding shares, and not "the holders of a majority of the stock," and a petition for the removal of officers of a corporation, signed by less than a majority of the shareholders, though the signers hold a majority of the stock, is therefore insufficient.—Chollar Min. Co. v. Wilson, 66 Cal. 374, 5 Pac. 670.

[d] Agents to draw and invest subscriptions having no interest coupled with their agency, it is competent for the corporation to remove them at any time and appoint other agents in their place, or itself assume the custody and disposition of the money.—San Joaquin etc. Co. v. West, 94 Cal. 399, 29 Pac. 785.

[e] Power to remove officers for cause is a common-law incident of all corporations.—Croly v. Sacramento, 119 Cal. 234, 51 Pac. 323.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 742-747, 935; 12 Cent. Dig., cols. 1274-1277, §§ 1263-1265.

B. AUTHORITY AND FUNCTIONS.

AUTHORITY OF DIRECTORS, § 278.
—— DE FACTO DIRECTORS, § 279.
MEETINGS OF DIRECTORS, § 280.
—— QUORUM, § 281.
—— CALLING AND NOTICE, § 282.
PRESIDENT, § 282½.
SECRETARY, § 283.
MANAGER OR MANAGING AGENT, § 284.

§ 278. Authority of Directors.

[a] Directors of a private corporation cannot ratify an act or contract which is ultra vires, or contrary to law.—Hall v. Auburn Tel. Co., 27 Cal. 256, 87 Am. Dec. 75, 38 Cal. 311.

[b] Power to make settlement of defalcation and to accept a deed in satisfaction belongs only to board of directors.—Bank of Healdsburg v. Bailhache, 65 Cal. 328, 4 Pac. 106.

[c] The payment of cash dividends out of net earnings of a corporation is a question of policy, and the action of the directors in that regard, if honest and intelligent, will not be lightly overruled.—Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

[d] Directors are managers of business of corporation, and what they cannot do stockholders cannot do or authorize to be done.—Vercoutere v. Golden State L. Co., 116 Cal. 415, 48 Pac. 375.

[e] The directors of a business corporation have power by resolution to authorize the president of the corporation to execute notes on behalf of the company.—McCormick v. Stockton etc. Co., 130 Cal. 100, 62 Pac. 267.

FOR AUTHORITIES FROM OTHER STATES:
10 Cyc. 758-770; 12 Cent. Dig., cols. 1280-1290, §§ 1274-1291.

§ 279. —— De Facto Directors.

[a] The acts of de facto directors in levying assessments are valid, though they were not elected by ballot as required by law.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; San Joaquin Land etc. Co. v. Belding, 35 Pac. 353; San Joaquin Land etc. Co. v. Hewlett, 35 Pac. 353; San Joaquin Land etc. Co. v. Hitchcock, 35 Pac. 353.

§ 280. Meetings of Directors.

Meetings of stockholders. See ante, § 201 et seq.

[a] Failure to record a vote will not vitiate act of directors.—Bay View Assn. v. Williams, 50 Cal. 353.

[b] Directors directly interested in passage of resolution are not competent to vote on it. Smith v. Los Angeles etc. Assn., 78 Cal. 292, 12 Am. St. Rep. 53, 20 Pac. 677.

[c] No decision or act of the board of directors of a corporation, made or done while not duly assembled as a board, is a valid corporate act.—Smith v. Dora, 96 Cal. 73, 30 Pac. 1024.

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[d] Where it is not shown whether a meeting of the board of directors of a corporation was regular or special, there is no presumption that it was special.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

[e] Where all of the directors of a corporation were present at a meeting, which was adjourned, but there was nothing to show that all the directors were present at the first meeting, when that meeting adjourned, and no other notice of the second meeting was given, and all were not present at the adjourned meeting, a resolution passed at the latter meeting to proceed by action for the collection of an assessment on the stock, which was business which could not have been lawfully transacted at the former meeting, was invalid.—Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383.

[f] Where in the absence of by-laws fixing the times for meetings of directors or a corporation, all of the directors, being duly assembled, agree to adjourn to a date and hour named, a meeting held by a majority of the directors at the time thus fixed is a legal meeting of the board, though no personal notice of a meeting is given to each director; and the acts of each meeting will be valid, under Civil Code, section 308, providing that every decision of a majority of the directors, made when duly assembled, valid as a corporate act.—Bank of National City v. Johnston, 60 Pac. 776.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 774-787; 12 Cent. Dig., cols. 1291-1307, §§ 1292-1319.

§ 281. —— Quorum.

[a] A regular meeting of the directors of a bank was had on January 14th, and an adjournment taken until February 14th. On January 20th, C. and two other defendants, directors, held a meeting, at which a forty-five thousand dollar loan was made to C., and a salary of four hundred dollars per month voted to C. Held, that the action taken at such meeting was not binding on the stockholders.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

[b] The incompetency of one director to act, by reason of his interest in the transactions leading to the conveyance of the property to the corporation, and to the execution of the mortgage of the corporation, cannot affect the validity of the original authorization of the mortgage by a majority of the full board of directors to which his vote was not necessary, nor affect the subsequent ratification of the mortgage by a newly elected full board of directors, of which he was a member.—Porter v. Lassen County Land Co., 127 Cal. 261, 59 Pac. 563.

[c] Director interested in proceeding of board does not count in figuring quorum.—Curtin v. Salmon River Hydraulic Gold Mining etc. Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

[d] No legal quorum of directors of a corporation is present when action is attempted to be taken on a matter as to which one of the directors necessary to make a quorum is interested. Judgment (1900) 61 Pac. 791, affirmed.—Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611.

[e] Resolutions passed at such meeting cannot be ratified by the stockholders. Judgment (1900) 61 Pac. 791, affirmed.—Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611.

[f] Under Civil Code, section 308, declaring that a majority of the directors of a corporation form a quorum, the passage of a resolution ratifying the payment of compensation to one of their members for services outside his duties as a director was not invalidated by the fact that such director was present when the vote was taken, though his presence was necessary to constitute a quorum, where the resolution was passed without his vote.—Bassett v. Fairchild, 61 Pac. 791.

§ 282. —— Calling and Notice.

[a] In the absence of a charter provision or a by-law to the contrary, a special meeting of the directors of a corporation must be called by giving personal notice to each member of the board.—Harding v. Vandewater, 40 Cal. 77.

[b] In the absence of proof to the contrary, notice to the directors of a meeting will be presumed, though not recited in the record of the meeting.—Granger v. Original Empire etc. Co., 59 Cal. 678.

[c] A mortgage was executed under a resolution passed at a special meeting of the directors. The resolution recited that written notices of the meeting had been served on each director. The purpose of the meeting was not specified in the notices. Held, that the meeting was regularly called, and the mortgage valid.—Granger v. Original Empire Mill etc. Co., 59 Cal. 678.

[d] Where regular meeting of directors from which two are absent is adjourned and the hour of the adjourned meeting is not fixed, it is a special meeting of which notice must be given to those absent from regular meeting.—Thompson v. Williams, 76 Cal. 155, 9 Am. St. Rep. 187, 18 Pac. 153.

[e] A corporate by-law, together with Civil Code, section 320, required that notices of special meetings of a corporation should be given on "the order of the president, or, if there be none, on the order of two directors." Held, that while there was a president competent to act, a special meeting called by two directors on the refusal of the president to make the call was illegal.—Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

[f] An attempted express ratification of promissory notes at a special meeting of the board of directors, of which the directors were not all notified, is not made at a meeting duly assembled, and does not bind the corporation as a corporate act.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

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[g] The secretary of a corporation, on the order of the president, sent by mail to each of the seven directors a written notice of a special meeting, properly addressed and postpaid, three days before the time fixed for the meeting. Held, that notice was given as required by Civil Code, section 320, and the acts of the five directors present were valid. Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809.

[h] Notice to the directors of a corporation of a special meeting will be presumed, in the absence of proof to the contrary, though not recited in the record of the meeting.—Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 41 Pac. 809.

[i] A corporation claiming that all of its directors were not notified to attend a meeting has the burden of proof.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

[j] The secretary of a corporation testified that he had notified the directors of a meeting by sending to each a written notice, by a boy from his office, twenty-four hours prior thereto. Held that, in the absence of evidence to the contrary, the court was authorized to find that proper notice was given.—Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891.

[k] Where a resolution adopted at a special meeting of directors was spread at length on the records of the corporation, and authenticated by the signature of its purported secretary, the presumption is that the directors were properly notified of the meeting.—Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891.

[l] On an issue as to the validity of a directors' special meeting, held, that it would be presumed that the vice-president, in calling such meeting and in mailing notices, in the absence of the president, acted in his capacity as secretary.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

[m] Notice of a special meeting of the directors of a corporation, signed by its vice-president and mailed by him personally to the directors, constitute a sufficient written declaration of the necessity of such meeting to make a legal call thereof.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

[n] The call of a special meeting of the directors of a corporation by the vice-president, in the absence of the president, held not objectionable, in that the president, if notified, could have reached the corporation's principal place of business and acted on the call within four or five hours.—Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

[o] In the absence of any limitation imposed by statute or the articles of incorporation or by-laws of a corporation, requiring the object of a special meeting to be stated in the notice therefor, a board of directors, duly assembled at an adjourned meeting, may resolve to proceed by action for the collection of an assessment upon stock, as provided in Civil Code, section 349, where the resolution levying the assessment fixed a day when unpaid assessments would become delinquent, and the time for payment has expired.—Bank of National City v. Johnston, 60 Pac. 776.

§ 282½. President.

[a] The president of a private corporation has no authority by virtue merely of his official position to make contracts binding the corporation, except in relation to matters arising in the ordinary course of the business of the corporation.—Blen v. Bear River etc. Mine Co., 20 Cal. 602, 81 Am. Dec. 132

[b] Ratification of employment of attorney by president is the act of the corporation.—Tenor v. Central Pac. R. R. Co., 50 Cal. 230, 231.

[c] President of railroad company may ratify acts of one assuming to act as agent of the company in employing professional service.—Tenor v. Central Pac. R. R. Co., 50 Cal. 230, 231.

[d] By-law held not to restrict president's power to contract.—Freyberg v. Los Angeles Brewing Co. (Cal. App.), 88 Pac. 378.

§ 283. Secretary.

[a] Defendant transferred to plaintiff by a bill of sale a quantity of wine, and gave plaintiff a written order to pay a certain amount to a mortgagee of the wines, which plaintiff accepted, and the mortgagee released the mortgage. In reply to a query as to shipment, plaintiff's secretary, forgetting plaintiff's obligation to the mortgagee, told defendant that he might sell a part of the wine to other parties and retain the proceeds, and defendant did so. Held, that the secretary of plaintiff corporation had no power to make such promise, in the absence of express or implied authority.—California Wine Makers' Corp. v. Sciaroni, 139 Cal. 277, 72 Pac. 990.

[b] Secretary of corporation has no power to release or transfer its property, in the absence of authority express or implied, and with no authorization or ratification by its board of directors.—California Winemakers' Corporation v. Sciaroni, 139 Cal. 277, 72 Pac. 990.

§ 284. Manager or Managing Agent.

Authority of managing agent of joint stock company. See Joint Stock Companies, § 7.

[a] Mortgage by managing agent of a corporation, without express authority, is void. Shaver v. Bear River etc. Co., 10 Cal. 396.

[b] Managing agent may do in transaction of ordinary business all that corporation may do.—Shaver v. Bear River etc. Co., 10 Cal. 396.

[c] A general managing agent of a corporation is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do within the scope of its powers; and he may assign a chose in action of the corporation to a third party for collection.—Greig v. Riordan, 99 Cal. 316, 33 Pac. 913.

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[d] Provisions of by-laws relating to manager of corporation are part of his contract of employment, measures his powers and fixes his duties and responsibilities.—San Pedro etc. Co. v. Reynolds, 121 Cal. 79, 82, 53 Pac. 410.

[e] A manager of a corporation having general supervision of a flume across an irrigation ditch, and acting under the control of the board of directors, but without authority to make an expenditure such as would be involved in trussing the flume, has no authority to bind the corporation by making a promise to the owner of the ditch that he would cause a truss bridge to be thrown across the ditch to support the flume—Centerville & Kingsburg Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 Pac. 1079.

[f] By-law held not to restrict manager's power to contract.—Freyberg v. Los Angeles Brewing Co. (Cal. App.), 88 Pac. 378.

C. RIGHTS, DUTIES AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS.

FIDUCIARY RELATION BETWEEN DIRECTOR AND CORPORATION, § 285.
OFFICERS OF DE FACTO CORPORATION, § 286.
COMPENSATION, § 287.
—— DIRECTORS, § 288.
—— PRESIDENT, § 289.
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—— MANAGER, § 291.
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—— DIRECTORS OR TRUSTEES VOTING THEMSELVES SALARIES OR INCREASE, § 293.
—— EXTRA TIME, § 294.
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—— PURCHASE OF CLAIMS AGAINST CORPORATIONS, § 297.
—— MORTGAGES, TO SECURE OR PAY CLAIMS, § 298.
LIABILITY FOR PROPERTY AND FUNDS IN GENERAL, § 299.
—— CONVERSION OR MISAPPROPIATION, § 300.
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ACQUIRING ADVERSE TITLE OR INTEREST, § 302.
—— PURCHASE AT JUDICIAL SALE, § 303.
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—— WHO MAY ATTACK TRANSACTION, § 305.
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—— RATIFICATION OF UNAUTHORIZED ACTS, § 307.
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OFFICERS OR AGENTS OF DIFFERENT CORPORATIONS, § 309.
ACTIONS BETWEEN SHAREHOLDERS AND OFFICERS, § 310.
CRIMINAL RESPONSIBILITY FOR MAKING FALSE ENTRIES, § 311.

§ 285. Fiduciary Relation Between Director and Corporation.

[a] Directors of corporation act in fiduciary capacity, and are trustees of the stockholders.—Farmers and Merchants' Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62.

[b] Relation between director and corporation is fiduciary.—Woodroof v. Howes, 88 Cal. 187, 26 Pac. 111.

[c] Directors of corporation hold a fiduciary relation to the stockholders, and are intrusted with the management of the corporate property for the common benefit and advantage of each stockholder, and are precluded by their acceptance of the trust from doing any act or engaging in any transaction in which their private interests will conflict with their duty to the stockholders, and from making any use of their power or of the corporate property for their own advantage.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

[d] The corporate authority of the officers is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted at least with a view to advance the interest of the stockholders, and not used with a purpose to injure or destroy their interests.—Wright v. Oroville Gold etc. Min. Co., 40 Cal. 20.

[e] A contract made on behalf of a corporation, by a person who is its president and one of its directors, with a partnership composed of himself and another person, is void, since the director occupies a fiduciary relation to the corporation, such that he cannot take part in any transaction where he has an interest adverse to that of the corporation. Judgment and order (1900) 62 Pac. 300, affirmed.—Sims v. Petaluma Gaslight Co., 131 Cal. 656, 63 Pac. 1011.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 787-807; 12 Cent Dig., cols. 1335-1337, §§ 1350-1351.

§ 286. Officers of De Facto Corporation.

[a] Any officer who in fact acts as an officer of a corporation de facto is subject to all the liabilities and penalties imposed upon directors and officers duly elected by a corporation de jure, and a de facto officer of a de facto corporation is liable criminally for the embezzlement of funds in his hands.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

§ 287. Compensation.

[a] The power of a corporation to fix or change the salary of its officers rests entirely upon statute, and the exercise of this power is subject to all of the limitations contained in the statute.—Marquis v. City of Santa Ana, 103 Cal. 661, 37 Pac. 650.

[b] One employed by a director of a corporation to do what the director should have done as a director, without compensation, cannot recover of the corporation for his services.—Brown v. Valley View Min. Co., 127 Cal. 630, 60 Pac. 424.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 898-902, 934-952; 12 Cent. Dig., cols. 1315-1335, §§ 1334-1349.

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§ 288. —— Directors.

[a] That plaintiff was director of a corporation weakens presumption of a promise to pay for services.—Barstow v. City Ry. Co., 42 Cal. 465.

[b] Directors may recover on quantum meruit value of services rendered and advances made when corporation has derived benefit therefrom.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 320, 22 Pac. 665.

[c] A director is not entitled to compensation for his services as director in the absence of any agreement in advance that he shall receive such compensation.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

[d] When a director rendered services for the corporation as manager, which were outside of his duties as director, for which he received payment without the authority from the board, such payment might be properly ratified thereafter; and the directors cannot be held liable therefor, as for a wrongful expenditure of funds.—Bassett v. Fairchild, 61 Pac. 791.

§ 289. —— President.

[a] Where plaintiff served as president of a corporation for two years without any provision being made for compensation except an understanding that he was to receive compensation, and at the beginning of the third year he was again elected president, and a resolution passed fixing his compensation at fifty dollars per month, such resolution constituted an agreement to pay for past as well as future services, at the rate specified.—Rosborough v. Shasta River Canal Co., 22 Cal. 556.

[b] President of corporation, who is also stockholder, is, in absence of any usage of company to contrary, entitled to compensation for his services as president. If rate is not fixed by special contract he is entitled to what his services are reasonably worth.—Rosborough v. Shasta River Canal Co., 22 Cal. 556.

[c] Understanding not amounting to agreement between a corporation and its president that he should receive pay for his services is competent evidence to rebut any presumption that he was serving gratuitously.—Rosborough v. Shasta River Canal Co., 22 Cal. 556.

[d] Resolution of trustees of a corporation entered upon its records fixing salary of president is a written contract.—Rosborough v. Shasta River Canal Co., 22 Cal. 557.

§ 290. —— Secretary.

[a] Where the secretary of a corporation has performed extra services for the corporation, and there is no proof that he did not perform them or was overpaid therefor, other than the protest of one director, and it does appear that the secretary, as a member of a board of five directors, took any share in the passage of the act for his compensation, it will be presumed from the action of the board that he did perform the extra service and received only a reasonable compensation therefor, and the resolution awarding the compensation was authorized and was properly passed.—Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

[b] To sustain the right of the secretary of a corporation to claim a salary for his services after he had waived the right thereto by a special agreement with other officers, whereby each was to do likewise, it cannot be shown that another officer had received money from it by reason of questionable transactions.—Ryan v. Pacific Axle Co., 136 Cal. xx, 68 Pac. 498.

§ 291. —— Manager.

[a] Where a director of a corporation performed services as its manager, not pertaining to his duties as director, he is entitled to recover the reasonable value of such services, though no rate of compensation was fixed by the board of directors prior to performance of the service. Judgment (1900) 61 Pac. 791, affirmed.—Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611.

[b] Where a director of a corporation performed service as its manager not pertaining to his duties as director, he is entitled to recover what such services were reasonably worth, though no rate of compensation was fixed by the board of directors in advance of the performance of the services.—Bassett v. Fairchild, 64 Pac. 791.

§ 292. —— Superintendent.

[a] Superintendent cannot be deprived of salary, by a court of equity because also a trustee and treasurer, in violation of by-laws, if he faithfully performs his duties and no fraud appears.—Neall v. Hill, 16 Cal. 146, 76 Am. Dec. 508.

[b] Where there is no contract fixing the salary of the superintendent of a railroad company, he is entitled to recover the value of his services.—Bee v. San Francisco etc. R. Co., 46 Cal. 248.

[c] A person appointed superintendent of a corporation for a fixed compensation held not entitled to recover the compensation without showing that the board of directors ratified the acts making the appointment and fixing the compensation.—Colpe v. Jubilee Min. Co. (Cal. App.), 84 Pac. 324.

§ 293. —— Directors or Trustees Voting Themselves Salaries or Increase.

[a] Contracts for salaries of officers made at a meeting at which such officers were present and voted, are void, if their votes were necessary to pass the resolution.—Shattuck v. Oakland Smelting etc. Co., 58 Cal. 550; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788, 106 Cal. 327, 39 Pac. 602.

[b] The superintendent of a mining company testified that the services rendered

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by the president and secretary of the company outside of the performance of their duty as such officers were worth a certain sum, but it appeared that he resided at the mine, was seldom at the offices of the company, and did not know what services were rendered by the president and secretary. The only evidence as to the value of his own service was the fact that he was superintendent. Held, that this evidence was insufficient to show that these officers had rendered services worth the sum stated, and that their charging the corporation therewith, by a resolution passed by their own votes, was fair and honest.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

[c] A resolution of a board of directors fixing the salary of the president, and which was spread upon the records, but was illegal because it required the president's vote to adopt it, could be ratified by a subsequent board, so as to justify the president for having drawn such salary.—Wickersham v. Crittenden, 110 Cal. 332, 42 Pac. 893.

§ 294. —— Extra Pay.

[a] Extra pay of superintendent must be authorized by vote of directors.—Bee v. San Francisco etc. Co., 46 Cal. 255.

§ 295. —— Action for Compensation.

[a] In an action against a corporation by one of its members, upon an implied contract for the value of services as secretary, it is competent for the defendant to show that by the usage and custom of the corporation no compensation was chargeable for such services.—Fraylor v. Sonora Min. Co., 17 Cal. 594.

[b] A by-law of a corporation that directors shall receive no compensation for services as directors, "though traveling expenses may be audited and paid," is relevant evidence in an action by a director for such services.—Barstow v. City R. Co., 42 Cal. 465.

[c] Whether there is a usage of a corporation not to pay compensation to its officers is matter of fact, competent and relevant to be testified to upon an issue as to whether there was any implied understanding for compensation to a stockholder and director acting as superintendent and general manager; and such testimony is not objectionable as being the conclusion of the witness, and it is specially important where it appears that the corporation was in poor financial condition when the services were rendered.—McCarthy v. Mt. Tecarte L. & W. Co., 111 Cal. 328, 43 Pac. 956.

§ 296. Rights as Creditors of Corporation —Loans and Advances for Benefit of Corporation.

[a] A director may, in good faith, loan his money to the corporation for the legitimate purposes of the corporation, and hold it as a valid claim against the corporation.—Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661.

[b] Where a director of a corporation lends money to it, and takes a mortgage to secure the notes taken therefor, the note and mortgage cannot be enforced, as to excessive interest stipulated for, and as to an amount included therein, beyond the sum actually borrowed.—Sutter Street R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916.

§ 297. —— Purchase of Claims Against Corporation.

[a] A director purchasing at a discount an outstanding claim against an insolvent corporation can enforce the same only for the amount paid.—Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439.

[b] Purchase of claims subsisting against a corporation by its agent, under its authority, does not extinguish them unless the corporation furnishes or refunds to him the purchase money. If he purchase them without authority, while it may be conceded that the claims are extinguished, it does not necessarily follow that the corporation is thereby relieved of indebtedness.—Sullivan v. Triunfo Gold etc. Min. Co., 39 Cal. 459.

[c] The trustee of a corporation will not be permitted to deal with himself in his individual capacity, so as to derive the benefit of the transaction, and, therefore, where a corporation resolved to borrow money with which to pay its debts and authorized the president and secretary to execute a mortgage as security therefor, and the president, instead, purchased the debts of the corporation and assigned them to the firm of which he was a member, the mortgage executed to such firm to secure said indebtedness was invalid.—Davis v. Rock Creek Lumber etc. Co., 55 Cal. 359, 36 Am. Rep. 40.

§ 298. —— Mortgages to Secure or Pay Claims.

[a] A corporate resolution, authorizing the borrowing of money for the payment of corporate debts, and the execution of a mortgage by the president, did not authorize him to execute a mortgage to a firm of which he was a member, which had purchased such debts.—Davis v. Rock Creek Lumber etc. Co., 55 Cal. 359, 36 Am. Rep. 40.

§ 299. Liability for Property and Funds in General.

[a] If the secretary of a corporation, whose duty it is to receive moneys due the corporation, and to pay them over to the treasurer, fails to pay over promptly, and the moneys are stolen from him, he and the sureties, on a bond given by him for the faithful performance of his duties, are liable.—Odd Fellows' Mut. Aid Assn. v. James, 63 Cal. 598 49 Am. Rep. 107.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 787-802, 807-817; 12 Cent. Dig., cols. 1365-1382, §§ 1376-1392.

§ 300. —— Conversion or Misappropriation.

[a] A complaint by a stockholder against an incorporated bank and its directors alleg-

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ing, in substance, that the president of the bank, who was one of its trustees, and who was the owner and in control of the majority of the shares of its stock, had combined and conspired with the other directors, who were under his control, for violation of his trust by diverting a large amount of its funds from the purpose of the trust to his own use and benefit, and had, without authority, appropriated to himself a large sum per month as salary for his services as trustee, states a cause of action.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

[b] An officer and stockholder of a bank will be required to account in an action by another stockholder for attorney's fees which he procured to be paid by the bank for attorney's services rendered solely for his own benefit in a litigation between himself and a third stockholder for the control of the bank. Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603.

[c] Manager of corporation who has been proven guilty of embezzlement through connivance with bookkeepers is liable for total loss sustained unless he prove that corporation received money not embezzled by him or that embezzlement by bookkeepers occurred through no failure of duty on his part.—San Pedro etc. Co. v. Reynolds, 121 Cal. 87, 89, 53 Pac. 410.

[d] In an emergency to meet a pay-roll of one thousand eight hundred and seventy-eight dollars, a corporation's treasurer obtained six hundred dollars of its funds from one of its officers, and paid it to the secretary, the disbursing agent, receiving his receipt therefor, and its president paid six hundred dollars of his own money direct to the same agent. Subsequently the board of directors, upon the account of the pay-roll, ordered warrants drawn for a check of six hundred dollars to repay the president, and one of one thousand two hundred and seventy-eight for cash, which warrants were presented to the secretary, and were honored by the treasurer, as he was in duty bound to do. In the books the treasurer charged himself with the six hundred dollars received from the officer, and credited himself with the amount disbursed on the pay-roll. He did not charge himself with the money received from the president, which did not come into his hands, but credited himself with the check of six hundred dollars to repay the president, and the check of one thousand two hundred and seventy-eight dollars. Held not to show any shortage on the part of the treasurer.—Mechanics' Institute v. Firth (Cal.), 49 Pac. 214.

§ 301. —— Sale of Property in General.

[a] Directors who sell property of corporation for inadequacy of price are guilty of fraud.—Woodroof v. Howes, 88 Cal. 187, 190 26 Pac. 111.

[b] A deed by the president to a partnership of which he is a member, which recites that a full board of directors of the corporation ordered the conveyance, is not void on its face.—Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

§ 302. Acquiring Adverse Title or Interest.

[a] Sections 2230, 2234 and 2322 of the Civil Code prohibiting trustee from acting where his interests are adverse to beneficiary, apply to corporate directors.—Graves v. Mono Lake etc. Co., 81 Cal. 319, 22 Pac. 665.

[b] Manager of corporation cannot buy its property for his own benefit at forced sale.—San Francisco Water Co. v. Pattee, 86 Cal. 629, 25 Pac. 135.

[c] Managing agent of corporation cannot obtain any advantage over it or acquire any interest adverse to it without consent of directors given on full knowledge of facts.—San Francisco Water Co. v. Pattee, 86 Cal. 629, 25 Pac. 135.

[d] The title to the corporation's property acquired from the secretary by one who himself occupied fiduciary relations to the corporation, and who had full knowledge of the manner in which the secretary acquired his title, must stand or fall with that of his grantor.—San Francisco Water Co. v. Pattee, 86 Cal. 623, 25 Pac. 135.

[e] Directors of a corporation who are directly and personally interested in a contract, adversely to the stockholders, cannot authorize the contract on behalf of the corporation, and a contract attempted to be so authorized by them is void.—Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354.

[f] Where it appears that the contract authorized by the interested directors was for pumping water, which interfered with water rights belonging to the corporation and deprived its stockholders of water they were entitled to receive, such deprivation is an additional ground for annulment of the contract.—Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354.

[g] A corporation is not estopped from challenging the validity of a contract made on its behalf by its directors, interested therein adversely to the corporation, by laches on the part of such directors in not causing the contract to be set aside, but allowing the other party to expend money on the strength of the contract.—Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354.

[h] The motives of the directors of a corporation in repudiating an illegal contract made by former directors on behalf of the corporation are of no concern to the other party to the contract.—Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354.

[i] The fact that a water company took steps to prevent certain other parties from diverting its water, but did not at the same time proceed against an association claiming rights in the water under an illegal contract, did not show that the company and its stockholders were estopped from asserting that the contract was illegal.—Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354.

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[j] The fact that the directors made the contract openly did not validate it.—Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 787-802, 813-817; 12 Cent. Dig., cols. 1377, 1378, § 1387.

§ 303. —— Purchase at Judicial Sale.

[a] To redeem its property from purchases of the secretary at execution and tax sales the corporation need repay him only his expenditures incurred in that behalf, and not his claim for salary, as the payment of such claim would be giving him an advantage over the other creditors of the corporation, in violation of Civil Code, section 2228, which prohibits a trustee from obtaining any advantage to himself in dealing with the trust property.—San Francisco Water Co. v. Pattee, 86 Cal. 623, 25 Pac. 135.

[b] Under Civil Code, section 305, providing that directors of a corporation must be stockholders, a person owning no stock in the corporation, elected a director without his knowledge, does not become a director either de jure or de facto, so as to prevent his purchasing corporate property at a judicial sale, though a share of stock was, subsequently to his election, issued to be delivered to him, which he retained; he never having acted as a director or been called upon to do so until ten years after his election, when he repudiated his office.—Rozencrans Gold Min. Co. v. Morey, 111 Cal. 114, 43 Pac. 585.

[c] Civil Code, section 2230, held, in the absence of fraud, not to invalidate an execution sale of property of a corporation to directors thereof under a judgment on claims against it brought by them.—Snediker v. Ayres, 146 Cal. 407, 80 Pac. 511.

§ 304. Individual Benefit from Corporate Business.

[a] Directors are trustees of stockholders, and cannot act in their own interest at their expense.—Wright v. Oroville etc. Co., 40 Cal. 20.

[b] Director cannot use his position to obtain an undue advantage.—Wright v. Oroville etc. Co., 40 Cal. 20.

[c] Directors must surrender to bank all profits received as a condition of loan of its funds.—Farmers' Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62.

[d] Equity will not permit a director, in the exercise of his official duties, to make a profit for himself to the exclusion of the other stockholders.—Farmers' etc. Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62.

[e] Resolution of directors making allowances in their own favor are voidable at election of corporation or minority of stockholders if corporation refuses to act whether they are fair or not.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 320, 22 Pac. 665.

[f] Corporation may repudiate mortgage given to secure claims of directors allowed by their interested votes, and induced by them in violation of section 2230 of the Civil Code. Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 323, 22 Pac. 665.

[g] The by-laws of a corporation providing that the president thereof "shall sign, as president, all certificates of stocks, checks, notes, ... and other instruments in writing, and shall have full power to act in all respects as the general agent and manager of the company, subject to the advice of the board of directors," does not authorize the president to purchase notes payable to the corporation and indorse them to himself individually.—Smith v. Pacific Vinegar etc. Works, 145 Cal. 352, 78 Pac. 550.

[h] The court will not permit any inquiry into the question of the honesty or fairness of a transaction whereby the president of a corporation purchases notes payable to the corporation and indorses them to himself.—Smith v. Pacific Vinegar etc. Works, 145 Cal. 352, 78 Pac. 550.

[i] Under Civil Code, section 2230, providing that no trustee or his agent may take part in any transaction concerning the trust in which he or his agent has an interest adverse to the beneficiary; section 2234, providing that a violation of this provision is a fraud against the beneficiary; and section 2322, declaring that no general authority shall authorize an agent to do any act which a trustee is forbidden from doing—the president of a corporation is prohibited from purchasing notes payable to the corporation and indorsing them to himself individually. Smith v. Pacific Vinegar etc. Works, 145 Cal. 352, 78 Pac. 550.

[j] In a suit by a bank depositor against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock, evidence held sufficient to sustain a finding that a purported purchase of the stock was for the use of the president, though in the name of another person.—Dundon v. McDonald, 146 Cal. 585, 80 Pac. 1034.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 791-796; 12 Cent. Dig., cols. 1382-1393, §§ 1393-1398-1400.

§ 305. —— Who may Attack Transaction.

[a] A contract by which a director obtains from a corporation its property or an advantage to himself is voidable only at the instance of the corporation or its stockholders.—Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

§ 306. Dealings with Corporations or Shareholders.

[a] In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if

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the authority has been in good faith exercised to promote the interest of the stockholders.—Wright v. Oroville M. Co., 40 Cal. 20.

[b] Promissory note made by corporation, payable to its acting trustees is void.—Wilbur v. Lynde, 49 Cal. 290.

[c] Director of a corporation cannot use his position to obtain an undue advantage, but may loan to corporation on fair terms, when it is to interest of corporation to borrow.—Sutter St. R. R. Co. v. Baum, 66 Cal. 51, 52, 4 Pac. 916.

[d] When terms of note by a corporation to one of its directors are unjust and excessive, corporation may rescind, without tender before suit. Offer in complaint to pay what is just is sufficient.—Sutter Street R. R. Co. v. Baum, 66 Cal. 45, 4 Pac. 916.

[e] Where the president of a corporation, owning a controlling interest in the stock, executed for the corporation a contract between the corporation himself and another, the contract was not invalid, as in violation of a trust relation.—(1900) Sims v. Petaluma Gaslight Co., 62 Pac. 300; judgment and order reversed (1901) 131 Cal. 656, 63 Pac. 1011.

[f] In order to void a contract which is merely voidable made by a director with his corporation, some injury must be shown.—Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7.

[g] Contracts made by a corporate director with his corporation are merely voidable.—Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7.

[h] Sale of property by director to corporation is valid.—Herbert Kraft Co. v. Bryan, 140 Cal. 79, 73 Pac. 745.

[i] The fact that defendant was secretary of the corporation did not prevent him from procuring oil leases from third persons, which were valuable, and transfer them to the corporation in exchange for corporate stock issued to him, where the transaction is free from fraud or concealment of facts.—Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838.

FOR AUTHORITIES FROM OTHER STATES:

13 C. C. A. 466, note. See, also, 10 Cyc. 797-802, 807-817; 12 Cent. Dig., cols. 1393-1409, §§ 1401-1415.

§ 307. —— Ratification of Unauthorized Acts.

[a] A resolution of the board of trustees of a corporation, carried by the casting vote of the president, ratifying an unauthorized act of the president, in a matter in which he was personally interested, is void.—Chamberlain v. Wool Growing Co., 54 Cal. 103.

[b] A finding that a voidable mortgage procured by a corporation's officers in their own favor was ratified by the holders of two-thirds of the stock is not warranted, where the evidence shows that certificates for a part of the stock necessary to make up the two-thirds had been canceled shortly after such attempted ratification, without showing that they remained in the hands of the person whose vote is alleged to have represented them until canceled.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

§ 308. Fraud Against Corporation.

[a] The by-laws of a mining corporation authorized the directors to fix salaries. H., a stockholder, contracted with two others for a transfer of their stock to him for four years, without power of sale. Having thus become a majority stockholder, he presented to his brother, A., and to personal friends, M. and C., five shares, each, of his own stock. M. was in the personal employ of H. At the stockholder's meeting, shortly ensuing, H., A., and M. were elected directors, and the board was organized by the election of H. as president, M, as secretary and treasurer, and A. as vice-president. Later another director was removed, and C. chosen in his place. On motion of A., seconded by M., H. was given a salary of two hundred and fifty dollars per month as president, and, on motion of C., M. was given a like amount. The minutes showed that both motions were carried unanimously but later interlineations showed that H. did not vote in the first instance nor M. in the second. H. paid assessment No. 4 by offsetting his salary as president, and purchased delinquent stock in the same manner. He borrowed M.'s salary from him, giving a note, without interest, payable when the mine became productive. On inquiry by S., an innocent director, as to the payment of assessment No. 4, H. said: "The cat is out of the bag. I suppose S. will be mad, but I had to do it. It cost a good deal to get control of the mine, and I am king of the situation. Crack your whip." Held, that the evidence was sufficient to show that the salaries voted H. and M. were a fraud on the corporation, and that their use by H. as offsets to his liabilities was ineffectual as payment.—Strouse v. Sylvester, 134 Cal. xx, 66 Pac. 660.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 797, 807-817, 823-835; 12 Cent. Dig., cols. 1393-1409, §§ 1401-1415.

§ 309. Officers or Agents of Different Corporations.

[a] The fact that some of the directors of the bank were also directors of the cable company does not prevent them from being distinct corporations, who have a right to contract with each other in their corporate capacities, and, if the relation of the parties has not been abused, it constitutes no bar to a recovery for moneys advanced by the bank, and used for the benefit of the cable company.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[b] The fact that the same persons were directors of two contracting corporations does not render the contract void, but merely voidable.—(Cal. 1896) San Diego etc. R. Co. v. Pacific Beach Co., 112 Cal. 53, 44 Pac. 333.

[c] A building contract for the construction of apparatus for a corporation, executed

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in the name of the corporation by its president and secretary, to a firm of which the president is a member, is in breach of the fiduciary relation occupied by the president to the corporation and its stockholders, and is invalid without reference to its fairness or unfairness, and cannot be enforced against the corporation.—Sims v. Petaluma Gaslight Co., 131 Cal. 656, 63 Pac. 1011.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 818-820; 12 Cent. Dig., cols. 1344-1349, §§ 1363, 1364.

§ 310. Actions Between Shareholders and Officers.

[a] Where four of the trustees of a corporation, owning the majority of the stock, negligently managed the affairs of the company, disregarding the by-laws, and neglecting to keep proper accounts, it was held that a bill would lie in the name of a single stockholder against the corporation and trustees, and that the plaintiff was entitled to an account, and to hold the trustees to make good any loss occasioned by their malfeasance.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508.

[b] Since the corporate authority is considered to have been conferred by the stockholders on the directors on the trust that it will be exerted with a view to advance the interests of the stockholders, courts of equity will, at the instance of a stockholder, restrain the directors of a corporation from doing acts even within the corporate authority, if such acts when done would, under the particular circumstances, amount to a breach of the trust on which the directors were vested with their authority.—Wright v. Oroville Gold etc. Min. Co. 40 Cal. 20.

[c] Where an action, though in the name of a stockholder, against the directors, was in behalf of the bank, it was a proper party to the action.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

[d] Where plaintiff, in an action against certain bank directors for misappropriation of funds, had the right to bring the action in his own name and for his individual account, as well as on behalf of the other stockholders, if his allegations were not sufficient to entitle the action to be considered as brought in behalf of others than himself, its sufficiency as an action in his own behalf was not impaired by his averment that he brought it for them as well as for himself.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

[e] Although the right to avoid a secret sale of the property of a corporation by the president to himself does not, as an abstract proposition, depend upon the adequacy of the price, yet, when the general powers of a court of equity are invoked against the consequences of such a sale, the chancellor has a wide discretion as to the form and character of the decree which he will render, under the particular facts of the case before him.—Dundon v. McDonald, 137 Cal. 1, 69 Pac. 498.

[f] An allegation that a corporation's stockholder "is informed and believes" that certain directors furnished labor and material for the corporation, and charged large profits against it, and that no accounting had been made, is insufficient on demurrer.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 963-1000; 12 Cent. Dig., cols. 1416-1445, §§ 1426-1439.

§ 311. Criminal Responsibility for Making False Entries.

[a] Where an indictment against an officer of a corporation for making false entries with intent to defraud it, prohibited by Penal Code, section 563, alleges that such entries were made with intent to defraud the corporation, it was not invalid for failure to set out how they could have effected that result, if the entries were such that the court could not say from their face that they could not possibly have done so.—People v. Leonard, 103 Cal. 200, 37 Pac. 222.

[b] Where an indictment of an officer of a corporation for making false entries in a record with intent to defraud the corporation, prohibited by Penal Code, section 563, set out the entries in haec verba, and alleged them to be false, it need not state wherein they were false.—People v. Leonard, 103 Cal. 200, 37 Pac. 222.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 952; 12 Cent. Dig., cols. 1446-1448, § 1441.

D. LIABILITY FOR CORPORATE DEBTS AND ACTS.

NATURE AND EXTENT OF LIABILITY, § 312.
STATUTES CONSTRUED, § 313.
WRONGFUL PAYMENT OF DIVIDENDS, § 314.
INCURRING EXCESSIVE DEBTS, § 315.
INDIVIDUAL LIABILITY ON CORPORATE CONTRACTS AND FOR UNAUTHORIZED OR ILLEGAL ACTS, § 316.
MISMANAGEMENT, § 317.
MISAPPROPRIATION, § 318.
FAILURE TO MAKE, POST OR PUBLISH MONTHLY ACCOUNTS AND REPORTS, § 319.
ACTIONS TO ENFORCE LIABILITY—FORM OF REMEDY, § 320.
—— PARTIES, § 321.
—— PLEADING, § 322.

§ 312. Nature and Extent of Liability.

[a] To charge the officers of a corporation with a loss sustained by a stockholder, in a diminution of the value of the stock, alleged to have been caused by their mismanagement, it should appear very clearly that the loss was occasioned by their gross negligence or willful misconduct.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508-n.

[b] Consent to act of treasurer formally given by board of directors releases treasurer from liability to corporation therefor, though not entered upon records.—Bay View Assn. v. Williams, 50 Cal. 353.

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[c] Agents of corporation are not relieved from liability for trespass which the corporation had no power to authorize, by resolution of trustees.—Brownell v. Fisher, 57 Cal. 150.

FOR AUTHORITIES FROM OTHER STATES:

Liability of directors: 53 Am. Dec. 637, note.

Liability of directors for torts: 74 Am. St. Rep. 610, note.

Personal liability of officers to third persons: 48 Am. St. Rep. 913, note; 28 L. R. A. 421, 422, 427, notes. See, also, 10 Cyc. 838-852; 12 Cent. Dig., cols. 1449-1473, §§ 1442-1459.

§ 313. Statutes Construed.

[a] Corporation law of April 22, 1850, making directors jointly and severally liable for debts exceeding the capital stock actually paid in, should be strictly construed, since it is a statute creating a forfeiture or imposing a penalty.—Irvine v. McKeon, 23 Cal. 472.

[b] The act of 1880, which provides for the recovery of one thousand dollars liquidated damages against the directors of mining corporation in an action by a stockholder for a violation of its terms, is constitutional and valid.—Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

[c] The act of 1880 does not relate to the business of the corporation, nor impose burdens, restrictions upon domestic corporations in the conduct of their business, from which foreign corporations are relieved, within the prohibition of section 15 of article 12 of the constitution.—Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

§ 314. Wrongful Payment of Dividends.

[a] Where an injunction restraining a mining corporation from washing dirt into a stream resulting in loss to the company, such loss was not an operating expense, for which the directors were required to provide before declaring dividends in order to escape liability under Civil Code, section 309, prohibiting directors from making dividends except from surplus profits, and rendering them personally liable for its violation, where such injunction proceeding could not reasonably have been anticipated.—Excelsior Water etc. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

[b] Directors of a mining corporation which has become indebted by acquiring its property encumbered with debt, and by making permanent improvements thereon, are not liable to the corporation merely because they declare and pay dividends out of the net proceeds of the mine without first paying the whole of such debts, and are not thereby guilty of any infraction of section 309 of the Civil Code, prohibiting the making of dividends except from the surplus profits arising from the business of the corporation.—Excelsior Water and Min. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 554, 883-885; 12 Cent. Dig., cols. 1459, 1460, § 1452.

§ 315. Incurring Excessive Debts.

[a] In an action against a director of a corporation under act of April 22, 1850, making directors severally liable for debts exceeding the amount of capital stock actually paid in, plaintiff must prove that defendant was a director when the debt was created, and that he was present at the meeting of the board authorizing it.—Irvine v. McKeon, 23 Cal. 472.

[b] To make directors personally liable under section 309, Civil Code, for debt created beyond subscribed capital, corporation must have been indebted at the time in aggregate amount exceeding amount of capital stock subscribed.—Moore v. Lent, 81 Cal. 506, 22 Pac. 875.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 878-882; 12 Cent. Dig., cols. 1464-1468, § 1455.

§ 316. Individual Liability on Corporate Contracts and for Unauthorized or Illegal Acts.

[a] At common law officers are not liable personally on promissory note of the corporation, made by them as such officers, in which the promise to pay is made by the corporation and not by the officers personally.—Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64.

[b] Statutes of 1853, page 173, section 19, relating to the incorporation of turnpike companies, and providing that unless contracts of such corporations shall be made by the directors in compliance with the by-laws such contract shall be void as to the corporations, but binding against the directors, the directors of a turnpike company are not liable on a contract which they entered into in behalf of the corporation, and which in terms binds the latter, unless it is in violation of by-laws adopted by the stockholders and filed in the recorder's office.—Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64.

[c] An agent of a corporation who, without authority, makes a contract for the payment of money in its name, is not liable to the promisee at common law on the contract, but only for the wrong done in exceeding his authority.—Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64.

[d] The trustees of a corporation who make and sign notes, as such trustees, with the intention of not binding themselves personally, are not personally liable, even if they had no authority from the corporation to make the notes.—Blanchard v. Kaull, 44 Cal. 440.

[e] Constitution, article 12, section 3, making the directors of corporations jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers, does not impose a liability on all the directors of a mining company because the president, without the

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knowledge of the other directors, agrees on behalf of the company to pay a milling company an excessive price for treating its ore in consideration of payment to him of part of the profits.—Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

[f] A receiver was appointed in a suit by an insolvent corporation to subject certain property to the satisfaction of a judgment, the directors of the corporation acting in good faith in bringing the suit. Held, that, in an action by the receiver against the corporation and directors to recover his compensation, he was not entitled to a personal judgment against the directors.—Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

§ 317. Mismanagement.

[a] Corporate manager is liable to corporation for failure to exercise "due care" in its management.—San Pedro etc. Co. v. Reynolds, 121 Cal. 82, 53 Pac. 410.

For Authorities from Other States:

10 Cyc. 839-852, 886; 12 Cent. Dig., cols. 1455-1457, §§ 1448, 1449.

§ 318. Misappropriation.

[a] The by-laws of a corporation provided that the general manager should have charge of all the company's property, and control of all persons in its employ with power to discharge them at will, and that he should cause regular and accurate accounts to be kept by a competent bookkeeper. Held, that the general manager was liable for funds misappropriated by the company's bookkeeper.—San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410.

[b] Under Constitution, article 12, section 3, providing that the directors of corporations shall be jointly and severally liable to the creditors and stockholders for all moneys misappropriated by officers during their terms of office, such liability is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss.—Rice v. Howard, 136 Cal. 432, 69 Pac. 77.

For Authorities from Other States:

Withdrawal of assets of corporation: 57 Am. St. Rep. 63, note. See, also, 10 Cyc. 850; 12 Cent. Dig., cols. 1457-1459, § 1451.

§ 319. Failure to Make, Post or Publish Monthly Accounts and Reports.

[a] Statute (Acts 1880, p. 134) is penal in its character; and, as it does not specifically declare that the penalty may be recovered for each failure to comply with its requirements, there can be but one recovery for all such failures prior to the commencement of suit.—Loveland v. Garner, 71 Cal. 541, 12 Pac. 616.

[b] Statute is mandatory as to time when account should be made and posted, and that failure to post within the time rendered the directors liable, though the account was made and posted before the bringing of an action for the recovery of the penalty.—Schenck v. Bandmann, 81 Cal. 231, 22 Pac. 654.

[c] Directors' liability is fixed by failure to make and post account on day directed, though they did not have the necessary information to make the report at such time.—Schenck v. Bandmann, 81 Cal. 231, 22 Pac. 654.

[d] Directors cannot evade liability for failure to post monthly reports by failure to have an office for transaction of business.—Chapman v. Downey, 89 Cal. 54, 26 Pac. 605.

[e] If the stockholders of a mining corporation forbear to sue till after several failures of the directors to post the monthly reports have occurred, only one penalty can be recovered up to the time such forbearance ceases and the suit is brought.—Schofield v. Doray, 89 Cal. 55, 26 Pac. 606.

[f] Action will lie by stockholder against any one or more of directors of a mining corporation to recover the penalty of one thousand dollars for omitting to cause to be made and posted an itemized account or balance-sheet monthly, as required by the act of March 30, 1874.—Francais v. Somps, 92 Cal. 503, 28 Pac. 592.

[g] In an action for a penalty against a gold mining company brought under Statute of 1880, page 134, which provides that such corporation shall on the first Monday of each month make and have posted in the office of such company certain reports and accounts current for the previous month, an answer denying the allegation of the complaint that said company had an office for the transaction of business is insufficient to raise a material issue; Civil Code, sections 290, 321a, contemplating that all corporations shall have a place of business.—Chapman v. Doray, 89 Cal. 52, 26 Pac. 605.

[h] Act of April 23, 1880, makes directors of a mining corporation liable to any stockholder, on failure to file reports of the company's affairs, for liquidated damages in the sum of one thousand dollars. Held that, in an action to recover such damages, they need not be proved.—Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399.

[i] Under the act of March 23, 1880, the directors of a mining company formed under the laws of this state, who, in good faith, on the first Monday in the month, make and post in the office of the company, a verified itemized account or balance sheet in attempted compliance with the requirements of the statute in that regard, are not liable for the penalty imposed by that act merely because the account covers a longer period than the preceding month.—Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399.

[j] Under section 1 of that act the monthly accounts and weekly statements required to be filed by the superintendent must be verified by him; if unverified, the directors are not relieved from the penalty imposed by the act, either by the fact that the accounts and statements were in fact true, or because

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it would have been a great inconvenience for the superintendent to go a long distance to an officer competent to administer oaths, or because they had been advised by counsel that a verification was unnecessary.—Shanklin v. Gray, 111 Cal. 88, 43 Pac. 399.

[k] Act of April 23, 1880, providing that a stockholder may recover one thousand dollars as liquidated damages from the directors of a mining corporation for failure to post monthly balance sheets as required by the act, imposes a penalty.—Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821.

[l] Pledgee of stock is liable as stockholder unless he appears to be pledgee on books of corporation.—Hurlbut v. Arthur, 140 Cal. 110, 98 Am. St. Rep. 17, 73 Pac. 734.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 866-875; 12 Cent. Dig., cols. 1474-1485, §§ 1460-1467.

§ 320. Actions to Enforce Liability—Form of Remedy.

[a] Under constitution, article 12, section 3, providing that "the directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee," the only proper remedy of a creditor of a bank, where certain sums of money were alleged to have been misappropriated by a certain officer thereof, is a bill in equity, in which all the creditors are parties or represented, and under which there can be an accounting, after all the facts have been ascertained, as the moneys misappropriated constitute a fund for the benefit of all the creditors who have been injured by such wrongful acts.—Winchester v. Mabury, 122 Cal. 522, 55 Pac. 393.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 871, 881, 882, 887-898; 12 Cent. Dig., cols. 1511-1536, §§ 1492-1508.

§ 321. —— Parties.

[a] The general rule is that an action against trustees of a corporation for a misappropriation of its funds must be brought in the name of the corporation.—Cogswell v. Bull, 39 Cal. 320.

[b] When a suit is brought by several stockholders against the trustees of a corporation the proof that either one of the plaintiffs is a stockholder is sufficient to maintain the action.—Parrott v. Byers, 40 Cal. 614.

[c] The corporation should be made a party to a creditor's bill against subscribing stockholders, but is not an indispensable party, unless the object of the action is to secure an adjudication of the rights and liabilities of all parties, and a final settlement of all the affairs of the company; and when the action is against a single stockholder objection to the nonjoinder of the corporation is waived, if not made by demurrer or answer.—Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

[d] Constitution, article 12, section 3, provides that the directors of a corporation shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of the corporation during the term of such director. A petition to charge defendants, as directors of a bank, with the misappropriation of its funds, alleged that the treasurer of the defendant corporation paid the sum of twenty thousand dollars for a note, and that the note was not secured in any way, but did not allege that the note was not paid, or that the makers were not solvent at the time it was purchased, or that the money was embezzled by any officer of the corporation, or was used for any unlawful purpose, or was converted by any officer to his own use. Held, that the facts alleged were not sufficient to make the defendants liable for a misappropriation, and hence a demurrer to the petition was properly sustained.—Winchester v. Howard, 136 Cal. 432, 64 Pac. 692.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 887-889; 12 Cent. Dig., cols. 1518-1523, §§ 1500, 1501.

§ 322. —— Pleading.

[a] Misnomer of corporation is immaterial in stockholder's suit against unfaithful trustees. Parrott v. Byers, 40 Cal. 614.

[b] Averment that certain persons were the duly elected trustees imports that they are the only trustees.—Parrott v. Byers, 40 Cal. 614.

[c] To make the directors of a plank or turnpike road company personally liable for debts contracted in violation of its by-laws, and after the same have been filed, the complaint must contain allegations that they were thus contracted.—Blanchard v. Kaull, 44 Cal. 440.

[d] In an action against the stockholders of a corporation for their respective portions of the debts of a corporation, held, that an objection on the ground of misjoinder of parties defendant, or on the ground that causes of action were improperly united, in the absence of special demurrer, could not be considered.—Faymonville v. McCollough, 59 Cal. 285.

[e] In an action against the directors of a corporation for failing to post monthly statements, etc., an allegation that the directors pretended to have received large sums of money and incurred large liabilities is not sufficient, and is not equivalent to an allegation that they did in fact receive money and incur liability.—Hewlett v. Epstein, 63 Cal. 184.

[f] A complaint by stockholders against the directors of a ditch and canal company which alleges that the company "is incorporated under and by virtue of the laws of the state of California" for the purpose of constructing a water ditch for irrigating purposes, and that defendants have fraud-

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ulently distributed the water gratuitously without alleging that the corporation was organized for profit or for the purpose of selling water, does not state a cause of action, since it shows no misconduct on the part of defendants.—Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. 692; Applegarth v. Burris, 19 Pac. 693.

[g] In an action by a stockholder against the directors, it is sufficient for the plaintiff, in order to establish a prima facie case, to aver and prove a neglect, failure, or refusal of the directors to comply with a specified provision of the act, and it is not necessary that the complaint should charge, or that plaintiff should prove, a willful failure or refusal; but it is incumbent upon the defendants to show that the failure was not willful, and they must set forth and prove facts or circumstances of exculpation as matter of defense.—Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

[h] A petition in an action to charge directors of a corporation with a misappropriation of the corporate funds by its officers, alleged that the purchase of a note was only a pretended purchase, and that the payment of the corporate fund therefor was unlawful, and that the corporation suffered by reason of the misappropriation and pretended purchase. Held, that the use of the words "pretended," "unlawful," and "misappropriation," did not dispense with the necessity of pleading the facts showing a misappropriation, and such words would be stricken.—Winchester v. Howard, 136 Cal. 432, 64 Pac. 692.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 891, 892; 12 Cent. Dig., cols. 1523-1530, §§ 1503-1505.

VII. CORPORATE POWERS AND LIABILITIES.

A. Extent and Exercise of Powers in General, §§ 323-334.

B. Representation of Corporation by Officers and Agents, §§ 335-361.

C. Property and Conveyance, §§ 362-373.

D. Contracts and Indebtedness, §§ 374-405.

E. Torts, §§ 406-435.

Power to acquire title by adverse possession. See Adverse Possession, § 6.

Power of national banks to hold stock in other companies. See Banks and Banking, § 94.

Effect of ultra vires acts of national banks. See Banks and Banking, § 96.

Power to loan money. See Insurance, § 6.

Power of one corporation to act as agent for another. See Insurance, § 7.

Powers of mining corporations. See Mines and Minerals, § 87.

A. EXTENT AND EXERCISE OF POWERS IN GENERAL.

EXTENT IN GENERAL, § 323.
DE FACTO POWER, 323½.
POWERS INCIDENT TO THOSE GRANTED, § 324.
ACQUISITION OF FRANCHISE GRANTED TO INDIVIDUAL, § 325.
SUBSCRIPTION TO STOCK OF OTHER CORPORATION, § 326.
PARTNERSHIP CONTRACTS, § 327.
MODE OF EXERCISING POWERS, § 328.
—— NECESSITY FOR ACTION OF BOARD OF DIRECTORS, § 329.
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WHO MAY QUESTION CORPORATE POWERS, § 331.
—— ESTOPPEL OF CORPORATION, § 332.
—— ESTOPPEL OF STOCKHOLDERS, § 333.
—— ESTOPPEL OF THIRD PERSONS, § 334.

§ 323. Extent in General.

[a] Charters of corporations are special grants of power. The corporation has no powers except those expressly given or which are necessary to the exercise of those expressly given.—Oakland v. Carpentier, 13 Cal. 540.

[b] The powers of corporations are strictly limited to those granted in their charters, or by the statutes under which they are organized.—McCracken v. City of San Francisco, 16 Cal. 591.

[c] In determining whether a given act is within the power of a corporation, it is necessary to consider, first, whether the act falls within the powers expressly enumerated in the certificate; or, second, whether it is necessary to the exercise of one of the enumerated powers.—Vandall v. South San Francisco Dock Co., 40 Cal. 83.

[d] All corporations organized under laws of this state are, by general law, vested with certain powers by express grant, They are invested with further powers by the particular act under which they are incorporated, or by the title of the code under which they are incorporated.—Spring Valley Water Works v. Schottler, 62 Cal. 69, 104.

[e] Corporation possesses only those properties which charter confers upon it expressly or incidental to its existence and calculated to effect object of its creation.—San Luis Water Co. v. Estrada, 117 Cal. 177, 48 Pac. 1075.

FOR AUTHORITIES FROM OTHER STATES:

Power of corporations to purchase their own capital stock: 33 Am. St. Rep. 339, note. See, also, 10 Cyc. 148, 282, 1096-1100, 1140-1146; 12 Cent. Dig., cols. 1539-1542, §§ 1511, 1514.

§ 323½. De Facto Power.

[a] There is no such thing in law as the exercise of a de facto power by a legally existing corporation.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

§ 324. Powers Incidental to Those Granted.

[a] A corporation authorized to buy, improve, lease, sell, or otherwise dispose of real estate and owning lands in the vicinity of a railroad, has power to appropriate a portion of its funds to the use of the railroad company, for the purpose of increasing its facilities and lessening the cost of transportation, where the direct and proximate tendency thereof is to enhance the value of

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the land.—Vandall v. South San Francisco Dock Co., 40 Cal. 83.

[b] A corporation possesses only the powers expressly granted to it and such as are necessary to carry out the object for which it was created.—McKiernan v. Lenzen, 56 Cal. 61.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1096-1100; 12 Cent. Dig., cols. 1546-1550, § 1517.

§ 325. Acquisition of Franchise Granted to Individual.

[a] Corporations formed under general law have power to purchase and hold exclusive franchise or privilege granted by the legislature to an individual and his assigns.—California State Telegraph Co. v. Alta Tel. Co., 22 Cal. 398.

[b] A corporation formed to supply a town with water may purchase and hold a valid franchise, previously granted to certain persons, of the exclusive right for years to furnish such supply.—San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

[c] Though constitution, article 4, section 31, forbids the creation of corporations by special act, a corporation may by purchase acquire franchises conferred by special act upon certain individuals "and their assigns" prior to its organization, there being nothing to show that any of the grantees of the franchise had any interest in the corporation or that they caused it to be formed.—San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

§ 326. Subscription to Stock of Other Corporation.

[a] There is no presumption that a corporation is incapable of purchasing and holding shares of the stock of another corporation, it not appearing under what circumstances it was acquired or held.—Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089.

[b] A private corporation has no implied authority to invest in shares of another private corporation and, in this state, a corporation is forbidden to engage in any business other than is expressly authorized in its charter or the law under which it is organized, and a corporation organized for the purpose of manufacturing, importing, buying, and selling furniture and upholstery cannot hold stock in a hotel corporation, and its subscription to its stock is ultra vires and void and it cannot be charged with liability as a stockholder of the hotel corporation.—Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:

Power of corporations to deal in shares of other corporations: 28 Am. Rep. 15, note.

Power of one corporation to acquire stock in another: 36 Am. St. Rep. 134, note; 68 C. C. A. 120, note; 18 L. R. A. 252, note. See, also, 10 Cyc. 376-380, 1107, 1108, 1145, 1265; 12 Cent. Dig., cols. 1573-1577, §§ 1531-1534.

§ 327. Partnership Contracts.

[a] Corporation formed to carry on business of a partnership is a trustee for the partnership, and entire capital stock is partnership assets.—Shorb v. Beaudry, 56 Cal. 446.

[b] It is not ultra vires for a corporation to enter into a contract with an individual to engage in a certain venture, profits and losses to be divided equally among them, where all the management of the enterprise is intrusted to the corporation.—Bates v. Coronada Beach Co., 109 Cal. 160, 41 Pac. 885.

[c] Corporation cannot legally enter into copartnership with individual.—Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 518, 75 Pac. 106.

FOR AUTHORITIES FROM OTHER STATES:

50 C. C. A. 131, note. See, also, 10 Cyc. 1142, 1143; 12 Cent. Dig., cols. 1580, 1581, § 1538.

§ 328. Mode of Exercising Powers.

[a] The express powers of a corporation must be exercised in the manner pointed out by the statute, but the powers merely incident thereto may be exercised by its officers or agents.—Smith v. Eureka Flour Mills, 6 Cal. 1.

[b] When to a corporation is prescribed, by the law of its being, the mode of exercising its power, such mode must be observed in order to render its acts binding. But when, by its organic law, it is declared in general terms that its officers shall manage its affairs, and make and execute all contracts to carry out the objects and purposes of such corporation, in any way and manner which they may deem proper, it cannot be held that the corporate powers existing must be exercised in any particular mode.—Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 774-782, 1097; 12 Cent. Dig., cols. 1585-1588, §§ 1542-1544.

§ 329 —— Necessity for Action of Board of Directors.

[a] The corporate powers of a corporation can be exercised by the trustees only when duly assembled and acting as a board.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

[b] Action of board of directors in session is not required merely to direct labor of an employee of the corporation.—Bee v. San Francisco etc. R. R. Co., 46 Cal. 248.

[c] Signing a petition for a street improvement is a corporate act, and can be done only by authority of the board of directors. Mulligan v. Smith, 59 Cal. 225.

[d] Corporation can only act through its board of trustees.—Solidarite etc. Assn., In re., 68 Cal. 394, 9 Pac. 453.

[e] Corporate powers, business and property of all private corporations must be exercised

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by board of directors.—Granite G. M. Co. v. Maginness, 118 Cal. 138, 50 Pac. 269.

§ 330. Effect of Ultra Vires Acts.

[a] An incorporated water company brought a suit against a city to recover for water furnished under a contract, which was beyond the power of either the water company or the city to make. Held, that no recovery could be had.—San Diego Water Co. v. City of San Diego, 59 Cal. 517.

[b] That which a corporation has not the power to do, if attempted to be done by it, is ultra vires, and void.—Griffith v. New York Life Ins. Co., 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1146-1167; 12 Cent. Dig., cols. 1588-1593, §§ 1545-1547.

§ 331. Who May Question Corporate Powers.

[a] When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the state and the corporation, which does not concern third parties.—Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

[b] In an action by a corporation upon a contract made by it with the defendant, the latter cannot interpose as a defense that the plaintiff in making the contract has exceeded the power conferred by its charter or the law under which it was formed. The question of a violation of its charter is one between the state and the corporation, and cannot be investigated collaterally by individuals.—Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

[c] The power of a corporation to purchase a privilege under the law which created the corporation cannot be questioned in an action between a third party and the corporation. It is a matter between the state and the corporation.—California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398.

[d] The question whether the grantee of a franchise to construct a street railroad can assign a portion of it is one which concerns the public alone.—Oakland R. Co. v. Oakland etc. R. Co., 45 Cal. 365, 13 Am. Rep. 181.

[e] Where a contract with a corporation is not only ultra vires but also void as against public policy, the court will not give relief to either party, and the fact that the contract is performed on one part does not estop the other party to plead the invalidity of the contract.—Visalia Gas and Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

[f] The question whether the purchase of a particular note and mortgage by a savings and loan corporation was "such as the purposes of the corporation required," is to be determined by its board of directors, and is not open to investigation at the instance of the mortgagor.—Savings Bank v. Barrett, 126 Cal. 413, 58 Pac. 914.

[g] A deed of a corporation unauthorized by the stockholders is void only as to stockholders or those connected with the corporation's title.—Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901; 143 Cal. xviii, 76 Pac. 1127.

[h] Act of April 23, 1880 (Stats. 1880, c. 118, p. 131) prohibiting the directors of any mining corporation from selling any mining ground owned by the corporation, unless ratified by two-thirds of the stockholders thereof, is for the benefit of stockholders of mining companies only, and does not authorize a person not a stockholder to impeach the deed of a mining corporation on the ground that its officers had no authority to execute the same.—Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901; 143 Cal. xviii, 76 Pac. 1127.

[i] Though an assignment of a certificate of redemption from mortgage foreclosure violated Constitution, article 12, section 9, and Civil Code, section 574, such fact held of no benefit to a purchaser at a subsequent judicial sale.—Youd v. German Savings etc. Soc. (Cal. App.), 87 Pac. 991.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1164-1166; 12 Cent. Dig., cols. 1593-1603, §§ 1548-1553.

§ 332. —— Estoppel of Corporation.

[a] Where answer in suit against corporation on its note relies simply on the want of power of the corporation to issue notes, the defendant cannot afterwards object that plaintiff has not shown that officers executing the note were empowered by the corporation to do so.—Smith v. Eureka Flour Mills, 6 Cal. 1.

[b] Where contract is executory the corporation cannot be held bound, unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefits of the consideration, an implied promise arises against it.—San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

[c] In a contract between a corporation and strangers dealing with it, when the act in question is one which the corporation has no power to perform under any circumstances, the corporation may avail itself of the defense of ultra vires; but when the act may be performed by the corporation for some purposes, but not for others, the defense of ultra vires may or may not be available. If the stranger dealing with the corporation knew of its intention to perform the act for an unauthorized purpose, the defense is available, otherwise not.—Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30.

[d] A corporation that has received and retained the consideration of a promissory note, given for its benefit, cannot deny its liability thereon on the ground that the con-

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tract was ultra vires.—Main v. Casserly, 67 Cal. 127, 7 Pac. 426.

[e] A corporation, after engaging in the hotel business and assuming the liability of an innkeeper, cannot repudiate its liability on the ground that its acts were ultra vires.—Magee v. Pacific Imp. Co., 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772.

[f] Where a national bank holds stock in a savings bank, and receives dividends thereon, it is estopped, in an action against it to enforce its liability as such stockholder to a depositor in the savings bank, from claiming that it is ultra vires for it to hold such stock, in the absence of a statute expressly prohibiting it.—Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

[g] The entering into a contract by a corporation, within the apparent scope of its business, is a determination on its part, conclusive against it, that the contract was "essential" within Civil Code, section 354, empowering a corporation to enter into contracts essential to the transaction of its ordinary affairs.—Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855.

[h] In the absence of an issue for that purpose, a corporation cannot show that its records, on the faith of which parties have contracted with it, and which it has not attempted to correct, are false.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

[i] It seems that the reception and retention by a corporation of the benefit of a pledge precludes question as to the power of the corporation to make the pledge.—Lawrence v. Johnson, 131 Cal. 175, 63 Pac. 176.

[j] In a suit for attorney's services rendered to a corporation under an executed contract of employment, the corporation held not entitled to claim that it had no power to make the contract of employment.—Kelly v. Ning Yung Benev. Assn. (Cal. App.) 84 Pac. 321.

FOR AUTHORITIES FROM OTHER STATES:

20 L. R. A. 765, note. See, also, 10 Cyc. 1065, 1069, 1156-1167, 1197, 1346; 12 Cent. Dig., cols. 1605-1626, §§ 1556-1567.

§ 333. —— Estoppel of Stockholders.

[a] Where the stockholders of a bank have received the dividends paid by it on deposits transferred to it by another bank in consideration of its assumption of all the latter's liabilities, it is too late for them to set up the defense of ultra vires in a suit by one of the depositors to enforce their individual liability after the bank to which the deposits were transferred has stopped payment.—Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110.

§ 334. —— Estoppel of Third Persons.

[a] One who contracts with a corporation is estopped to deny its power to make contract.—Grangers' Business Assn. v. Clark, 67 Cal. 634, 8 Pac. 445.

[b] When the purchaser of land covered by a building and loan mortgage secured a release of the mortgage by giving his note for the amount due thereon, secured by a mortgage on other land, in a suit to foreclose the second mortgage he was estopped from claiming that the building and loan company's act in accepting his note and mortgage was ultra vires.—Bay City Building etc. Assn. v. Broad, 136 Cal. 525, 69 Pac. 225.

[c] In an action by one bank against another for money loaned, and on a note representing the balance due, the loan and balance being established, it is immaterial whether the note was authorized by the directors.—First Nat. Bank v. California Nat. Bank, 35 Pac. 639.

B. REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

APPLICATION OF PRINCIPLES OF AGENCY—ASSIMILATION TO LAW RESPECTING NATURAL PERSONS, § 335.
—— WHO MAY REPRESENT CORPORATION, § 336.
—— DIRECTORS AS MIND AND SOUL OF CORPORATION, § 337.
REPRESENTATION OF DIFFERENT CORPORATIONS BY SAME DIRECTORS, § 338.
EXPRESS AUTHORITY AND AUTHORITY IMPLIED THEREFROM, § 339.
USE OF CORPORATE SEAL, § 340.
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CONTRACTS IN GENERAL, § 342.
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PURCHASES AND SALES, § 345.
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NEGOTIABLE INSTRUMENTS, § 347.
BONDS AND MORTGAGES, § 348.
SETTLEMENT WITH CREDITORS, § 349.
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RATIFICATION OR REPUDIATION OF UNAUTHORIZED ACT, § 354.
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NOTICE TO OFFICER OR AGENT AS NOTICE TO COMPANY, § 357.
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NOTICE IMPUTED TO PERSONS DEALING WITH CORPORATION, § 359.
EVIDENCE OF AUTHORITY, § 360.
—— SEAL AS PRESUMPTIVE EVIDENCE, § 361.

§ 335. Application of Principles of Agency—Assimilation to Law Respecting Natural Persons.

[a] Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and

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depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter.—Argenti v. City of San Francisco, 16 Cal. 255.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 933-952; 12 Cent. Dig., cols. 1639-1653, §§ 1585-1601.

§ 336. —— Who May Represent Corporation.

[a] Under Laws of 1853, page 88, section 5, providing that the corporate power of a mining corporation shall be exercised by the board of trustees, and section 7, providing that a majority of the trustees shall form a board for the transaction of business, a resolution adopted by stockholders, directing the sale of the corporate property, is not a corporate act.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 373, 374, 760, 1000, 1001, 1198-1203; 12 Cent. Dig., cols. 1646-1648, §§ 1592-1594.

§ 337. —— Directors as Mind and Soul of Corporation.

[a] Directors or dominant body of corporation is deemed to be mind and soul of corporate entity, and what they do as the representative of the corporation the corporation itself is deemed to do; and the manifested motives and intentions of the directors when a material fact is in issue are to be imputed to the corporation.—Maynard v. Firemen's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

§ 338. Representation of Different Corporations by Same Directors.

[a] Directors who are common to both incorporations are not within the rule that he who acts in a fiduciary capacity cannot deal with himself in his individual capacity, but they owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either of them.—San Diego v. Pacific Beach R. R. Co., 112 Cal. 53, 44 Pac. 333.

[b] Mere fact that two contracting corporations have common directors does not render the contract between the corporations invalid, or incapable of ratification, where there is no actual fraud alleged or found, and where the contract is within the chartered powers of both corporations.—San Diego v. Pacific Beach R. R. Co., 112 Cal. 53, 44 Pac. 333.

[c] A purchase by a corporation of all the property of another corporation is not void merely because the boards of directors of both corporations were the same.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

FOR AUTHORITIES FROM OTHER STATES:

33 L. R. A. 788, note. See, also, 10 Cyc. 818-820; 12 Cent. Dig., cols. 1344-1349, §§ 1363, 1364.

§ 339. Express Authority, and Authority Implied Therefrom.

[a] A resolution by the board of directors of a corporation, conferring on its president full power to act for it with reference to municipal street work, authorizes the president to contract with the city on behalf of the corporation for the improvement of a street.—Oakland Pav. Co. v. Rier, 52 Cal. 270.

[b] Corporation president authorized to buy is authorized to buy on credit and give corporate note.—Siebe v. Joshua Hendy M. Wks., 86 Cal. 392, 25 Pac. 14.

[c] Where the directors of a corporation, by resolution, authorizes its vice-president to sign all legal documents relating to its business, he is empowered to retain an attorney for the corporation, and to pay him for his services.—Streeten v. Robinson, 102 Cal. 542, 36 Pac. 946.

[d] A resolution of a board of directors of a corporation authorizing the president "to make and sign contracts" in its name, "and do a general business for said corporation," authorizes him to lease premises for the use of the corporation, and which are necessary for carrying on its business.—Hawley v. Gray Bros. Artificial Stone Pav. Co., 106 Cal. 337, 39 Pac. 600.

[e] A resolution authorizing the president of a corporation "to make arrangements for paying off a debt by giving a mortgage, or any other means," was sufficient in form to authorize the execution of a mortgage.—Boggs v. Lakeport Agricultural Park Assn., 111 Cal. 354, 43 Pac. 1106.

[f] The executive committee of the board of directors of a corporation, authorized by the board to make arrangements with a person for "securing the transfer" of patent rights belonging to him to the corporation, have authority to execute a contract for the transfer.—Andres v. Fry, 113 Cal. 124, 45 Pac. 534.

§ 340. Use of Corporate Seal.

Necessity for seal. See post, § 379.

[a] Cashier of a bank may affix corporate seal without vote of directors, and perhaps any managing agent clothed with general power may do so.—Bliss v. Kaweah etc. Co., 65 Cal. 504, 4 Pac. 507.

[b] The secretary of a corporation is the proper party to affix the corporate seal, and it devolves upon the party denying the execution of the instrument to prove that he had no authority to affix it. The seal itself is prima facie evidence that it was affixed by proper authority.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

[c] Secretary and manager of a corporation held to have authority to issue warehouse re-

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ceipts to himself.—Riley v. Loma Vista Ranch Co. (Cal. App.), 82 Pac. 686.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 944, 1004-1022, 1037-1043; 12 Cent. Dig., col. 1709, § 1676.

§ 341. Control of Corporate Property.

[a] Board of trustees may control corporate property within the limit which the law has assigned to the exercise of corporate authority.—Wright v. Oroville M. Co., 40 Cal. 20.

FOR AUTHORITIES FROM OTHER STATES:

Withdrawal of assets of corporation: 57 Am. St. Rep. 63, note. See, also, 10 Cyc. 764, 768, 927-951; 12 Cent. Dig., cols. 1677-1685, §§ 1626-1639; cols. 1700-1705, §§ 1664-1669; cols. 1710-1713, §§ 1677, 1678.

§ 342. Contracts in General.

[a] The president has no authority to contract beyond matters incident to the management of the corporate business.—(Cal. 1862) Blen v. Bear River etc. Min. Co., 20 Cal. 602, 81 Am. Dec. 132.

[b] Under act of May 12, 1853, section 19, providing that the directors shall have only such powers as the by-laws give them, contracts made by the corporation through its directors are not void merely because the by-laws are not filed with the county recorder, since the statute only makes contracts invalid which are not in accordance with the articles as filed.—Forbes v. San Rafael Turnpike Co., 50 Cal. 340.

[c] One claiming under a contract of a corporation, executed without its corporate seal by its president and secretary, must show that they were clothed with general or special authority to make it, or had powers from which such authority might be inferred, or that their act was ratified by the board of directors.—Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 927, 950-1000, 1001; 12 Cent. Dig., cols. 1658, 1659, § 1606; cols. 1664-1669, §§ 1611-1614.

§ 343. Contract of Employment.

[a] Where the president of a bank employed attorneys in a contest between stockholders for its control in which it had no real interest, and whose services were rendered for his private benefit alone, the fees of such attorneys cannot properly be paid from the funds of the bank, and if so paid an action by stockholders will lie to compel him to account to the bank therefor.—Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603.

[b] In a suit against a corporation for attorney's services, it was not necessary that plaintiff should show that the corporation's secretary was authorized to make the contract of employment by by-law or a formal resolution of the corporation's board of directors.—Kelly v. Ning Yung Benev. Assn. (Cal. App.), 84 Pac. 321.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 767, 926-929, 931, 933, 949; 12 Cent. Dig., cols. 1669-1674, §§ 1615-1619.

§ 344. Assignment of Accounts and Claims.

[a] A general agent of a corporation, to whom has been intrusted the management of its affairs, has power to assign its choses in action to its creditors either in payment of or as security for their claims, without express authority from the board of directors. McKiernan v. Lenzen, 56 Cal. 61.

[b] An assignment of an account for goods sold by a corporation, made by its secretary, who only had general charge of orders for goods, is invalid, unless it is shown that he had authority to make it.—Read v. Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555.

[c] An assignment of a claim by a corporation is not invalid because no authority, either in the by-laws or by resolution of the board of directors, is shown in the manager of the corporation and president, who executed the assignment, where it was made in the regular course of business, with the knowledge and consent of the board of directors.—Greig v. Riordan, 99 Cal. 316, 33 Pac. 913.

§ 345. Purchases and Sales.

[a] Where a corporation is engaged in the business of conveying water through ditches for sale to miners, a purchase of additional ditch property to extend the operations of the company is not within the power of the president of the corporation, so as to bind the corporation therefor.—Blen v. Bear River etc. Min. Co., 20 Cal. 602, 81 Am. Dec. 132.

[b] The president of a corporation has no power to sell or purchase real property, either by statute or by implication.—Bliss v. Kaweah Canal etc. Co., 65 Cal. 502, 4 Pac. 507.

[c] The secretary and general manager of a corporation may assign accounts under a general authorization, the adoption of a special resolution authorizing it being unnecessary.—Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445.

[d] Civil Code, section 2310, provides that where the act of an agent has been ratified by accepting and retaining the benefits of the act, with notice thereof, oral authorization of the act is sufficient. Held that, where fruit sold by plaintiff to H. was delivered to and shipped by the defendant corporation, its general manager had power to bind defendant by an oral agreement to pay the proceeds of the fruit to plaintiff instead of H. Tevis v. Savage, 130 Cal. 411, 62 Pac. 611.

[e] President and general manager of saloon company have authority to sell fixtures, goodwill and license.—Freyberg v. Los Angeles Brewing Company (Cal. App.), 88 Pac. 378.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 374, 764, 927; 12 Cent. Dig., cols. 1679-1681, §§ 1629-1632.

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§ 346. Loans.

[a] The fact that a resolution of the board of directors, authorizing the secretary to make a loan on behalf of the corporation, was not reduced to writing, does not prevent a recovery for the loan.—Bank of Yolo v. Weaver, 31 Pac. 160.

For Authorities from Other States:

10 Cyc. 766, 949, 1104, 1198-1203; 12 Cent. Dig., cols. 1691-1693, §§ 1647-1649.

§ 347. Negotiable Instruments.

[a] The officers of a corporation have no power to authorize the execution of a note for a debt of a third party to the payee, having no relation to the corporate business, and in which the corporation has no interest, and the holder of such a note cannot recover on it.—Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75.

[b] The secretary of a mining company has no implied authority, as incident to his office, to make an assignment of promissory notes belonging to the company. To sustain an assignment made by a secretary in the name of his company, either an express authority or ratification must be shown.—Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435.

[c] A note signed by the president and secretary in their official capacity is the note of the corporation.—Farmers' etc. Bank v. Colby, 64 Cal. 352, 28 Pac. 118.

[d] Note showing on its face that it is executed by president of corporation to himself charges assignee with notice of want of authority.—Smith v. Los Angeles etc. Assn., 78 Cal. 293, 12 Am. St. Rep. 53, 20 Pac. 677.

[e] Under a resolution by the directors of a corporation conferring on the president, as the chief executive of the board, the power to incur indebtedness, negotiate loans, to contract, and otherwise act as the agent of the corporation, the president had authority to execute a note which would bind the corporation.—McCormick v. Stockton etc. R. Co., 130 Cal. 100, 62 Pac. 267.

[f] Under a resolution of the directors of a corporation that the president should have power, as the agent and chief executive of the company, to incur debts, negotiate loans, and contract for the corporation, a note signed, "R., President S. & T. Co. R. R. Co., R., Personally,"—was binding on the corporation.—McCormick v. Stockton etc. R. Co., 130 Cal. 100, 62 Pac. 267.

[g] Where the directors of a corporation authorized the president by resolution to incur debts, negotiate loans, and contract for the company, the fact that a by-law of the corporation provided that notes signed by the president and secretary should be binding on the company did not prevent a note signed by the president, without the signature of the secretary, from binding the corporation.—McCormick v. Stockton etc. R. Co., 130 Cal. 100, 62 Pac. 267.

[h] Corporation held not liable as indorser on certain instruments, regardless of whether such instruments were negotiable promissory notes or not.—Wickersham Banking Co. v. Nicholas (Cal. App.), 82 Pac. 1124.

For Authorities from Other States:

10 Cyc. 767, 929-931, 949, 950, 1023, 1043-1048, 1118; 12 Cent. Dig., cols. 1685-1691, §§ 1640-1646.

§ 348. Bonds and Mortgages.

[a] Under Civil Code, section 2309, providing that authority to execute an instrument required by law to be in writing can only be conferred by writing, a mortgage of real property of a corporation, executed by an agent whose authority is verbal, is void.—Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373.

[b] Civil Code, section 305, provides that the powers of a corporation must be exercised, and its property controlled, by its board of directors; and section 308 declares that the decision of a majority of the directors, "when duly assembled," constitutes a valid corporate act. Held, that a mortgage executed by the president or secretary of a corporation without a resolution of the board of directors was void, though subsequently ratified by the holders of two-thirds of the stock.—Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373.

[c] The president has no ex officio authority to mortgage corporate property.—Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373.

[d] The secretary has not by virtue of his office power to execute a mortgage.—Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373.

§ 349. Settlement with Creditor.

[a] Settlement by secretary with creditor of corporation is not a corporate act.—Blood v. Marcuse, 38 Cal. 594, 99 Am. Dec. 435.

For Authorities from Other States:

12 Cent. Dig., cols. 1705-1708, §§ 1670-1675.

§ 350. Legal Proceedings.

[a] The directors of a corporation have authority to make a bona fide settlement of a pending action which will be binding on the stockholders.—Donohoe v. Mariposa Land etc. Co., 66 Cal. 317, 5 Pac. 495.

[b] The president and general manager of a corporation, who, in the latter capacity, is authorized by the by-laws to supervise the affairs of the company, may sign a protest against a street improvement for the corporation.—Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535.

§ 351. Representations and Admissions.

[a] A corporation is not bound by the declarations or acts of individual members

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thereof made or done at a time when they were not acting as agents of such corporation.—Shay v. Tuolumne Water Co., 6 Cal. 73.

[b] A statement of the real property owned by a railroad company, furnished by its superintendent to an assessor, is binding on the corporation, and justifies the assessor in adopting it as a correct statement of the property belonging to the company.—People v. Stockton etc. R. Co., 49 Cal. 414.

[c] Corporation is bound by statements of its secretary in charge of entire corporate business.—Abbott v. Land and Water Co., 87 Cal. 328, 25 Pac. 693.

[d] It is within the power of the president of a corporation to furnish the lessor of premises leased by him for corporate purposes with evidence that the corporation has ratified the lease by what purports to be a certified copy of a resolution of the board of directors, and his act in doing so is binding on the corporation, which cannot repudiate it on the ground that such resolution had ever been, in fact, passed.—Hawley v. Gray Bros. Artificial Stone Pav. Co., 106 Cal. 337, 39 Pac. 609.

[e] Where a corporation ratifies a contract made by its president without authority, it is bound by any declarations he may have made during the negotiation determining the meaning of an ambiguity, since it is presumed to have notice of all the facts relating to the negotiation.—Balfour v. Fresno Canal etc. Co., 123 Cal. 395, 55 Pac. 1062.

[f] Where a note before maturity was indorsed to an insurance company for value and without notice of a want of consideration or fraud, the statement of the company's managing agent, made to the maker, that the maker would not be troubled about the note, and that the payee would be looked to for a settlement, was not binding on the company; the agent having no authority to make such a promise.—Muller v. Swanton, 140 Cal. 249, 73 Pac. 994.

[g] The president and managing agent of a corporation have authority to make admissions in regard to the fulfillment of contracts which will be evidence against the corporation.—Bullock v. Consumers' Lumber Co., 31 Pac. 367.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 373, 374, 915, 947-949; 12 Cent. Dig., cols. 1717-1723, §§ 1685-1691.

§ 352. Wrongful Acts.

[a] Corporation is liable for acts done by its agents in delicto as well as ex contractu, in the course of its business and their employment; and the corporation is responsible therefor as an individual is responsible under similar circumstances.—Maynard v. Firemen's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

[b] If a corporation furnishes its secretary with money to pay its employees, and an employee monthly delivers to the secretary receipts for the month's salary, and leaves the money with the secretary, the corporation is not liable for the default of the secretary in failing, afterwards, to pay over the amounts.—Gardner v. Omnibus R. Co., 63 Cal. 326.

FOR AUTHORITIES FROM OTHER STATES:

41 L. R. A. 650, notes. See, also, 12 Cent. Dig., cols. 1723, 1724, §§ 1692-1695.

§ 353. Who May Question Authority and Estoppel to Question.

[a] Corporate act is not essential in all cases to fasten a liability, and, if it were necessary, the law would sometimes presume, in order to uphold fair dealing and prevent gross injustice, the existence of such act, and estop the corporation from denying it.—San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

[b] Where a corporation agrees to pay a sum of money, and places the amount in the hands of its treasurer for the purpose of meeting the obligation, and such treasurer expends the money for the benefit of the obligee, and the corporation by resolution assents to such expenditure, it cannot afterward hold the treasurer liable for such money.—Bay View Homestead Assn. v. Williams, 50 Cal. 353.

[c] Where a corporation attempts to empower its president to contract with a city for the improvement of a street, and the power was defective, but the contract was made, the work done by the corporation, the assessments issued therefor in its favor, and suit was brought by the corporation to recover the same, both the city and the lot owners when sued for the assessment are estopped to deny that the contract was legally executed by the corporation.—Oakland Paving Co. v. Rier, 52 Cal. 270.

[d] A corporation is not estopped to deny the validity of an unauthorized act of an agent when it has not availed itself of any benefit from his act.—Bliss v. Kaweah etc. Co., 65 Cal. 502, 4 Pac. 507.

[e] The shareholders of a corporation cannot avoid responsibility for the unauthorized acts of the directors by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

[f] Where the president of a corporation authorized to execute a mortgage included in the note and mortgage terms and conditions which the corporation had power to authorize but did not authorize him to insert, and the corporation by its representations and declarations and acts through its directors intentionally led the mortgagees to believe that the president was authorized to insert such terms and conditions, and received the consideration from the mortgagee, and applied the money to its own use, including the payment of a

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prior mortgage which included similar terms and conditions, and, with full knowledge of such terms and conditions, used the consideration and paid the interest thereon monthly, as it became due upon the note and mortgage, such acts of the corporation constitute a ratification of the acts of its president, and an estoppel in pais, precluding the corporation from questioning his authority.—Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

[g] Corporations, equally with individuals, are subject to the rule that where, with full knowledge of all the facts involved, a principal reaps the fruit of an unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter.—Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

[h] Where the president of the corporation in making a lease of premises for its benefit presented to the owner of the premises a certified copy of the resolution of the board of directors, ratifying and confirming his acts in making the lease, his act in furnishing such resolution was the corporation's act, and it is estopped from denying the ratification of the lease, although no such resolution appears upon its minutes.—Hawley v. Gray Bros. Artificial Stone P. Co., 106 Cal. 337, 39 Pac. 609.

[i] Corporation cannot be held liable on unauthorized contract of its secretary, on the ground that it had accepted its benefits, if, in fact, it expressly repudiated the contract, and the work done under it proved wholly worthless.—Thomasson v. Grace M. E. Church, 113 Cal. 558, 45 Pac. 838.

[j] The alteration of a note of a corporation before delivery by the president, who was authorized to negotiate a loan for the corporation, and secure the same by the note, with indorsers, was not available to the corporation as a defense.—Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12.

[k] A mortgagor, under a trust deed authorizing the mortgagee company to substitute a trustee by resolution of its directors, cannot complain of the regularity of the stockholders' meeting at which such directors were elected.—Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891.

[l] Corporation held not estopped to deny agent's authority to make indorsement on certain notes.—Wickersham Banking Co. v. Nicholas (Cal. App.), 82 Pac. 1124.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 1725-1727, § 1696.

§ 354. Ratification or Repudiation of Unauthorized Act.

[a] Taking possession by trustees of corporation ratifies an unauthorized purchase by its agent.—Shaver v. Bear River etc. Co., 10 Cal. 396.

[b] The president of a corporation had general discretionary powers as to all matters in the prosecution of the company projects. He bought a house, to be used as an office, and the trustees held their meetings in it during six weeks. Held, that even if he had no authority the trustees had ratified his acts, and therefore that a subsequent rejection of the contract was of no avail, and could not excuse the company from payment. Shaver v. Bear River etc. Min. Co., 10 Cal. 396.

[c] The president of a corporation entered into a contract, beyond his powers, for the purchase of property. A written report was made on the subject, omitting some details of the contract, but not professing to set it forth wholly, and presented to the board of trustees, who unanimously ratified the "report and proceedings," the president being present and voting on the occasion. Suit being afterward brought upon the contract against the corporation, they sought to defend on the ground that they acted upon the report alone, and so with information insufficient to make the ratification binding. Held, that without evidence of any actual mistake on the part of the board, this defense was insufficient, the circumstances not being strong enough to overthrow the inference of knowledge which every ratification implies.—Blen v. Bear River etc. Min. Co., 20 Cal. 602, 81 Am. Dec. 132.

[d] In an action against a railroad company duly incorporated and acting under the act of 1861 for professional services, where it appeared that the plaintiff was retained verbally by the president of the company to act for them in a certain suit, and that he did so act, and recovered a large amount of money for said company, that while thus openly engaged the president advised frequently with the board of directors concerning such business, it was held that this amounted to a ratification of the acts of the president, although none such appeared by books or resolutions of the directors.—Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

[e] Where the employment of attorneys by the president of a railroad company was known to the directors and officers of the company, who also knew of their attending to the business of the company, and advised with them respecting such business, these facts were sufficient to establish a ratification. Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

[f] Execution of unauthorized mortgage in presence of trustees with their assent, without resolution when duly assembled, is not thereby ratified.—Davis v. Rock Creek, 55 Cal. 360, 36 Am. Rep. 40.

[g] Trustees may ratify advances of money by a director to pay debts at request of president.—Seeley v. San Jose I. M. & L. Co., 59 Cal. 22.

[h] Evidence tending to prove ratification by shareholders of a corporation of the violation of a by-law by the directors, in executing notes and mortgages beyond the sub-

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scribed capital stock, is equivalent to evidence of an original authority, and justifies a finding of original authority, under pleading tendering an issue as to such authority, and raising no issue as to the probative fact of ratification.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

[i] Acts of directors in violation of by-law may be ratified by the shareholders, and generally by the same number of shareholders that would be necessary to enact them; and such ratification need not be formally made in a meeting of the stockholders, but may be presumed from the circumstances of the case, such as long acquiescence in acts beneficial to the corporation, with knowledge of all the material facts and may even be presumed without evidence.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

[j] The acts of the corporation in accepting money paid it under the terms of an agreement of sale by an agent, and in commencing suit to recover money due by its terms, did not amount to a ratification of the contract.—Salfield v. Sutter County Land etc. Co., 94 Cal. 546, 29 Pac. 1105.

[k] Ratification of agent's authority can be made only in the same manner required for the conferring of original authority.—Salfield v. Sutter County Land etc. Co., 94 Cal. 546, 29 Pac. 1105.

[l] Where the answer denies the authority of the president of the corporation to execute the mortgage, but does not deny the facts constituting a ratification of his acts, plaintiffs are entitled to judgment without proof of the president's original authority.—Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

[m] The fact that some of the members of the flume company may have encouraged the contract with the city cannot estop the corporation from objecting to such contract, there being no valid ratification of the contract by the corporation.—San Diego W. Co. v. San Diego F. Co., 100 Cal. 43, 34 Pac. 656.

[n] A ratification by board of directors of action of president and secretary of corporation in executing a mortgage of property purchased by the corporation, is equivalent to a previous authority; and such ratification is involved in the issue as to whether the mortgage was executed by the corporation, and may be proved thereunder without being specifically pleaded.—Boggs v. Lakeport etc. Assn., 111 Cal. 354, 43 Pac. 1106.

[o] A ratification of a contract entered into by the directors of a corporation, by a majority of its stockholders, cannot be objected to by the corporation upon the ground that some of the stockholders may have acted without the knowledge of the facts, when they voted to ratify the action of the directors, where it is clear that they knew or ought to have known the nature of the contract, and the circumstances attending it, and there is no attempt to show a want of knowledge by any of the stockholders of any circumstance connected with the contract.—San Diego v. Pacific Beach R. R. Co., 112 Cal. 53, 44 Pac. 333.

[p] Majority of stockholders having power to authorize a contract have power to ratify it, and an express ratification thereof by them binds the corporation.—San Diego v. Pacific Beach R. R. Co., 112 Cal. 53, 44 Pac. 333.

[q] Where the execution of a note and mortgage could have been authorized only by a resolution of the board of directors, equivalent to an authority in writing, within Civil Code, section 2309, a corporation can ratify an unauthorized execution by its president and secretary only in the manner that would have been necessary to confer original authority for the act ratified, as provided by section 2310, and not by an exercise of ownership over the property for the price of which the note and mortgage were executed.—Blood v. La Serena Land etc. Co., 113 Cal. 221, 45 Pac. 252.

[r] Under the Civil Code, a ratification can only be made in the manner required in order to confer original authority for the act ratified; and a note and mortgage which could only be authorized by resolution of the board of directors can only be ratified by such resolution.—Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

[s] A corporation whose by-laws provide that all bonds, contracts, and other instruments on its behalf shall be executed by the president, and "also be signed by the secretary," may, by acquiescence therein, become liable on notes signed in its name by the president alone.—Illinois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

[t] In an action for the enforcement of the mortgage security for certain bonds of a corporation, it appeared that the president, as the financial manager of the company, had been authorized to negotiate the bonds; that he raised large sums by pledge thereof; which were expended by the company for the purposes which had induced the issue of the bonds; that said transactions expended over a period of more than a year; and that the company had failed to repudiate liability to the holders of such bonds until after action brought thereon. Held, that the company had acquiesced in and thus ratified the president's assumption that his agency to negotiate the bonds extended to the hypothecation of them.—Illinois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

[u] A mortgage was executed by a corporation when the number of its directors was reduced by a vacancy to less than that required by law. Subsequently, at meetings of full boards, the mortgagee was required to make further advances on the security of the mortgage, and a second mortgage was directed by a resolution expressly recognizing the validity of the previous one. Held, sufficient to constitute a ratification of the previous mortgage.—Porter v. Lassen County Land etc. Co., 127 Cal. 261, 59 Pac. 563.

[v] Even if the president of a corporation has no power to give a note for it, yet the note, being for a valuable consideration received by the corporation, and the whole

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transaction being entered at large in the books of the corporation, it, by failing to object thereto after notice so brought to it, and making no offer to restore the consideration, ratifies the transaction.—Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749.

[w] Civil Code, section 305, declares that the business of a corporation must be carried on by its board of directors. Act of April 23, 1880 (Stats. 1880, p. 131), section 1, declares that it shall not be lawful for the directors of any mining corporation to sell leased property, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, unless such act be ratified by the holders of at least two-thirds of the capital stock. Held, that where a mortgage on all the property of a mining company was invalid because of having been authorized at a directors' meeting at which no legal quorum was present, and thereafter two-thirds of the stockholders united in signing an instrument which purported to ratify the giving of the mortgage, the stockholders not having had authority to mortgage the mine under section 305, their ratification of the invalid act of the directors did not render the mortgage valid.—Curtin v. Salmon River Hydraulic Gold Min. etc. Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

[x] The stockholders of a mining corporation, organized under the laws of the state of California, have no power under the provisions of the act of April 23, 1880, to ratify an attempted mortgage of the mining property of the corporation, which is invalid by reason of a want of authorization of the board of directors.—Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749.

[y] Under Civil Code, section 2307, declaring that authority may be conferred by subsequent ratification, a corporation retaining the consideration for a note is liable thereon, though at the meeting at which it was authorized a director was not present or notified; it appearing that he and the other directors owned all the stock, and that he must have subsequently had notice of the transaction.—Mills v. Boyle Mining Co., 132 Cal. 95, 64 Pac. 122.

[z] A maker executed notes to a corporation. The president indorsed the notes to himself individually, making the corporation liable as indorser. Renewal notes were given, indorsed in the same manner. The directors of the corporation had no knowledge of the transaction, and did not know of the existence of the renewal notes. At directors' meetings they asked the president if the notes were being paid at maturity, and they received an affirmative answer. The vice-president testified that while he acted as president he indorsed some of these notes to raise money, but knew nothing of the renewal notes. Held, not to show an express ratification on the part of the corporation of the unauthorized acts of the president.—Smith v. Pacific Vinegar etc. Works, 145 Cal. 352, 78 Pac. 550.

[aa] On the issue whether a corporation impliedly ratified the unauthorized act of its president in indorsing to himself individually notes belonging to the corporation, it was shown that the secretary joined with the president in indorsing the name of the corporation on the notes. Knowledge of the transaction was concealed from the directors by the president and secretary, who made false statements on being asked whether the notes were being paid at maturity. Held not to show an implied ratification by the corporation.—Smith v. Pacific Vinegar etc. Works, 145 Cal. 352, 78 Pac. 550.

[bb] In a suit by a bank depositor against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock, evidence held sufficient to sustain finding that purchase of stock by president was not ratified by bank.—Dundon v. McDonald, 146 Cal. 585, 80 Pac. 1034.

[cc] Where a president of a corporation agrees that the corporation shall assume the debts of a person, it cannot be held liable by a creditor of such person, no corporate action with relation to the contract being shown, but it being claimed simply that money paid on the contract came into possession of the corporation.—Hamilton v. Bates, 35 Pac. 304.

[dd] The fact that such ratification was a ratification of all the acts of the directors since the preceding stockholders' meeting, could not be urged against its validity as a ratification of such payment, where the objection was made to the adoption of the resolution at the meeting on the ground that it would cover such specific payment, since that phase of the question was thereby distinctly presented and voted on by the stockholders.—Bassett v. Fairchild, 61 Pac. 791.

[ee] Stockholders of a corporation may ratify the action of the board of directors in ratifying a payment to a director for services outside his duties as a director, and the fact that such director was present at the stockholders' meeting at which action thereon was taken did not invalidate it; a majority of the stockholders, independent of such interested stockholder, having voted in favor of the resolution.—Bassett v. Fairchild, 61 Pac. 791.

[ff] A corporation held not to have ratified its agent's act in indorsing a note in its name.—Wickersham Banking Co. v. Nicholas (Cal. App.), 82 Pac. 1124.

[gg] Certain facts held not to imply knowledge on the part of a corporation of unauthorized indorsement of note in corporation's name by agent.—Wickersham Banking Co. v. Nicholas (Cal. App.), 82 Pac. 1124.

[hh] A corporation held to have ratified the issuance of a warehouse receipt by the secretary to himself.—Riley v. Loma Vista Ranch Co. (Cal. App.), 82 Pac. 686.

[ii] A ratification by a board of directors of the appointment of a superintendent held not, by virtue of Civil Code, section 2311, a ratification of the agreement fixing the compensation.—Colpe v. Jubilee Min. Co. (Cal. App.), 84 Pac. 324.

[jj] Under Civil Code, sections 1589, 2310, the unauthorized appointment of a super-

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intendent of a corporation for a fixed compensation held ratified by the board of directors with respect to the appointment, but not with respect to the salary agreed on.—Colpe v. Jubilee Min. Co. (Cal. App.), 84 Pac. 324.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 820-823, 913, 1069-1085, 1202; 12 Cent. Dig., cols. 1736-1756, §§ 1707-1719.

§ 355. Representative or Individual Character of Acts.

[a] The secretary of a corporation is acting as its agent where he solicits a stock subscription, turns over to the company a note given therefor, whereupon the president delivers the stock certificate to the purchaser, and such actions are thereafter ratified by the board.—Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

§ 356. Rights Acquired by Corporation.

[a] Prior possession by corporation of ground in controversy, and the entry into the occupation by the defendants as trustees of the corporation, is sufficient evidence of title to support a judgment in favor of the stockholders.—Parrott v. Byers, 40 Cal. 614.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 1789-1791, §§ 1745-1747.

§ 357. Notice to Officer or Agent as Notice to Company.

[a] In an action against a corporation, it cannot, for want of information, deny matters which are presumptively within the knowledge of any of its officers, though the officer verifying the answer is himself without any information on the subject.—Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 Pac. 320.

[b] A corporation, in the absence of fraud, is chargeable with the knowledge of its directors or officers that one of its officers is to receive a commission for the sale of property to the corporation, so as to estop it from objecting on that ground to the validity of a purchase price mortgage on such property. Blood v. La Serena Land etc. Co., 134 Cal. 361, 66 Pac. 317.

[c] Where work is done wholly upon credit of director of corporation, apart from official relation to corporation, the doctrine of constructive notice to corporation of doing of work is inapplicable, and no lien therefor attaches to property of corporation.—Ayers v. Green Gold M. Co., 116 Cal. 335, 336, 48 Pac. 221.

[d] Where the rights of a street railway company in the use of a street are encroached on by a railroad with full knowledge and acquiescence of the president and other officers of the street railway company, and on promise of payment of all damages, the company is bound by such knowledge and acts of its officers.—Fresno St. R. Co. v. Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773.

[e] A corporation is charged with the knowledge of its president, acting as attorney in fact of one making an assignment to it.—Witter v. McCarthy Co., 43 Pac. 969.

[f] Notice to one who is secretary, bookkeeper, and director of a corporation, that a note given by it had been assigned, is notice to the corporation.—Love v. Anchor Raisin Vineyard Co. (Cal.) 45 Pac. 1044.

FOR AUTHORITIES FROM OTHER STATES:

Notice to officer or agent of effect thereof: 36 Am. Dec. 188, note.

When notice to officer does not affect the corporation: 39 Am. Rep. 322, note.

See, also, 10 Cyc. 915, 1053-1065; 12 Cent. Dig., cols. 1791-1804, §§ 1748-1762.

§ 358. Notice of Entries in Corporate Books.

[a] Where the certificate book of a corporation shows that stock is held by a person as trustee, the officers of the corporation are charged with notice that he does not hold the stock in his own right.—Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

[b] Notice of transaction entered in books of company is imparted to it.—Curtin v. Salmon etc. Co., 141 Cal. 311, 99 Am. St. Rep. 75, 74 Pac. 851.

§ 359. Notice Imputed to Persons Dealing with Corporation.

[a] If a course of action contrary to a by-law of a private corporation is acquiesced in by the shareholders the by-law is thereby waived, and will not affect the rights of persons dealing with the corporation in good faith, even though such persons may be shareholders, if they did not have actual notice of the by-law.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 940-942; 12 Cent. Dig., cols. 1757-1760, §§ 1720-1725.

§ 360. Evidence of Authority.

[a] Authority of agent of a corporation to borrow money for its use may be inferred from the character of his agency, his habit of borrowing money for the corporation, and the fact of the application of the money to the use of the corporation, without any direct authority being shown by a resolution of the board of directors.—Allen v. Citizens' Steam Nav. Co., 22 Cal. 28.

[b] In the absence of the common seal of a corporation, or of proof of facts whence the authority of the officers of a corporation to execute a conveyance may be inferred, such authority can only be established by resolution of the trustees entered in the proper book of the corporation, which should be in the office of the secretary.—Southern

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California Colony Assn. v. Bustamente, 52 Cal. 192.

[c] The authority of an agent of a corporation to make a contract on its behalf may be inferred from the general course of its business and from his admitted relations to the corporation.—Crowley v. Genesse Min. Co., 55 Cal. 273.

[d] There is no presumption that acts done by officers of a corporation are within the powers conferred on the officers where the acts are not within the powers conferred upon and usually exercised by them as part of the ordinary business of the corporation.—Mulligan v. Smith, 59 Cal. 206, 225.

[e] Burden is on party claiming that corporate officers have exceeded their authority in executing mortgage in due form.—Schallard v. Eel River etc. Co., 70 Cal. 146, 11 Pac. 590.

[f] Mere fact that resolutions of directors do not appear in proper book of corporation should not disprove their existence to annul instrument executed in due form.—Schallard v. Eel River etc. Co., 70 Cal. 146, 11 Pac. 590.

[g] On an issue whether cattle purchased by the superintendent of a corporation had been purchased for the corporation or by him individually, that a note in part payment was signed by the superintendent individually was not conclusive as showing the sale to have been to him.—Lake Shore Cattle Co. v. Modoc Land etc. Co., 130 Cal. 669, 63 Pac. 72.

[h] In an action by the assignee of a corporation on a contract with the corporation, the burden of showing want of authority to make the assignment is upon defendant.—McKee v. Cunningham (Cal. App.), 84 Pac. 260.

[i] In an action by the assignee of a corporation on a contract with it, evidence held sufficient to show authority for the assignment.—McKee v. Cunningham (Cal. App.), 84 Pac. 260.

[j] Proof of signing of contract by corporation by corporation held unnecessary.—Mebius & Drescher Co. v. Mills, 88 Pac. 917.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 937-944, 1050-1053; 12 Cent. Dig., cols. 1760-1777, §§ 1726-1737; cols. 1786-1789, § 1743.

§ 361. —— Seal as Presumptive Evidence.

[a] The seal of a corporation, together with the signatures of its proper officers, raises a presumption that the deed was made with proper authority from the corporation. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30.

[b] The seal of a corporation affixed to an instrument executed by an officer thereof is prima facie evidence of the authority of such officer to execute the instrument.—(Cal. 1884) Bliss v. Kaweah Canal etc. Co., 65 Cal. 502, 4 Pac. 507; (1892) Gutzeil v. Pennie, 95 Cal. 598, 30 Pac. 836; (1896) Andres v. Fry, 113 Cal. 124, 45 Pac. 534.

[c] Where instruments, purporting to be executed by a corporation, have affixed to them the corporate seal, and are proved to be signed by the proper officers, such officers must be presumed not to have exceeded their authority, and the burden to prove the contrary is on the party disputing the due execution of the instruments.—Schallard v. Eel River Steam Nav. Co., 70 Cal. 144, 11 Pac. 590.

[d] Corporate seal is prima facie evidence of authority to execute instrument to which it is affixed by proper officer.—Crescent City etc. Co. v. Simpson, 77 Cal. 290, 19 Pac. 626.

[e] Where a note of a corporation is signed by the proper officers and sealed with the seal of the corporation, it is prima facie evidence of the authority of the officers, and of its due execution by them.—Mills v. Boyle Min. Co., 132 Cal. 95, 64 Pac. 122.

C. PROPERTY AND CONVEYANCES.

CAPACITY TO ACQUIRE AND HOLD LAND, § 362.
—— IN JOINT AND COMMON TENANCY, § 363.
DEEDS TO CORPORATION, § 364.
—— RESCISSION, § 365.
POWER TO DISPOSE OF PROPERTY, § 366.
POWER TO MORTGAGE OR PLEDGE, § 367.
CONVEYANCES BY CORPORATION—WHO MAY EXECUTE, § 368.
—— WHO MAY AUTHORIZE EXECUTION, § 369.
—— REQUISITES AND SUFFICIENCY, § 370.
—— OPERATION AND EFFECT, § 371.
—— PROOF OF DUE EXECUTION, § 372.
EFFECT OF ULTRA VIRES SALE OF PROPERTY, § 373.

§ 362. Capacity to Acquire and Hold Land.

[a] Where land has been conveyed to a company, and there is an absence of proof as to whether the company is a corporation, or capable of taking and holding lands, the court will presume that the company had such power.—Hagar v. Yolo County, 47 Cal. 222.

[b] Land which a corporation cannot hold in its own name it cannot hold in the name of another, and, when a corporation cannot hold the legal title to land, it cannot take a beneficial interest in it.—Coleman v. San Rafael Turnpike Road Co., 49 Cal. 517.

[c] A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land.—(1885) People v. La Rue, 67 Cal. 526, 8 Pac. 84; (1893) Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936.

[d] Where a corporation is legally organized for the specific purpose of dealing in land, its power to hold land is not limited.—Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[e] Every corporation is presumed to have power to purchase and hold land; anything abridging this power must be affirmatively shown.—Granite G. M. Co. v Maginness, 118 Cal. 138, 50 Pac. 269.

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[f] Where a plaintiff owned a certificate of purchase of state school lands, and the court found that plaintiff was a corporation, but there was no other proof, such certificate is admissible in evidence, as it will be presumed that the corporation had power to purchase and hold lands.—Diamond Coal Co. v. Cook, 129 Cal. xviii, 61 Pac. 578.

FOR AUTHORITIES FROM OTHER STATES:

Capacity of corporations to take title to real property: 94 Am. Dec. 381, note; 32 L. R. A. 293, note. See, also, 10 Cyc. 1122-1125, 1139; 12 Cent. Dig., cols. 1804-1815, §§ 1763-1773.

§ 363. —— In Joint and Common Tenancy.

[a] No one of the reasons which work want of capacity to hold as joint tenants would prevent corporations holding as tenants in common.—De Witt v. San Francisco, 2 Cal. 289.

[b] Two corporations cannot hold land as joint tenants.—De Witt v. San Francisco, 2 Cal. 289.

§ 364. Deeds to Corporation.

[a] There can be no valid delivery of a deed to a corporation not in esse when the attempted delivery is made.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

[b] The acceptance of a deed by the grantee will not be presumed from the beneficial character of the grant when the grantee named is a corporation having no legal existence.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

[c] A deed to the corporation, though executed prior to its organization, took effect only when it was delivered to the corporation after the filing of its articles.—San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1136-1138; 12 Cent. Dig., cols. 1814, 1815, § 1773.

§ 365. —— Rescission.

[a] A corporation which has received a conveyance of property pursuant to an agreement of purchase made by promoters of the corporation, and which has paid a portion of the purchase money upon account, and given notes and mortgages as security for the residue of the purchase price, cannot maintain an action to have a judgment of foreclosure of the mortgages, and also the notes and mortgages, set aside, annulled, and canceled, on the ground of alleged fraud in their procurement, while retaining the conveyance to it of the property, and not paying or offering to pay the value of the property which it has received.—Buena Vista F. & V. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386.

§ 366. Power to Dispose of Property.

[a] All corporations capable of taking and holding property have the right of disposing of it as fully as natural persons, except so far as they are restrained by statute.—People v. Trustees of California College, 38 Cal. 166.

FOR AUTHORITIES FROM OTHER STATES:

Sale by corporations of all their assets and effect thereof: 99 Am. Dec. 333, note.

Sale of all the property of corporations and the right of minority stockholders to assail: 103 Am. St. Rep. 548, note. See, also, 10 Cyc. 1138, 1139, 1265-1269; 12 Cent. Dig., cols. 1815-1818, § 1774.

§ 367. Power to Mortgage or Pledge.

[a] Majority of stockholders cannot execute a valid mortgage or authorize conveyance.—Head v. Horn, 18 Cal. 211.

[b] Authority to execute mortgage of corporate property can only be conferred by resolution of board of directors duly assembled.—Alta S. M. Co. v. Alta P. M. Co., 78 Cal. 632, 21 Pac. 373.

[c] Where the only authority upon which the president and secretary of a corporation acted in executing a note and mortgage in its name was a resolution passed at the preliminary meeting of stockholders before organization of the board of directors, such authorization is insufficient to support a finding of due and regular execution of the note and mortgage.—Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017. 45 Pac. 252.

[d] Under Constitution, article 12, section 11, providing that no corporation shall issue stock or bonds, except for money labor, or property, a corporation has the right to pledge its bonds as collateral security for money or property procured by it.—Illinois Trust etc. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

[e] Stockholders cannot make mortgage or validate one that has not been previously authorized and executed by the board of directors.—Curtin v. Salmon etc. Co., 141 Cal. 310, 311, 99 Am. St. Rep. 75, 74 Pac. 851.

§ 368. Conveyance by Corporation—Who may Execute.

[a] The individuals who the are trustees of a corporation, in their official character as trustees, when not acting as a board, have no authority, independent of that conferred by the corporation, to execute a deed of the corporate property.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

FOR AUTHORITIES FROM OTHER STATES:

How and by whom may be executed: 23 Am. Dec. 743, note. See, also, 10 Cyc. 1008-1016; 12 Cent. Dig., cols. 1823-1831, §§ 1778-1784.

§ 369. Who may Authorize Execution.

[a] The stockholders of a corporation have no power, as such, to authorize the sale of the corporate property, or to sell the same,

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either when collectively assembled as such in a stockholders' meeting or when acting individually.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

[b] Conferring authority to sell and convey the property of a corporation is the exercise of corporate power.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

[c] Power to sell and convey corporate property can be conferred only by the board of trustees when assembled and acting as such. The board may confer this power upon themselves as individual trustees or upon any other person or persons.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

§ 370. —— Requisites and Sufficiency.

[a] Conveyance of real property by corporation must be under its corporate seal. It may alter its seal at pleasure, and may adopt as its own the private seal of an individual, but in the latter case the seal adopted must be used as that of the corporation.—Richardson v. Scott River etc. Co., 22 Cal. 150.

[b] It is not necessary to state in a conveyance by a corporation that the seal used is that of the corporation. This fact may, in the absence of any declaration to the contrary, be presumed from the language of the conveyance or proved by evidence aliunde.—Richardson v. Scott River etc. Co., 22 Cal. 150.

[c] If to a deed, purporting to be that of a corporation, a seal be affixed as that of the individual agent who signs it, such seal cannot be treated as that of the corporation. A declaration in the instrument that the seal is affixed as that of the agent is conclusive of its character and effect.—Richardson v. Scott River etc. Co., 22 Cal. 150.

[d] If the grantor of a deed is in fact a corporation, and the corporation seal is affixed thereto, a statement in the deed that it is incorporated is not essential, and an objection upon appeal that a deed offered in evidence at the trial does not show upon its face that the grantor was a corporation, will not be considered where the only objection to its introduction taken at the trial was the general objection that the deed was incompetent, irrelevant, and immaterial, there being no proof that the grantor was not a corporation in fact, and no objection urged upon that ground in the court below.—Colton Land and Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

For Authorities from Other States:

10 Cyc. 1012; 12 Cent. Dig., cols. 1823, 1824, § 1778; cols. 1830, 1831, § 1783.

§ 371. —— Operation and Effect.

[a] Corporate acts, by which corporate property is alienated, if done pursuant to prescribed mode, and not being in themselves ultra vires, are, in point of mere law, binding upon the corporate title; and through that title equally binding upon the interest of the stockholders.—Wright v. Oroville M. Co., 40 Cal. 20.

[b] The sale by a corporation of all its property and franchises, except its corporate franchise, does not carry with it shares of its own stock, which it had bought in for delinquent assessments, and had not authorized to be reissued.—Tulare Irr. Dist. v. Kaweah Canal etc. Co., 44 Pac. 662.

For Authorities from Other States:

12 Cent. Dig., col. 1831, § 1784.

§ 372. —— Proof of Due Execution.

[a] One who claims under a deed without a seal, executed by the president of a corporation to himself, must show that it was executed under a resolution of the directors, entered on the records of the corporation, or ratified by such a resolution.—Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Barney v. Phon, 117 Cal. 56, 48 Pac. 987.

§ 373. Effect of Ultra Vires Sale of Property.

[a] Where officers of a corporation receive into its treasury money obtained from a sale of its property which is void for want of power in the corporation to make it, the purchaser cannot recover the money back from the corporation, without its having appropriated the same to its own use, but the officers alone are liable therefor.—Herzo v. City of San Francisco, 33 Cal. 134.

[b] The conveyance of the real property of a corporation which is unauthorized and void cannot be validated by parol acts of ratification and acquiescence.—Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

For Authorities from Other States:

Withdrawal of assets of corporation: 57 Am. St. Rep. 63, note. See, also, 12 Cent. Dig., cols. 1831, 1832, § 1785.

D. CONTRACTS AND INDEBTEDNESS.

CAPACITY TO CONTRACT IN GENERAL, § 374.
CONTRACTS OF PROMOTERS BEFORE INCORPORATION, § 375.
IMPLIED CONTRACTS, § 376.
FORM AND REQUISITES—MODE OF CONTRACTING IN GENERAL, § 377.
—— MISNOMER OF CORPORATION, § 378.
—— NECESSITY FOR SEAL, § 379.
CONTRACTS OF EMPLOYMENT, § 380.
GUARANTY AND SURETYSHIP, § 381.
LOANS AND INVESTMENTS, § 382.
TAKING MORTGAGES, § 383.
NEGOTIABLE INSTRUMENTS, § 384.
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LIABILITY ON ULTRA VIRES CONTRACTS, § 389.
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—— CHATTEL MORTGAGES, § 394.
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—— PLEADING IN FORECLOSURE SUIT, § 402.
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—— INJUNCTION AGAINST FORECLOSURE, § 404.
—— SETTING ASIDE FORECLOSURE DECREE, § 405.

See, also, ante, § 342.

Contracts of corporations protected from impairment of obligation. See Constitutional Law, § 175.

§ 374. Capacity to Contract in General.

[a] A corporation, unless expressly prohibited by law or provisions of its charter, has power to make all contracts that are necessary and usual in the course of the business it transacts as means to enable it to effect the object of its creation.—Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

[b] Where the agreement made on behalf of the corporation to pay all reasonable charges of the physicians contains the words: "We reserve to ourselves the right to determine what is reasonable," such reservation is one which the company, under the circumstances shown, had a right to make, and the physician is entitled to recover only the amount offered him by the corporation, and a jury cannot award him any greater amount. Fraser v. San Francisco Bridge Co., 103 Cal. 79, 36 Pac. 1037.

[c] A contract making a water company the exclusive agent of a flume company for the sale and distribution of water within the corporate limits of a city to consumers of water, all sales of water being subject to the approval of the flume company, is not illegal, nor beyond the powers of either of the corporations; nor is such contract against public policy, as being a combination between the corporations for the purpose of creating a monopoly for the sale of water to the city and its inhabitants, nor as injuriously affecting the interests of the city or its inhabitants.—San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. 495.

FOR AUTHORITIES FROM OTHER STATES:

Contracts of corporations forbidden by their charters or other statutes: 51 Am. Dec. 341, note. See, also, 10 Cyc. 1099; 12 Cent. Dig., cols. 1834-1838, § 1786.

§ 375. Contracts of Promoters Before Incorporation.

[a] An agreement among parties owning a mine, and who expected to incorporate themselves but did not then do so, that a person was entitled to two thousand five hundred shares of the stock of the company, held not to be the agreement of the corporation.—Morrison v. Gold Mountain Gold Min. Co., 52 Cal. 307; Hawkins v. Mansfield Gold Min. Co., 52 Cal. 307, 513.

[b] Corporation may acquire right to enforce contract made by its promoters in advance of its existence by other party's acceptance of performance by it.—Scadden etc. Co. v. Scadden 121 Cal. 38, 53 Pac. 440.

[c] Corporation may adopt contract made for it by its promoters in advance of its existence.—Scadden etc. Co. v. Scadden, 121 Cal. 38, 53 Pac. 440.

FOR AUTHORITIES FROM OTHER STATES:

When corporation is bound by contracts of promoters or members: 13 Am. St. Rep. 28, note. See, also, 10 Cyc. 1072, 1201; 12 Cent. Dig., cols. 1843-1854, §§ 1789-1792.

§ 376. Implied Contracts.

[a] Where a contract with a corporation has been executed and the corporation has enjoyed the benefits of the consideration, an obligation to pay for the benefits so received will be implied.—San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453.

[b] Under act of 1861, section 10, concerning railroad corporations, which provides that no contract shall be binding upon the company unless made in writing, an action for personal services rendered such company, where there was no contract in writing, must be brought upon an implied promise, and the recovery must be limited to the value of the actual benefit received.—Foulke v. San Diego S. E. R. Co., 51 Cal. 365.

[c] Corporation may be bound by implied contracts within the scope of their authority.—Brown v. Board of Education of the City of Pomona, 103 Cal. 531, 37 Pac. 503.

[d] Where money is obtained by and disbursed through the proper financial officer of a corporation through the agency of a bank, and is applied to the proper use of the corporation, there arises from such use an implied promise of the corporation to repay the money to the bank.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1034-1036; 12 Cent. Dig., cols. 1838-1842, § 1787.

§ 377. Form and Requisites—Mode of Contracting in General.

[a] It is not essential to the validity of a contract, executed by a corporation, that it

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be signed with the corporate name, but the corporation may bind itself by an instrument signed only by its president and secretary, with their names and the description of their offices.—Rowe v. Table Mountain Water Co., 10 Cal. 441.

[b] Where the act creating a corporation prescribes to it a mode of contracting, it must observe such mode or the instrument will be void.—(Cal. 1860) McCracken v. City of San Francisco, 16 Cal. 591.

[c] Where power to contract exists, it may be exercised by corporation or its agent in the same way a natural person can contract, unless restrained by its charter to some particular mode of contracting.—McKiernan v. Lenzen, 56 Cal. 61.

FOR AUTHORITIES FROM OTHER STATES:

Liability of officers dependent on manner of signing contracts: 39 Am. Rep. 299, note. See, also, 10 Cyc. 1001-1003, 1036-1053; 12 Cent. Dig., cols. 1859-1879, §§ 1796-1805.

§ 378. —— Misnomer of Corporation.

[a] The plaintiff cannot recover against "the corporation of Bradley, Berdan & Co.," upon a written contract entered into between himself and "Bradley & Co.," as the contract was not made by the corporation.—Morrison v. Bradley, Berdan & Co., 5 Cal. 503.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1024-1031, 1037-1043, 1049; 12 Cent. Dig., cols. 1861-1864, § 1798.

§ 379. —— Necessity for Seal.

[a] Corporation may contract without seal. Smith v. Eureka Flour Mills, 6 Cal. 1; McKiernan v. Lenzen, 56 Cal. 64.

[b] Old doctrine that a corporation can contract only under its corporate seal is now repudiated.—Crowley v. Genesee Min. Co., 55 Cal. 273.

[c] Corporation may make contracts within the scope of their general powers, without the use of the corporate seal.—McKiernan v. Lenzen, 56 Cal. 61.

FOR AUTHORITIES FROM OTHER STATES:

Contracts from which seal may be omitted: 13 Am. Dec. 561, note. See, also, 10 Cyc. 1004-1022, 1043-1048; 12 Cent. Dig., cols. 1868-1875, §§ 1801-1803.

§ 380. Contracts of Employment.

[a] A mining corporation is not liable for services in watching the mine, performed on behalf of stockholders chiefly interested therein.—Brown v. Valley View Min. Co., 127 Cal. 630, 60 Pac. 424.

[b] A corporation, by its president, contracted with plaintiff to advertise and sell certain lands for a certain salary and commission. Below the signatures of the parties was a writing to the effect that a certain other company thereby agreed to plaintiff's employment, and would pay him half the salary mentioned. Plaintiff objected to the writing, but the president said that it was none of his affair. Thereafter such other company notified the president that it would not sign the writing, but the president had plaintiff assist him in selling the lands. Held, that the corporation intended to be bound in any event, and the company's failure to sign the writing did not render the contract incomplete.—Pettibone v. Lake View Town Co., 134 Cal. 227, 66 Pac. 218.

FOR AUTHORITIES FROM OTHER STATES:

49 L. R. A. 471, note. See, also, 12 Cent. Dig., cols. 1879-1881, § 1806.

§ 381. Guaranty and Suretyship.

[a] Corporation cannot become a surety, nor ratify a note to secure debt of another. Hall v. Auburn T. Co., 27 Cal. 256, 87 Am. Dec. 66.

[b] A corporation may, for a valid consideration, guarantee the payment of a debt which it may directly contract to pay.—Low v. Central Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 568, 1109, 1111; 12 Cent. Dig., cols. 1889-1891, § 1815.

§ 382. Loans and Investments.

[a] A loan of money upon mortgage security by corporation organized for purpose of constructing ditches for conveyance and sale of water is not necessarily an act exceeding its corporate powers. Such contract, if necessary to attain its general objects, and made as an incident to the exercise of its granted powers, is valid. In the absence of proof, its validity will be presumed.—Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

[b] The payment by the corporation of an assessment for the construction of a tunnel run for the purpose of working the mines of another mining company, of which the corporation was a stockholder, is an investment of capital, and not a current expense.—Excelsior Water etc. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1105-1107; 12 Cent. Dig., cols. 1887, 1888, § 1814.

§ 383. Taking Mortgages.

[a] Taking of mortgage held not a purchase, location, or holding of property, within Civil Code, section 299, relating to power of corporations.—Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1022-1031, 1118, 1119. See 12 Cent. Dig., cols. 1891-1895, §§ 1816-1819.

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§ 384. Negotiable Instruments.

[a] Where note executed by officers provides that only assets of corporation, and none of the property of stockholders, shall be liable, the corporation cannot raise the objection as affecting its own liability.—Smith v. Eureka Flour Mills, 6 Cal. 1.

[b] A superintendent of a mining corporation cannot bind the corporation by a promissory note, unless he has authority from the corporation to make it.—Beeman v. Lovett, 46 Cal. 387.

[c] A promissory note of a turnpike company is not void because made before it has filed a copy of its by-laws with the county recorder.—Forbes v. San Rafael etc. Co., 50 Cal. 340.

[d] Note executed by president is invalid unless authorized or ratified by directors.—Smith v. Los Angeles etc. Assn., 78 Cal. 292, 12 Am. St. Rep. 53, 20 Pac. 677.

[e] The giving of a note by a corporation for the purpose of increasing its legitimate business is not ultra vires.—Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634, 37 Pac. 530.

[f] Promissory notes executed in the name of a corporation, by its secretary, who does not appear to have been authorized to execute them by any resolution of the board of directors, or to have been clothed with general power to execute promissory notes or other obligations on its behalf, do not bind the corporation, and are not admissible in evidence in support of causes of action based thereon.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[g] Where corporation requires its notes executed in certain manner, it may, by acquiescence, become liable if executed in some other manner.—Illinois etc. Sav. Bank v. Pacific Ry. Co., 117 Cal. 347, 49 Pac. 197.

[h] Note irregularly issued by corporation may be validated by acts in pais such as retaining benefits with notice and failure to rescind.—Curtin v. Salmon etc. Co., 141 Cal. 311, 99 Am. St. Rep. 75, 74 Pac. 851.

[i] Suit may be maintained on note originally invalid but made valid by conduct of company.—Curtin v. Salmon etc. Co., 141 Cal. 312, 99 Am. St. Rep. 75, 74 Pac. 851.

For Authorities from Other States:

10 Cyc. 1045-1048, 1111-1122; 12 Cent. Dig., cols. 1895-1903, §§ 1820-1831.

§ 385. Corporate Bonds.

[a] A bond containing no mention of a corporation as party to it, and signed by four persons, with nothing to designate them as agents of the corporation, is the individual obligation of those signing it; and extrinsic evidence is not admissible to change the character of the instrument, although given for the debt of the corporation.—Richardson v. Scott River etc. Min. Co., 22 Cal. 150.

[b] Corporation has a common-law right to issue a bond to pay a debt.—McLane v. Placerville etc. R. R. Co., 66 Cal. 612.

[c] There is nothing criminal or against good morals in an attempt ultra vires of one corporation to acquire property and franchise of another, such as would affect validity of bonds issued by grantee.—Illinois etc. Sav. Bank v. Pacific Ry. Co., 117 Cal. 343, 49 Pac. 197.

[d] Engraved bonds substituted for lithographed bonds are regarded as mere duplicates or reissues of lithographed bonds for which they are exchanged.—Illinois etc. Sav. Bank v. Pacific Ry. Co., 117 Cal. 348, 49 Pac. 197.

[e] Bonds issued by a corporation having authority to borrow money and issue evidences of indebtedness are not invalidated by the want of power to make the mortgage by which they were in terms secured.—Illinois etc. Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

[f] Bonds issued by a street railroad corporation in part payment for the construction of its railroad are for the creation of a bonded indebtedness within the provision of section 359 of the Civil Code requiring the creation of the bonded indebtedness of any corporation to be approved by the vote of two-thirds of the entire capital stock; and in default of such approval no liability is created upon such bonds against the stockholders.—Boyd v. Heron, 125 Cal. 453, 58 Pac. 64.

[g] A stockholder claiming that bonds issued by the directors were void, because issued without notice to the stockholders, must allege that the stockholders did not consent to the meeting at which the indebtedness was created, as Civil Code, section 317, provides that such consent abrogates the necessity of notice.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

[h] A stockholder of a corporation, which purchased a street railroad of another corporation and agreed to assume bonds issued by it, cannot raise the question of fraud in constructing the road, or attack the validity of the bonds. By divided court.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

For Authorities from Other States:

10 Cyc. 1167-1181; 12 Cent. Dig., cols. 1904-1922, §§ 1832-1855.

§ 386. —— Authority to Pledge.

[a] Right of corporation to sell its bonds includes right to pledge them.—Illinois etc. Sav. Bank v. Pacific Ry. Co., 117 Cal. 344, 49 Pac. 197.

[b] Authority to president of corporation to negotiate its bonds carries with it power to pledge them.—Illinois etc. Sav. Bank v. Pacific Ry. Co., 117 Cal. 345, 49 Pac. 197.

§ 387. Place of Performance of Contracts.

[a] Contract of corporation is performable in place where circumstances, viewed in light

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of pertinent code provisions, indicate that parties intended it to be performed.—Bank of Yolo v. Sperry Flour Co., 141 Cal. 316, 74 Pac. 855.

§ 388. Imputed Notice of Corporation's Contract to Officer.

[a] Officers are charged with notice of contract to which corporation is a party.—Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

§ 389. Liability on Ultra Vires Contracts.

[a] Although where money or property is given to a corporation under a void contract the corporation is liable to account for the money or other property received, this rule cannot apply to a lessee of the corporation whose lease is void, and who is found to have made nothing from the lease.—Visalia Gas and Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

[b] A corporation must account for benefits received under an ultra vires contract, with interest on the amount found due.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[c] The holders of bonds issued by a corporation for a purpose not within its charter powers, who did nothing to promote such purpose beyond parting with their property on the faith of such obligations, and who do not found their right of recovery on such illegal contract, are not affected by its illegality.—Illinois etc. Sav. Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

FOR AUTHORITIES FROM OTHER STATES:

Ultra vires contracts of corporations: 13 Am. Dec. 108, note.

Contracts of corporations forbidden by their charters or other statutes: 51 Am. Dec. 341, note.

Ultra vires, doctrine of in relation to contracts of private corporations: 70 Am. St. Rep. 156, note; 20 L. R. A. 765, note. See, also, 10 Cyc. 1114, 1116, 1122, 1146-1167, 1174; 12 Cent. Dig., cols. 1946-1949, §§ 1893-1898.

§ 390. Borrowing Money.

[a] Corporations may borrow money and issue the ordinary evidences of debt.—Magee v. Mokelumne Hill etc. Min. Co., 5 Cal. 258.

[b] Power of a corporation to create debts is treated as incident to express powers, under our laws, and not as itself one of the express powers.—Smith v. Eureka Flour Mills, 6 Cal. 1.

[c] Persons advancing money to corporation are bound by facts disclosed by books of company.—Moore v. Boyd, 74 Cal. 171, 172, 15 Pac. 670.

[d] The capital stock of a corporation is its sole basis of credit and as to creditors the corporation is presumed to have sought credit based upon its supposed capital stock at its par value, either actually paid in or due from the stockholders. Public policy requires that the fact, whether a particular creditor did trust the corporation on that basis, should not be inquired into.—Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057.

[e] A corporation which, in payment for property, assumes the payment of bonds issued by another corporation, cannot retain the property, and claim the bonds were invalid as being overissued, in violation of Civil Code, section 309, prohibiting the contraction of debts beyond the subscribed capital stock. By divided court.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

[f] Shares of stock delivered by corporation to the stockholders of another corporation, as a part of the price of property purchased from it, are part of the former corporation's capital stock, within Civil Code, section 309, prohibiting the creation of debts by a corporation beyond its "subscribed capital stock." By divided court.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1100-1105; 12 Cent. Dig., cols. 1885-1887, § 1813.

§ 391. Limitation of Amount of Indebtedness.

[a] The third section of act of 1850, concerning corporations, prohibits them from issuing bills, notes, or other evidences of debt upon loans or for circulation as money. The act contemplates that corporations will incur debt and limits their power to incur debts to the amount of the capital stock paid in. Held that corporations are not prohibited from borrowing money and issuing the usual evidences of debt therefor.—Magee v. Mokelumne Hill Co., 5 Cal. 258.

[b] Civil Code, section 309, applies to all subscribed capital stock, whether paid in or not, and regardless of disposition made of it; and debts do not include capital stock paid for corporate property.—Moore v. Lent, 81 Cal. 502, 22 Pac. 875; Shea v. Lent, 22 Pac. 870.

[c] The execution of non-negotiable notes and mortgages by a corporation, the consideration of which is the promise of the mortgagees to advance money and deliver lumber as needed by the corporation to improve the mortgaged property, though given for a debt, larger than the subscribed capital stock of the corporation, is not prohibited by Civil Code, section 309.—Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049.

[d] Non-negotiable notes and mortgages, executed by a corporation, the consideration of which is the promise of the mortgagees to advance money and deliver lumber as needed by the corporation to improve the mortgaged property, are not "bonded indebtedness," in the sense of Constitution, article 12, section 11, forbidding, except on certain conditions, the increase by corporations of their bonded indebtedness.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

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[e] The fact that notes and mortgages were executed by a corporation for indebtedness beyond the subscribed capital stock of the corporation, contrary to the provisions of section 309 of the Civil Code, does not render such notes and mortgages void.—Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. 1049.

[f] Under the facts, held, that the by-law which forbade the directors creating any indebtedness exceeding the amount of the subscribed capital stock was waived.—Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049.

[g] Under Civil Code, section 473, providing that the consolidation of railroad companies thereby authorized shall not relieve such companies from their joint liabilities, the obligations of the constituent companies, though not primary liabilities of the consolidated company, are charges on its property, which such company may properly consider as debts, within section 309, forbidding a corporation to create debts in excess of its subscribed capital stock.—Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

§ 392. Priority of Corporate Creditors Over Stockholders.

[a] Corporate creditors have prior right over stockholders to capital and assets other than surplus profits.—People v. Savings Union, 72 Cal. 204, 13 Pac. 498.

§ 393. Mortgages and Trust Deeds—Authority to Execute.

[a] Authorization to execute mortgage must be in writing (Civ. Code, 2309).—Curtin v. Salmon etc. Co., 141 Cal. 311, 99 Am. St. Rep. 75, 74 Pac. 851.

[b] Mortgages must be made by directors with consent of two-thirds of stockholders.—Curtin v. Salmon etc. Co., 141 Cal. 310, 99 Am. St. Rep. 75, 74 Pac. 851.

§ 394. —— Chattel Mortgages.

[a] Under Civil Code, section 2957, subdivision 1, providing that a mortgage of personal property shall be void as against creditors of the mortgagor, etc., unless accompanied by a good faith affidavit, by all the parties thereto, such affidavit need not be executed by all the members of a corporation or partnership where a corporation or partnership is a party to the mortgage.—Alferitz v. Scott, 130 Cal. 474, 62 Pac. 735.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1182-1203; 12 Cent. Dig., cols. 1923-1943, §§ 1856-1889.

§ 395. —— Form, Requisites and Validity.

[a] A note and mortgage to secure indebtedness of a corporation to certain of its officers on a claim allowed by themselves are voidable where they are executed in pursuance of a resolution of the board of directors, at the instance of such officers, without passing upon the merits of the demand, and under a deception practiced by such officers, who informed them that the debts were fictitious, and that the mortgage, being for the purpose of preventing an attachment of the property of the corporation, would be canceled as soon as money could be raised to pay the other debts.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 22 Pac. 665.

[b] Where the body of a note expressed the promise, and the mortgage expressly purported to be the mortgage of the "S. B. Land, Building & Improvement Company" (its proper name), but the note is signed by the president and secretary of the "S. B. Land & Improvement Company," and the mortgage is signed by the same parties as president and secretary of the "Land & Improvement Company," and both the note and the mortgage were attested by the corporate seal, there can be no doubt as to what corporation executed the mortgage.—Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049.

[c] Where a corporation executed two nonnegotiable notes and two mortgages, the consideration therefor being the promise of the mortgagees to advance money and deliver lumber as needed and ordered by the corporation for the improvement of the mortgaged property, and the money was advanced and the lumber delivered, and there was no fraud on the part of the mortgagees, such indebtedness was not fictitious.—Underhill v. Santa Barbara Land etc. Co., 93 Cal. 300, 28 Pac. 1049.

[d] Under Civil Code, section 305, providing that corporate powers must be exercised by a board of directors "to be elected" from among the holders of the stock of the corporation, a mortgage executed by a corporation's president and secretary, in pursuance of a resolution of its board of directors who were named in the articles of incorporation as its board of directors for the first year is valid. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

[e] Under Statutes of 1897, page 96, chapter 92, providing for attaching the certificate of the secretary to mortgages on the property of a corporation, the evidence of a ratification by the stockholders is not required to be attached to a mortgage of a corporation to give it validity, the ratification being complete on the adoption of a resolution therefor. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1190-1197; 12 Cent. Dig. cols., 1925-1929, §§ 1858-1868. See 12 Cent. Dig., col. 1929, § 1869; cols. 1931-1933, §§ 1872-1875.

§ 396. —— Validating Invalid Mortgage.

[a] Levy of assessment to pay debt secured by void mortgage does not validate mortgage.—Alta S. M. Co. v. Alta P. M. Co., 78 Cal. 633, 21 Pac. 373.

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[b] Civil Code, sections 290, 305, 308, provide that the minimum number of directors of a corporation shall be five. Defendant corporation which was organized with a board of five directors, executed a mortgage at a time when a vacancy in the board reduced it to four. After the vacancy was filled the mortgage was ratified by the whole board. Held, that the subsequent ratification of the mortgage by the full board validated it.—Porter v. Lassen County Land etc. Co., 127 Cal. 261, 59 Pac. 563.

§ 397. —— Parties Bound.

[a] A mortgage given to secure a bond for a corporate debt, naming, as parties of the first part, four persons, "president, directors, and members of" the company, concluding: "In witness whereof the said parties of the first part hereunto set their hands and affix their seals," and signed by the said four persons with their private seals only, held to be the seals and deed of those signing it only, and not that of the corporation.—Richardson v. Scott River etc. Min. Co., 22 Cal. 150.

[b] A mortgage purporting to be a mortgage of a corporation, but signed by its trustees individually, and not in the name of the corporation by its trustees, is not a mortgage by the corporation.—Love v. Sierra Nevada Lake etc. Min. Co., 32 Cal. 639, 91 Am. Dec. 602.

§ 398. —— Lien.

[a] Where a mortgagee of a mining corporation's property was the general manager of the corporation while certain persons performed labor on the mining ground, and such labor was performed with the knowledge of such mortgage, or even at his request, the lien of his mortgage, which was a matter of public record long prior to the time when the services were rendered, was not postponed to the liens acquired by virtue of such labor.—Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

§ 399. —— Discharge.

[a] If certain out of many creditors, secured by one mortgage of corporate property, form a new corporation, and take the debtor's property, covenanting out of the net proceeds to pay certain debts not their own, the mortgage is canceled as to them, and stands only as to those mortgagees who do not join the new corporation.—Tyler v. Yreka Water Co., 14 Cal. 212.

§ 400. —— Foreclosure.

[a] Mortgage held to import that bank mentioned therein was a corporation, so that, in a suit by the bank to foreclose its claim under a mortgage, the recital furnished prima facie evidence of plaintiff's corporate character.—Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

[b] Action to foreclose mortgage held not action in relation to property purchased or located in the county, within Civil Code, section 299, relating to power of corporations.—Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

[c] In a mortgage foreclosure suit against a corporation, evidence examined, and held sufficient to show ratification by the stockholders of the mortgage on which the foreclosure was based.—Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., col. 1893, § 1876.

§ 401. —— Parties to Foreclosure.

[a] Where a mortgage is given to secure the separate debts of several persons as mortgagees it is a several security, and may be enforced by each creditor, as in case of a separate mortgage. But where other parties are interested in the property, the court will require them to be brought in before ordering a sale of foreclosue.—Tyler v. Yreka Water Co., 14 Cal. 212.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 1933-1945, 1949-1967, §§ 1877-1892, 1899-1909. See, also, 10 Cyc. 1178; 1203-1224, 39 C. C. A. 9, note.

§ 402. —— Pleading in Foreclosure Suit.

[a] In an action to foreclose a mortgage made for a corporation by its president without authority, where the complaint states facts showing ratification of the president's act, and the answer simply denies the "due execution" of the mortgage for want of authority, but does not deny the facts stated, showing a ratification, plaintiffs are entitled to judgment without proof of authorty.—Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

[b] In an action to foreclose a mortgage made by a corporation on its brewery plant, a denial in his answer, by its assignee for the benefit of creditors, on information and belief, that certain appliances connected with property described in the mortgage were attached to the realty and were fixtures, was insufficient, since he must be presumed to be in possession and to have knowledge as to such fact.—Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

[c] A mortgage given by the president of a corporation under a resolution insufficient to authorize him to do so was subsequently ratified by the directors. Held, that, in an action to foreclose, it was not necessary to specially plead the ratification.—Boggs v. Lakeport Agricultural Park Assn., 111 Cal. 354, 43 Pac. 1106.

§ 403. —— Attorneys' Fees on Foreclosure.

[a] Where resolution authorizing mortgage did not give authority to have attorneys'

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fees secured by it, none should be allowed on foreclosure.—Schallard v. Eel River etc. Co., 70 Cal. 147, 11 Pac. 590.

[b] In an action to foreclose, a corporation cannot object to the allowance of attorney's fees, provided for in its mortgage, on the ground that the resolution authorizing its execution did not authorize payment of such fees, where its directors had passed a resolution authorizing the execution of a mortgage, "to contain covenants, terms, and provisions set forth in a draft of such mortgage submitted" to them by the proposed mortgagee, which provided for such fees.—Hubbard v. University Bank of Los Angeles, 125 Cal. 684, 58 Pac. 297.

§ 404. —— Injunction Against Foreclosure.

[a] In an action by stockholders to enjoin the foreclosure of a trust deed securing bonds issued by a railroad corporation, and to compel a return of the bonds, it was alleged by plaintiffs that the bonds had been fraudulently transferred without consideration. Held, that, since the facts alleged were available as a defense to the foreclosure action, an injunction could not be granted.—Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646, 44 Pac. 1086.

§ 405. —— Setting Aside Foreclosure Decree.

[a] Defendants, having a contract for land at five dollars an acre, employed agents to organize a corporation to purchase it at twenty-five dollars. It was represented to the subscribers for stock in such corporation that the contract held by defendants was for the purchase of the land at twenty-five dollars an acre, the lowest price at which it could be obtained; and it was concealed from them that one of defendants, a large subscriber to the corporation, was interested in the contract, and that the organizers were defendants' agents. The corporation gave a mortgage for part of the price, which was foreclosed, defendants buying in the land and obtaining a deficiency judgment. Held, in an action to set aside the foreclosure decree and the judgment, and to cancel the notes and mortgage, that the fact that the decree asked for by plaintiff was more disadvantageous to defendants than to the actual organizers of the corporation, who had received cash commissions for their services, did not affect plaintiff's right to such relief. Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

E. TORTS.

NATURE AND GROUNDS OF CORPORATE LIABILITY, § 406.
CONVERSION OF STOCK, § 407.
WILLFUL OR MALICIOUS ACT, § 408.
—— LIBEL, § 409.
LIABILITY FOR EXEMPLARY DAMAGES, § 410.

§ 406. Nature and Grounds of Corporate Liability.

[a] Corporations are liable for torts of their agents and employees within the scope of their authority.—Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; (1873) Maynard v. Fireman's Fund Ins. Co., 47 Cal. 207.

[b] Corporation is not liable for trespass committed by stockholders before incorporation.—Berry v. San Francisco etc. R. Co. 50 Cal. 435.

FOR AUTHORITIES FROM OTHER STATES:

Liability of corporations for torts: 5 Am. Dec. 42, 13 Am. Dec. 596, notes.

Defense of ultra vires is not available in favor of action for negligence: 52 Am. Rep. 358, note. See, also, 10 Cyc. 1203; 12 Cent. Dig., cols. 1949-1951, § 1899.

§ 407. Conversion of Stock.

[a] An order of the president of a corporation, drawn upon himself as president, to transfer to a person a certain number of shares of stock of the corporation, he holding all its stock as trustee, followed by the refusal of himself and the secretary to deliver the stock, does not amount to a conversion of the stock by the corporation.—Morrison v. Gold Mountain Gold Min. Co., 52 Cal. 306.

[b] The neglect of officers of a corporation to require indorsement of a certificate before transferring the stock is no evidence of conversion by the corporation.—Tafft v. Presidio etc. R. Co., 22 Pac. 485.

§ 408. Willful or Malicious Act.

[a] The directors are the chosen representatives of the corporation, and constitute, for all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, even though such injury necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case.—Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

FOR AUTHORITIES FROM OTHER STATES:

Liability of corporations to actions for malicious prosecution; 34 Am. Rep. 495, note. See, also, 10 Cyc. 1210-1218; 12 Cent. Dig., cols. 1959-1961, § 1904.

§ 409. —— Libel.

[a] A corporation aggregate has the capacity to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages by the person of and concerning whom the words are composed and published.—Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

§ 410. Liability for Exemplary Damages.

[a] Unless wanton acts of agents and servants are directed or ratified by corporation, exemplary damages cannot be awarded.—

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Trabing v. California etc. Co., 121 Cal. 143, 59 Pac. 144.

FOR AUTHORITIES FROM OTHER STATES:

Liability of corporation for exemplary damages: 59 Am. St. Rep. 589, note. See, also, 12 Cent. Dig., cols. 1966, 1967, § 1909.

F. CIVIL ACTIONS BY OR AGAINST.

CAPACITY TO SUE AND BE SUED—EXISTENCE OF CORPORATION, § 411.
—— DE FACTO CORPORATIONS, § 412.
—— FILING ARTICLES AS CONDITIONS PRECEDENT, § 413.
RIGHT OF ACTION—ON CONTRACT, § 414.
—— FOR CONVERSION, § 415.
JURISDICTION AND VENUE, § 416.
—— TRANSITORY ACTIONS, § 417.
—— CHANGE OF VENUE, § 418.
—— WAIVER OF OBJECTIONS TO VENUE, § 419.
USE OF CORPORATE NAME, § 420.
—— EFFECT OF CHANGE OF NAME, § 421.
PARTIES, § 422.
PROCESS—SERVICE, § 423.
—— PROOF OF SERVICE, § 424.
APPEARANCE BY ATTORNEY, § 425.
RECEIVERS—JURISDICTION TO APPOINT, § 426.
PLEADING, § 427.
—— ALLEGATION OF CORPORATE EXISTENCE OR CAPACITY TO SUE, § 428.
—— DENIAL OF EXISTENCE OR CAPACITY TO SUE, § 429.
—— VERIFICATION, § 430.
EVIDENCE, § 431.
JUDGMENT, § 432.
PROPERTY SUBJECT TO EXECUTION, § 433.
REDEMPTION FROM EXECUTION SALE, § 434.
APPEAL AND ERROR, § 435.

See, also, references under Action.

Actions by or against unincorporated associations. See Associations, §§ 14-16.

§ 411. Capacity to Sue and be Sued—Existence of Corporation.

Foreign corporations. See post, § 488.

[a] Damages arising from the act of a director named in the articles of incorporation, whereby the formation of the corporation was prevented, cannot be recovered in an action by the alleged corporation, as it is not in esse.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1331-1335; 12 Cent. Dig., cols. 1969-1973, §§ 1910-1919.

§ 412. —— De Facto Corporations.

[a] In an action by a de facto corporation, claiming in good faith to be a corporation under the laws of this state, and doing business as such, held, that the question of the due incorporation of the association could not be inquired into.—Bakersfield Town Hall Assn. v. Chester, 55 Cal. 98.

[b] The trustees of a corporation de facto can sue in its corporate name until its existence is questioned by a direct proceeding on information of the attorney general.—First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. 60.

[c] A de facto corporation may sue and assert its corporate character as against the world, except in a direct proceeding by the attorney general to test its right to its franchise.—People's Ditch Co. v. '76 Land etc. Co., 44 Pac. 176.

§ 413. —— Filing Articles as Conditions Precedent.

[a] The failure of a corporation to file a copy of its articles of incorporation in the office of the clerk of the county in which it owns property, as required by section 299 of the Civil Code, does not prevent the corporation from defending an action brought against it to recover for work and labor alleged to have been performed on such property.—Weeks v. Garibaldi S. G. M. Co., 73 Cal. 599, 15 Pac. 302.

[b] Civil Code, section 299, which prohibits a corporation from maintaining or defending any action relating to its property, or the rents, issues, or profits thereof, unless it shall have previously filed a certified copy of its articles of incorporation in the county where such property is situated, does not apply to an action against a corporation for work and labor done at its request; and hence in such an action it is error to render judgment for plaintiff on the pleadings simply for the reason that the answer fails to allege that defendant has filed a copy of its articles of incorporation under the above section.—Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302.

[c] An objection that defendant corporation is not entitled to defend the suit because it has not complied with Civil Code, section 299, requiring that every corporation shall file a copy of its articles of incorporation in every county where it holds property, and on failing to do so it shall not maintain or defend any proceeding in relation to such property, will be deemed waived unless taken during the trial.—Lobory v. Los Angeles Orphan Asylum, 97 Cal. 270, 32 Pac. 231.

[d] Where the properly certified copy of the articles of incorporation is filed in the county where the property affected by a suit in favor of the corporation is situated, though such filing be after the commencement of the suit, but before the filing of a plea in abatement of the suit upon the ground that it was not filed, such plea thereafter interposed is unavailing to prevent a further maintenance of the action.—California Sav. etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525.

[e] Section 299 of the Civil Code does not apply to action to foreclose mortgage.—Savings etc. Soc. v. McKoon, 120 Cal. 179, 180, 52 Pac. 305.

[f] Under Civil Code, section 299, and the statute requiring a corporation to file its certificate of incorporation in the county in which its principal place of business is locat-

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ed, a corporation held entitled to maintain an action to quiet title to certain real estate.—San Diego Gas Co. v. Frame (Cal. Sup.), 82 Pac. 1049.

§ 414. Right of Action—On Contract.

[a] An action on an implied promise may be maintained against a corporation aggregate. Hunt v. City of San Francisco, 11 Cal. 250.

[b] Agreement of corporators to divide capital stock of a company to be incorporated may be enforced against the corporation.—Chater v. San Francisco etc. Co., 19 Cal. 219.

[c] If the president of a corporation signs, as president, a paper stating that the person named in it has a credit for a given sum for work done for the corporation the instrument itself does not constitute a cause of action against the corporation or against the persons composing the corporation.—Curtiss v. Murry, 26 Cal. 633.

§ 415. —— For Conversion.

[a] A person who has not the legal title to the stock of a corporaton cannot maintain an action against the corporation for converting it.—Morrison v. Gold Mt. G. M. Co., 52 Cal. 306.

§ 416. Jurisdiction and Venue.

[a] In the absence of any law defining the residence of a corporation, it is not necessarily where its principal place of business is, and an action against the corporation to condemn land should be brought in the county where the land lies.—California Southern R. Co. v. Southern Pac. R. Co., 65 Cal. 394, 409, 4 Pac. 344, 388; Thomas v. Placerville Gold Quartz Min. Co., 65 Cal. 600, 4 Pac. 641.

[b] When the affidavit on which an application for change of venue is based states that the principal place of business of defendant corporation is San Francisco, such place is its "residence," as the term is used in Code of Civil Procedure, section 395, which fixes the "residence" of defendants in certain cases as the place where the cause must be tried subject to change of venue.—Cohn v. Central Pac. R. Co., 71 Cal. 488, 12 Pac. 498.

[c] Under section 392 of the Code of Civil Procedure, an action against a corporation to have a deed absolute on its face declared to be a mortgage, and to redeem the same, is an action to determine a right or interest in real estate, and is properly brought in the county in which the real estate is situated.—Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 Pac. 686,

[d] In an action against a corporation to redeem a mortgage the liability or obligation of the corporation to grant a redemption will be deemed to have arisen, within the meaning of section 16 of article 12 of the constitution, in the county in which the mortgaged premises are situated, when the only allegation in the pleadings as to the residence of the mortgagors or the place where the mortgage was made is a recital in the mortgage that the mortgagors were residents of that county, and a certificate of a notary of that county annexed to the mortgage that the same was acknowledged before him.—Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 Pac. 686.

[e] Constitution, article 12, section 16, provides that corporations may be sued in the county where the contract is made or to be performed, or where the liability arises or breach occurs, or where its principal place of business is, subject to the power of the court to change the place of trial as in other cases. Article 6, section 5, provides that the superior courts shall have jurisdiction in all cases in which the demand exceeds three hundred dollars, and their process shall extend to all parts of the state. Held, in an action against a national bank, commenced in a county other than those mentioned in section 16, to recover six thousand dollars on a contract for building it a house in the county of its principal place of business, that the court had jurisdiction of the person of defendant as well as the subject matter of the action.—Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157.

[f] The principal place of business of a corporation is its residence, within the meaning of that term as used in section 395 of the Code of Civil Procedure fixing the place of trial of actions.—Cohn v. Central Pacific R. R. Co., 71 Cal. 488, 12 Pac. 498.

[g] In an action against a corporation for breach of contract to convey land on full payment of the price, it appeared that defendant's principal place of business was in S. county, but that it had an office in K. county, where payments were to be made. Held, that the breach occurred in K. county, within Constitution, article 12, section 16, allowing a corporation to be sued in the county where the breach occurs.—Ivey v. Kern County Land Co., 115 Cal. 196, 46 Pac. 926.

[h] Section 16 of article 12 of the constitution, which provides for the venue of actions against corporations, and permits the action, at the election of the plaintiff, to be prosecuted "in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases," is self-executing and applies to actions of tort, as well as those founded in contract. Though it is in the nature of a code provision for procedure, it cannot be repealed or limited in its operation by statute, and any statute inconsistent therewith must give way.—Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856.

FOR AUTHORITIES FROM OTHER STATES:

6 C. C. A. 174, note. See, also, 12 Cent. Dig., cols. 1981-1983, §§ 1933, 1934.

§ 417. —— Transitory Actions.

[a] Constitution, article 12, section 16, providing that a corporation may be sued in the county where the contract is made, or is to

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be performed, or where the liability arises, or the breach occurs, or in the county where its principal place of business is, applies to actions in tort, as well as those on contract.—Lewis v. South Pac. Coast R. Co., 66 Cal. 209, 5 Pac. 79.

[b] A corporation may be sued in county where its breach of obligation occurred or where it has its principal place of business.—Chase v. South etc. R. R., 83 Cal. 473, 23 Pac. 532.

[c] An action by stockholders of a corporation against other stockholders, the directors, and a mortgagee, to set aside the mortgage as fraudulently given, by the directors for too large an amount, and to determine the amount of indebtedness to the mortgagee, is one which the mortgagee may have tried in the county of his residence, it being a personal action and he being the only defendant against whom relief is sought.—Bailey v. Cox, 102 Cal. 333, 36 Pac. 650.

[d] An action against a corporation for personal injuries may be begun in the county where the injuries were received, though defendant's principal place of business is in another county.—Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413.

[e] An action for breach of a contract of a corporation to convey land situated in a county other than that of its principal place of business is triable at the election of the plaintiff in the county where the contract was made or was to be performed and where it appears that the contract was made and was to be performed in the county where the land is situated, an action brought therein cannot be removed for trial, upon motion of the defendant, to the county in which its principal place of business is situated.—Ivey v. Kern County Land Co., 115 Cal. 196, 46 Pac. 926.

FOR AUTHORITIES FROM OTHER STATES:

Residence of corporations for jurisdictional purposes: 33 Am. Dec. 399, note. See, also, Cent. Dig., cols. 1984-1993, §§ 1935-1946.

§ 418. —— Change of Venue.

[a] Corporation cannot claim change of venue of action against it to its principal place of business as its residence.—California Southern R. Co. v. Southern Pac. Ry. Co., 65 Cal. 394, 409, 601, 4 Pac. 344.

[b] Under Constitution, article 12, section 16, a railroad company, the principal place of business of which is in San Francisco, when sued in Los Angeles county for damages for breach of a contract made in San Francisco, to be performed out of the state, and the breach of which occurred outside of the state, is entitled to a change of venue to San Francisco county.—Cohn v. Central Pac. R. Co., 71 Cal. 488, 12 Pac. 498.

[c] Section 16 of article 12 of the constitution permits corporation to be sued in certain counties other than that of its residence at option of the plaintiff and to deny corporation absolute right to change venue when sued in such other counties. Authorities reviewed.—Fresno Nat. Bank v. Superior Court, 82 Cal. 495-498, 24 Pac. 157.

[d] Code of Civil Procedure, section 305, giving a defendant a right to have the action tried in the county where he resides, gives a corporation no absolute right to a change of venue to the county where its principal office is situated, when sued in one of the counties named in Constitution, article 12, section 16, providing that corporations may be sued in the county where the contract was made, or the liability arose, or the breach occurred, or where its principal place of business is situated.—Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395; Burness v. W. R. Strong Co., 36 Pac. 396.

[e] The place of residence of a corporation is in the county where it has its principal place of business; but a corporation defendant cannot insist upon a change of the place of trial to the place of its residence, where it has been sued in the county where its liability arose.—Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395.

[f] In an action against a corporation and a third person, a motion by the latter for a change of venue to the county of his residence must be decided before plaintiff can be allowed to dismiss the action as to such third person.—Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209.

[g] In an action brought in the city and county of San Francisco, between corporations, each of which has its principal place of business therein, to recover damages for injury to real property situated in Kern county, the defendant is not entitled to demand, as matter of right, to have the cause tried in that county, under section 392 of the Code of Civil Procedure, without any showing of grounds "to change the place of trial, as in other cases," as contemplated by section 16 of article 12 of the Constitution. Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856.

§ 419. —— Waiver of Objections to Venue.

[a] Constitution, article 12, section 16, providing that a corporation may be sued in the county where the contract is made, or where the breach occurs, etc., is merely permissive; and by joining another defendant, whose residence is in a different county, plaintiff waives the benefit of such provision.—Griffin & Skelley Co. v. Magnolia & Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 Pac. 495.

[b] The plaintiff is entitled, as of right, to the privilege given by section 16 of article 12 of the constitution to sue a corporation in the county where the contract was made only when the corporation is the sole defendant in the action; and, if he chooses to join as defendants in the action others whose residence is in a different county, he waives the benefit of the provision, and cannot deprive them of a right held by them to have the action tried in the county of their residence.—Griffin & Skelley Co. v. Magnolia &

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Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 Pac. 495.

[c] The right given by Constitution, article 12, section 16, to sue a corporation in the county of its principal place of business, or where the liability arose, is waived by the joinder as defendant of a third person, who resides in another county; the latter having, under Code of Civil Procedure, section 395, a right to have the action tried in the county of his residence.—Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209.

[d] Where a plaintiff commenced an action against a corporation for damages resulting from a breach of contract, in the county where the contract was made, and joined as a codefendant a stockholder in the corporation, to recover his proportionate amount of the corporate liability, such stockholder being a resident of another county in which the corporation has its principal place of business, upon an affidavit showing those facts, the defendants are entitled to a change of the place of the trial to the latter county.—Griffin & Skelley Co. v. Magnolia & Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 Pac. 495.

§ 420. Use of Corporate Name.

[a] Corporation is recognized in law only by its corporate name, and must sue and be sued by its corporate name.—Curtiss v. Murry, 26 Cal. 633.

[b] If several persons associate themselves together and form corporation they cannot be sued as individuals for the debts of the corporation.—Curtiss v. Murry, 26 Cal. 633.

[c] An action can be maintained against a company only in the name under which it transacts business.—King v. Randlett, 33 Cal. 318.

[d] Name of an insurance company does not raise a presumption of incorporation.—Briggs v. McCullough, 36 Cal. 542.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 1996-2004, §§ 1953-1957.

§ 421. Effect of Change of Name.

[a] Where a corporation changes its name after making a contract, a suit on the contract should be brought by or against the corporation by its new name.—Cumberland College v. Ish, 22 Cal. 641.

§ 422. Parties.

[a] Trustees are necessary parties to a bill in equity against a corporation.—French Bank Case, 53 Cal. 495, 550; Reed v. Goldstein, 53 Cal. 296.

[b] Where an action to foreclose a mechanic's lien was brought against certain persons who were alleged to compose a firm, and they answered, setting up the fact of their incorporation and alleging title to the property, a judgment against the corporation was erroneous, inasmuch as it had never been made a party to the action.—Rousseau v. Hall, 55 Cal. 164.

[c] In an action against a corporation to compel the execution and delivery of a certificate of certain shares of stock which stand on the books of the company in the name of another, from whom plaintiff claims title under a mortgage and sheriff's deed in foreclosure proceedings, the mortgagor is not a necessary party.—Tregear v. Etiwanda Water Co., 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 2004-2013, §§ 1958-1970.

§ 423. Process—Service.

[a] Service on party in possession of property, who does not appear to be one of the officers named in the Practice Act as an officer on whom process may be served, will not entitle the plaintiff to a judgment by default.—Aiken v. Quartz Rock Co., 6 Cal. 186.

[b] Under Practice Act, section 29, providing that, in a suit against a corporation, the summons shall be served on the president, secretary, cashier, or managing agent, service "on the party in possession of the property," who does not appear to be one of the officers named, will not entitle plaintiff to a judgment by default.—Aiken v. Quartz Rock Mariposa Gold Min. Co., 6 Cal. 186.

[c] Summons must be served on one of officers or agents named in Practice Act in suit against corporation.—Aiken v. Quartz Rock Co., 6 Cal. 186.

[d] A service on "J. S., one of the proprietors," in an action against a corporation is insufficient; it not appearing that J. S. was one of the officers specified in Practice Act, section 29.—O'Brien v. Shaw's Flat etc. Canal Co., 10 Cal. 343.

[e] Under Practice Act, section 125, subdivision 5, a service of process on the teller of a bank is not sufficient.—Kennedy v. Hibernian Savings etc. Soc., 38 Cal. 151.

[f] Service upon president of corporation de jure, who has not resigned, is valid, though removed from county and not acting.—Eel River etc. Co. v. Struve, 41 Cal. 616.

[g] Where the officers of the company concealed themselves to prevent service on them, service on one who has repeatedly appeared as an attorney of the company is sufficient.—Golden Gate Hydraulic Const. Min. Co. v. Superior Court of Yuba, 65 Cal. 187, 3 Pac. 628.

FOR AUTHORITIES FROM OTHER STATES:

Service of process: 66 Am. Dec. 119, note. See, also, 12 Cent. Dig., cols. 2013-2047, §§ 1971-2000.

§ 424. —— Proof of Service.

[a] A sheriff's return on the summons against a corporation that he served the

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same on the president and secretary of the company, is prima facie evidence that the persons named in the return were such officers.—Rowe v. Table Mountain Water Co., 10 Cal. 441.

[b] An affidavit of service of summons, reciting that the summons was served "personally" on the managing agent of the "above-named defendant" corporation, instead of on the corporation, sufficiently shows service on the corporation; the agent not being a party defendant.—Keener v. Eagle Lake Land etc. Co., 110 Cal. 627, 43 Pac. 14.

§ 425. Appearance by Attorney.

[a] When a corporation had not done business for some time, and one of the stockholders was dead, attorneys employed by the stockholder, acting for the owners of a majority of the stock, were authorized to sue in the name of the corporation.—San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1347. See, also, 12 Cent. Dig., cols. 2048-2052, §§ 2001-2005.

§ 426. Receivers—Jurisdiction to Appoint.

[a] Ordinarily equity courts have no jurisdiction to appoint a receiver of the property of a corporation in aid of a suit prosecuted against it by a private person. Such power can only be derived from statute. Code, section 564, does not confer it.—La Societe Francaise v. District Court, 53 Cal. 495.

[b] A court has no power, pending an action against a corporation, to displace the corporate management, and put in its place a receiver, in the absence of a statute giving it such power.—Fischer v. Superior Court of City and County of San Francisco, 110 Cal. 129, 42 Pac. 561, distinguishing Fisher v. Superior Court of Tuolumne County (1893) 98 Cal. 67, 32 Pac. 875.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., col. 2060, §§ 2015, 2016.

§ 427. Pleading.

[a] Defendant executed a note to a corporation, containing an agreement that "no change in the name, character, or management" of the corporation should affect the liability of the maker. The corporation changed its name before the action, which was brought in its new name, and the complaint stated this fact, and that the note was plaintiff's property. Held, that a good cause of action was stated, and that a demurrer could not be sustained.—Cumberland College v. Ish, 22 Cal. 641.

[b] Where a corporation, sued by a wrong name, answers by its correct name the complaint may be amended.—Mahon v. San Rafael Turnpike Road Co., 49 Cal. 270.

[c] Complaint against a corporation must aver its corporate existence in each count.—Loup v. California So. Ry., 63 Cal. 97.

[d] In suit on contract made by president his authority to make it need not be alleged. Malone v. Crescent etc. Co., 77 Cal. 42, 18 Pac. 858.

[e] Allegation that plaintiff was employed by corporation through its secretary is sufficient though it would be better practice to omit mention of secretary.—Sullivan v. Grass Valley etc. Co., 77 Cal. 421, 19 Pac. 757.

[f] In an action by a corporation against a former stockholder to recover money paid him by its president for his stock on an ultra vires purchase thereof for plaintiff, the complaint does not state a cause of action if it fails to show that plaintiff has returned or offered to return the stock.—Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444.

[g] Under an allegation that a contract was made by defendant, it may be shown that it was made by ratification of the unauthorized acts of its officers.—Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1347-1363; 12 Cent. Dig., cols. 2061-2120, §§ 2017-2084.

§ 428. —— Allegation of Corporate Existence or Capacity to Sue.

[a] The allegation that plaintiff is a corporation under the laws of the state is sufficient to establish the legal capacity to sue.—California State Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511.

[b] When corporation is sued by its corporate name, its corporate existence is thereby admitted.—People v. Stanford, 77 Cal. 364, 18 Pac. 85, 19 Pac. 693.

[c] Corporation plaintiff need not allege that it has filed articles as required by section 299, Civil Code.—Ontario State Bank v. Tibbits, 80 Cal. 69, 22 Pac. 66.

[d] Averment of defendant's corporate existence is necessary in every count of complaint against corporation.—People v. Central etc. R. R. Co., 83 Cal. 398, 399, 23 Pac. 303, 310.

[e] An averment of the existence of a de facto corporation is as issuable as an averment of the existence of a corporation de jure.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 386.

[f] A mining company made defendant in the action under which plaintiff derives no right need not be alleged in the complaint to be a corporation; and where such company appears and answers by that name, it will not be allowed to say that it was not properly named in the complaint, or that the complaint did not show how it came to bear that name. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

[g] An allegation in the answer that defendant as a corporation was duly, regularly, and legally formed, and that it has continued to act as such, is a mere averment of a legal

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conclusion, and raises no issue.—People v. Lowden, 8 Pac. 66.

FOR AUTHORITIES FROM OTHER STATES:

Necessity of averring corporate existence: 35 Am. St. Rep. 289; 29 Am. Dec. 375, notes. See, also, 10 Cyc. 1347-1363; 12 Cent. Dig., cols. 2084-2118, §§ 2052-2081.

§ 429. —— Denial of Existence or Capacity to Sue.

[a] An objection that it does not appear, from the complaint, that plaintiff was ever duly created a corporation, goes to its legal capacity to sue, and not to the sufficiency of the facts stated to constitute a cause of action.—Swamp etc. Dist. No. 110 v. Feck, 60 Cal. 403.

[b] Failure of the complaint to show that plaintiff suing as a corporation had the legal capacity to sue can only be taken advantage of by answer.—Swamp etc. Dist. No. 110 v. Feck, 60 Cal. 403.

[c] Failure of corporation to file articles in county where property is situated must be specially pleaded.—Southern Pacific R. R. Co. v. Purcell, 77 Cal. 72, 18 Pac. 886.

[d] Denial of plaintiff's corporate existence and capacity to sue does not raise issue of failure to file corporate articles.—Ontario St. Bank v. Tibbits, 80 Cal. 70, 22 Pac. 66.

[e] Failure of corporation plaintiff to file articles under section 229, Civil Code, can be set up only by special plea.—South Yuba etc. Co. v. Rosa, 80 Cal. 336, 22 Pac. 222.

[f] Failure of corporation to file its articles as required by section 299, Civil Code, is matter of abatement.—Ontario St. Bank v. Tibbits, 80 Cal. 70, 22 Pac. 66.

[g] The allegations in the answer that "plaintiff never was a corporation duly or otherwise organized under the laws of this state, nor a copartnership, nor an individual," do not raise the issue that the corporation had not filed its articles of incorporation in the county, as required by Civil Code, section 299.—Ontario State Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66.

[h] Question of want of corporate capacity to sue can be raised only by a plea in abatement.—California Saving etc. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525.

§ 430. —— Verification.

[a] Verification of a petition by three persons, one of whom swears that he is vice-president of the corporation named as one of the petitioners, sufficiently shows a verification by an officer of the corporation, as required by section 446 of the Code of Civil Procedure.—Matter of Close, 106 Cal. 574, 39 Pac. 1067.

[b] A corporation cannot deny for want of sufficient information and belief, if the matters alleged are presumptively within the knowledge of any of its officers, though the officer verifying the answer is himself without any information or belief on the subject.—Sloane v. Southern Cal. Ry. Co., 11 Cal. 668, 44 Pac. 320.

[c] A complaint verified by the manager of a corporation plaintiff held verified by an officer of the corporation.—Stockton Lumber Co. v. Blodget (Cal. App.), 84 Pac. 441.

§ 431. Evidence.

[a] It is presumed that purchase by a corporation is necessary for its operations.—Shaver v. Bear River etc. Co., 10 Cal. 396.

[b] In an action brought against a corporation by the payee of a note executed by its officers in the name of the corporation, for a debt due the payee from a third person, and having no relation to the business of the corporation, evidence that the note was not given for the debt of the corporation is admissible under an answer denying the execution of the note.—Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75.

[c] Testimony tending to show that company is corporation de facto dispenses with strict proof of the corporate character, and precludes the party offering it from afterward disputing the company's right to act as a corporation.—Rondell v. Fay, 32 Cal. 354.

[d] In an action against a private corporation on a contract made in its behalf by one purporting to act as its agent, parol evidence is admissible to show such person's authority to act as its agent, unless it is compelled by its charter to appoint its agents by deed or resolution.—Carey v. Philadelphia etc. Petroleum Co., 33 Cal. 694.

[e] If an action of trespass is brought against a corporation for damages alleged to have been done by the corporation to the plaintiff's land, the defendant may introduce in evidence its articles of incorporation for the purpose of showing that it was not incorporated till after the alleged trespasses, or a part of them, were committed.—Berry v. S. F. & N. P. R. R. Co., 50 Cal. 435.

[f] When the common seal of a corporation is affixed to an instrument in writing, purporting to be executed by it, and the signatures of the proper officers of the corporation are affixed to it and proved, courts will presume that the officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority.—Southern Cal. Col. Assn. v. Bustamente, 52 Cal. 193.

[g] Action of trustees of a corporation annulling a previous illegal ratification is evidence of positive repudiation.—Chamberlain v. Pacific Wool G. Co., 54 Cal. 103.

[h] Abridgment by charter or nature of business of power presumed to exist must be shown affirmatively by party claiming that contract is ultra vires.—Evans v. Bailey, 66 Cal. 112; People v. La Rue, 67 Cal. 526, 4 Pac. 1089.

[i] In an action by a corporation brought in the county in which its original articles of

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incorporation are filed, a copy certified by the Secretary of State of the certified copy of such articles on file in his office is admissible in evidence to prove the organization of the corporation.—Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22; Fresno etc. Irr. Co. v. Warner, 72 Cal. 379.

[j] Corporate seal may be shown to have been affixed to deed without proper authority.—Vaca Valley etc. R. R. v. Mansfield, 84 Cal. 566, 24 Pac. 145.

[k] A promoter of the corporation, being an active party to the litigation, his statements and admissions pertaining to the subject matter of the action wherever and whenever made, are competent evidence against him.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

[l] Records of a corporation showing authority from the board of directors given to its president and secretary to execute a note, and that the one who signed the note as secretary and attached to it the corporate seal, authenticated the record of the meeting of the directors conferring the authority, and the records of the other meetings for a considerable time prior and subsequent to the execution of the note, are sufficient to sustain a finding that he was secretary of the corporation when the note was executed, and was duly authorized as such to execute it.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

[m] It is presumed that the board of directors of a corporation consists of at least five, since the code requires at least that number. —Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

[n] Where in a suit on a note of a corporation defendant claimed that it was not properly executed, because one of the directors was not notified and was not present at the meeting at which it was authorized, but the resolution of the board of directors showing the nature of the transaction in which the note was given, authorizing the same, was in evidence, and recited the absence of the director, in the absence of evidence to the contrary it would be presumed that proper notice was given.—Mills v. Boyle Min. Co., 132 Cal. 95, 64 Pac. 122.

[o] In a suit on the note of a corporation, defendant claimed the same not to have been properly executed, in that at the meeting at which it was authorized one of the directors was not present, and was not notified thereof. It appeared from the record of the meeting that the director was absent, and one of the directors testified that on the day of the meeting the payee had agreed to loan a sum to the defendant, and that the meeting took place thereafter. Another witness testified that no opportunity was given the payee to notify any director, but it appeared that the absent director had a desk in the room adjoining where the meeting was held, and the parties had been engaged in negotiating the matter for four or five days. Held, that the evidence was not sufficient to overcome the presumption that the absent director was notified; there being no testimony on the part of the president or the absent director.—Mills v. Boyle Min. Co., 132 Cal. 95, 64 Pac. 122.

[p] The fact that the superintendent who purchased the cattle from plaintiff gave his individual note to the plaintiff for the balance of the purchase price is merely a circumstance in favor of the corporation defendant, but is not conclusive of the issue whether the corporation defendant made the purchase.—Lake Shore Cattle Co. v. Modoc Land etc. Co., 130 Cal. 669, 63 Pac. 72.

[q] Where the contract sued on describes plaintiff as a corporation, no further proof of its incorporation is necessary.—Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. 693.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 2121-2127, §§ 2085-2093.

§ 432. Judgment.

[a] Where an action was commenced in a justice's court against the "Independent Company" and the return showed that service was made on R., a member of the Independent Company, and judgment was entered by default against the "Independent Tunnel Company," held, that the court acquired no jurisdiction over the Independent Tunnel Company, although the summons was addressed in that name; and the judgment was void.—King v. Randlett, 33 Cal. 318.

[b] If a corporation is sued by a wrong name, but answers by its true name, and judgment is rendered against it by its true name, the judgment is not void, and the supreme court, on appeal, in affirming the judgment, will direct the court below to substitute the true name in the complaint.—Mahon v. San Rafael Turnpike Road Co., 49 Cal. 269.

[c] A judgment against a corporation establishes its liability conclusively until reversed in a direct proceeding, and concludes the stockholders in an action against them in the nature of a creditor's bill to compel them to pay in the unpaid portion of their subscriptions to the capital stock toward the satisfaction of the judgment obtained, and it is not necessary that the complaint in such action should allege the indebtedness upon which the judgment was recovered.—Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

[d] The fact that a certain corporation is named as defendant in a complaint, while judgment is rendered against another not named, does not render the judgment irregular, where the latter appeared and filed an answer which, if true, showed the identity of the two.—Haynes v. Backman, 31 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

30 L. R. A. 240, note. See, also, 12 Cent. Dig., cols. 2129-2135, §§ 2099-2113.

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§ 433. Property Subject to Execution.

[a] Stock sold for assessment and purchased by corporation is held subject to control by stockholders, and cannot be sold under execution against corporation.—Robinson v. Spaulding Gold & Silver Min. Co., 72 Cal. 34, 13 Pac. 65.

FOR AUTHORITIES FROM OTHER STATES:

30 L. R. A. 103, note. See, also, 12 Cent. Dig., cols. 2136-2146, §§ 2114-2130.

§ 434. Redemption from Execution Sale.

[a] Where the property of a corporation has been sold under execution, and no steps are taken by the corporate authorities to redeem the property within the period limited by law, a stockholder may interpose, and redeem the property for the corporation, and hold it liable for the money advanced for that purpose. By so doing, he becomes the equitable assignee of the certificate of sale, and is subrogated to all the rights of the original purchaser at the sheriff's sale.—Wright v. Oroville Gold etc. Min. Co., 40 Cal. 20.

§ 435. Appeal and Error.

[a] Upon the motion to vacate a judgment by default against a corporation, upon the ground that there was no service of the summons upon the corporation, and that the one to whom the summons was delivered was not the president or other officer of the corporation, the question whether he was such is a question of fact for the court below, and a finding that he was a president of the corporation at the time of the service will be sustained when the evidence upon the issue is substantially conflicting and not so one-sided as to show an abuse of discretion in making the finding.—J. L. Mott Iron Works v. West Coast Plumbing Supply Co., 113 Cal. 341, 45 Pac. 683.

[b] Where Code of Civil Procedure, section 462, gives plaintiff in an action on a note the right to controvert by evidence any new matter set up in the answer, except as to the genuineness and due execution of the note, it is harmless error to allow plaintiff to file an affidavit denying the genuineness and due execution of a corporate note set up in the answer, after the time allowed by statute, where the note on its face does not purport to have been made by the corporation, as an admission of its due execution would not be an admission that it was the company's note.—Myers v. Sierra Valley Stock etc. Assn., 122 Cal. 669, 55 Pac. 689.

[c] Where defendant's corporate character was alleged and not denied, it was error to find that defendant was not a corporation, in view of Code of Civil Procedure, section 462, declaring that uncontroverted material allegations in the complaint must be taken as true, and section 590, declaring that issues of fact arise only on allegations in the complaint controverted by the answer.—Moynihan v. Drobaz, 124 Cal. 212, 71 Am. St. Rep. 46, 56 Pac. 1026.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 736; 12 Cent. Dig., cols. 2147-2150, §§ 2131-2137.

VIII. INSOLVENCY AND RECEIVERS.

APPLICATION OF GENERAL INSOLVENCY LAWS, § 436.
PETITION IN INSOLVENCY—PLACE OF FILING, § 437.
JURISDICTION OF SUPERIOR COURT—WHEN ACQUIRED, § 438.
PREFERENCES TO CREDITORS, § 439.
PREFERENCES TO OFFICERS, § 440.
TRANSFER TO ANOTHER CORPORATION HAVING SAME OFFICERS OR STOCKHOLDERS, § 441.
REMEDIES OF CREDITORS, § 442.
ASSIGNMENT FOR BENEFIT OF CREDITORS, § 443.
—— RIGHT OF ASSIGNEE TO ENFORCE SUBSCRIPTION, § 444.
APPOINTMENT OR RECEIVER, § 445.
COLLECTION OF ASSETS, § 446.
ENFORCEMENT OF UNPAID SUBSCRIPTION, § 447.
RANK AND PRIORITY OF CLAIMS, § 448.
ACTIONS AGAINST INSOLVENT CORPORATIONS AND RECEIVERS, § 449.
—— ATTACHMENT, § 450.

Foreign corporations. See post, § 493.

§ 436. Application of General Insolvency Laws.

[a] A petition for a writ of prohibition to the superior court to restrain a proceeding in insolvency against a corporation which does not set forth the class of corporations to which the insolvency corporation belongs, or the nature of the business in which it is engaged, is defective in not showing that such a corporation is within the scope of the bankruptcy act.—R. H. Herron Co. v. Superior Court, 136 Cal. 297, 89 Am. St. Rep. 124, 68 Pac. 814.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 2162-2164, § 2153.

§ 437. Petition in Insolvency—Place of Filing.

[a] Statutes of 1880, chapter 87, section 8, requires that a petition in insolvency shall be filed "in the superior court of the county, or city and county, in which the debtor resides or has his place of business." Held, that a corporation whose residence was in the county of S., but whose mill was located in the county of H., where all his operations were carried on, where it contracted its liabilities, and where its creditors lived, had its place of business in the county of H. for the purposes of the above statute.—Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196.

§ 438. Jurisdiction of Superior Court—When Acquired.

[a] The superior court acquires jurisdiction over the estate of an insolvent corporation,

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when a petition in insolvency has been filed by its creditors, setting forth facts constituting the insolvency of the corporation, and praying that it be adjudged an insolvent debtor.—State Investment etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

§ 439. Preferences to Creditors.

[a] Where a creditor of an insolvent corporation obtained collaterals to secure its debt in good faith and in due course of business, it cannot be compelled to surrender such securities for the common benefit of all corporate creditors, nor can it share in other assets of the corporation until such securities have been exhausted.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

FOR AUTHORITIES FROM OTHER STATES:

Preferences by insolvent corporations: 45 Am. St. Rep. 826, note; 22 L. R. A. 802, note. See, also, 10 Cyc. 806, 1246-1265; 12 Cent. Dig., cols. 2177-2186, §§ 2162-2169.

§ 440. Preferences to Officers.

[a] A mortgage given by a corporation in lieu of an invalid one previously given by the stockholders, which has been canceled for a corporate indebtedness, is not fraudulent as to creditors.—Head v. Horn, 18 Cal. 211.

[b] Where the president of a corporation resigned as president and director in order to take a conveyance of all of the corporation's property in consideration of a pre-existing debt, the conveyance should be treated as though made to an officer of the corporation, and therefore void as against the corporation's creditors.—Nixon v. Goodwin (Cal. App.) 85 Pac. 169.

[c] A deed of all the property of a mining company to its president and director the day after he had resigned, in consideration of a pre-existing debt, held void as to the corporation's creditors.—Nixon v. Goodwin (Cal. App.) 85 Pac. 169.

FOR AUTHORITIES FROM OTHER STATES:

Preferences by insolvent corporations: 45 Am. St. Rep. 826, note. See, also, 10 Cyc. 803-807, 1255, 1256; 12 Cent. Dig., cols. 2186-2196, §§ 2170-2175.

§ 441. Transfer to Another Corporation Having Same Officers or Stockholders.

[a] The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation. Where the persons interested in one railroad corporation formed a new one, which chose for its officers the officers of the old corporation, and the persons owing the stock of the old corporation received in exchange therefor stock of the new, and the trustees then caused the property of the old corporation be conveyed to the new, held, that the conveyance was a fraud upon the creditors of the old corporation.—San Francisco etc. R. Co. v. Bee, 48 Cal. 398.

§ 442. Remedies of Creditors.

[a] Where a creditor of a corporation has suffered damages by reason of the fraudulent misappropriation by other creditors of moneys belonging to the corporation, whereby the corporation has been rendered insolvent, the remedy is by an action in the nature of a creditor's bill against the corporation and the other creditors or wrongdoers, wherein the rights of all the parties in interest may be adjudicated.—Reid v. Goldstein, 53 Cal. 296.

[b] A creditor's remedy for damages from fraudulent misappropriation by other creditors of the corporation's moneys, rendering it insolvent, is by suit in the nature of a creditor's bill against both it and them.—Reed v. Goldstein, 53 Cal. 296.

[c] The subscribed stock of a corporation is a trust fund in favor of its creditors which a court of equity will enforce in their favor when the corporation ceases to be a going concern and it will not allow the trust so arising to be defeated by simulated payment, or by any device short of an actual payment in good faith.—Vermont Marble Co v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1258; 12 Cent. Dig., cols. 2198-2204, §§ 2178-2181.

§ 443. Assignment for Benefit of Creditors.

[a] In an action to set aside an alleged fraudulent conveyance by a corporation to its president, evidence held insufficient to sustain a finding that the conveyance was made for the benefit of all the creditors of the corporation.—Nixon v. Goodwin (Cal. App.), 85 Pac. 169.

FOR AUTHORITIES FROM OTHER STATES:

4 Cyc. 132; 10 Cyc. 766, 928, 1236-1245. See 12 Cent. Dig., cols. 2213-2220, §§ 2190-2200.

§ 444. —— Right of Assignee to Enforce Subscription.

[a] An assignee of an insolvent corporation succeeds to all the rights of the corporation to enforce subscriptions to its stock.—Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

§ 445. Appointment of Receiver.

[a] Part of the property of a corporation was sold in good faith to petitioners, who were among its stockholders, pending proceedings for the appointment of a receiver. Held, that the fact that the petitioners, in their character of stockholders, contested the appointment of the receiver for the corporation's property cannot be construed as a voluntary submission to the jurisdiction of the court in their character of purchasers, so as to estop them from questioning the validity of the appointment otherwise than by appeal.—Havemeyer v. Superior Court, 84

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Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[b] A court is without jurisdiction to appoint a receiver to take possession of the property of a corporation upon a complaint filed by a member or stockholder which does not show that the corporation has been dissolved, or seek its dissolution, and which neither shows its insolvency nor alleges fraud or mismanagement on the part of its officers, but alleges only that its liabilities exceed its assets, and that it has ceased to conduct the business for which it was incorporated.—Murray v. Superior Court of Los Angeles County, 129 Cal. 628, 62 Pac. 191.

FOR AUTHORITIES FROM OTHER STATES:

When may be appointed: 72 Am. St. Rep. 49, 70, note.

Power of receivers to create liens: 83 Am. St. Rep. 72, note. See, also, 10 Cyc. 989, 990; 12 Cent. Dig., cols. 2221-2264, §§ 2201-2252.

§ 446. Collection of Assets.

[a] Where vice-president, who, in absence of president, conducts business affairs of corporation, employed an attorney for the corporation, with whom a settlement was had for services rendered, and payment made, without objection on the part of the corporation or any officer thereof, the subsequent assignee in insolvency of the corporation cannot recover the money so paid.—Streeten v. Robinson, 102 Cal. 542, 36 Pac. 946.

[b] A corporation having no power to adopt a by-law inconsistent with the laws of the state (Civil Code, section 301), and corporate directors having express authority to levy and collect an assessment for such percentage of the full amount unpaid on capital stock as may be necessary to satisfy the claims of creditors (Civil Code, section 331, and section 332, subdivision 1), a corporate by-law providing that "no further calls for payments on capital stock shall be made except by a two-thirds vote of all the stock issued and outstanding" does not prevent an assessment by the directors in liquidation.—Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 2269-2274, §§ 2261-2264.

§ 447. Enforcement of Unpaid Subscriptions.

[a] An action by the assignee of an insolvent corporation organized under the laws of this state to recover from the stockholders the balance due from them severally upon their subscriptions to its capital stock is an action upon contract, and an attachment will lie against nonresident stockholders who are sued as defendants therein; and it is immaterial that the complaint does not show the amount due upon each subscription and that the prayer of the complaint is for an accounting, where the affidavit for attachment shows the amount due.—Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

[b] A finding in an action by creditors against stockholders of an insolvent corporation to recover unpaid subscriptions, that its indebtedness exceeded such unpaid subscriptions, was sufficient, without specifying the amounts due such creditors, and was not inconsistent with a finding that the court could not definitely determine the amount due one of such creditors until securities held by it had been realized.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

FOR AUTHORITIES FROM OTHER STATES:

Power of courts to compel payment of subscriptions and levy and payment of assessments at the instance of creditors: 100 Am. Dec. 552, note. See, also, 10 Cyc. 485; 12 Cent. Dig., cols. 2274-2289, §§ 2265-2279.

§ 448. Rank and Priority of Claims.

[a] Where an insolvent stockholder of an insolvent corporation is indebted on his subscription for stock to an amount in excess of a sum due him on a note of the corporation, an attachment lien procured by him in an action on his note against the corporation will be postponed in equity to a subsequent attachment lien of other creditors of the corporation.—Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

[b] A creditor of an insolvent bank, who recovers a portion of his debt from stockholders on their personal liability, is not thereby prevented from sharing with other creditors on the basis of his entire debt in the assets of the corporation, to the extent of the balance due.—Sacramento Bank v. Pacific Bank, 124 Cal. 147, 71 Am. St. Rep. 36-n, 56 Pac. 787.

[c] Where a stockholder of an insolvent corporation paid a portion of the corporate indebtedness on which he was liable as surety, he was entitled to share the assets of the corporation ratably with other creditors to the extent of the payment so made.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

[d] The indorsers of a note of the corporation, to the extent of any payments made by them, stand in the relation of ordinary creditors of the corporation, and may share ratably in the assets of the corporation.—Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1263; 12 Cent. Dig., cols. 2296-2305, §§ 2283-2286.

§ 449. Actions Against Insolvent Corporations and Receivers.

[a] Question of liability of receiver of an insolvent street railway corporation properly belongs to the court appointing the receiver. Pacific Ry. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768.

[b] While it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver of a street railway corporation to determine the amount of

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compensation or damages against the corporation in favor of one having a claim against it, yet the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting; and it is immaterial whether the damage was occasioned prior or subsequent to the appointment of the receiver.—Pacific Ry. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768.

[c] A creditor of an insolvent corporation held not entitled to relief against stockholders in a suit for distribution of the corporation's assets, where no such relief was demanded by a cross-complaint.—Bank of Visalia v. Dillonwood Lumber Co. (Cal. Sup.), 82 Pac. 374.

FOR AUTHORITIES FROM OTHER STATES:

69 L. R. A. 124, note. See, also, 12 Cent. Dig., col. 1972, § 1916.

§ 450. Attachment.

[a] Property of insolvent private corporations is subject to attachment.—Bories v. Union etc. Assn., 141 Cal. 79, 74 Pac. 554.

IX. CONSOLIDATION AND REORGANIZATION.

ARTICLES OF CONSOLIDATION, § 451.
CONSENT OF STOCKHOLDERS, § 452.
STATUS OF NEW CORPORATION, § 453.
RIGHT TO STOCK IN CONSOLIDATED CORPORATION, § 454.
RIGHTS AND LIABILITIES OF NEW CORPORATION, § 455.
ACTIONS BY OR AGAINST CONSOLIDATED CORPORATION, § 456.
NECESSITY FOR REINCORPORATION UNDER ACT OF 1858, § 457.

Consolidation of corporation party to suit as ground for abatement. See Abatement and Revival, § 54.

Reorganization of corporation in fraud of rights of creditors. See Fraudulent Conveyances, § 18.

Reorganization—Liability of new hospital company for debts of old. See Hospitals, § 3.

Consolidation of railroad companies. See Railroads, § 16.

Consolidation of street railroad corporations. See Street Railroads, § 10.

§ 451. Articles of Consolidation.

[a] When two corporations consolidate, it is sufficient to file articles of consolidation with Secretary of State without filing additional new articles.—California etc. Co. v. Southern Pacific R. R., 67 Cal. 59, 7 Pac. 123.

[b] Articles of consolidation constitute new articles of incorporation of consolidated company.—California Central Ry. Co. v. Hooper, 76 Cal. 406, 18 Pac. 599.

FOR AUTHORITIES FROM OTHER STATES:

Consolidation of corporations: 79 Am. Dec. 421, note.

Consolidation of corporations, effect of: 89 Am. St. Rep. 604, note. See, also, 10 Cyc. 1265; 12 Cent. Dig., cols. 2345, 2346, §§ 2330, 2331.

§ 452. Consent of Stockholders.

[a] It is sufficient that the number of consenting stockholders of each constituent corporation shall be three-fourths of the outstanding stock, and it is not required that the consent shall be by the owners of three-fourths of the entire nominal capital stock of the corporation.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[b] Where the trustees of stock consented to the consolidation of the corporation prior to the cancellation of certificates held by them in trust, it is immaterial that the stock so held in trust by them was subsequently canceled.—Market Street Ry. Co. v Hellman, 109 Cal. 571.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 297-301; 12 Cent. Dig., cols. 2349-2351, §§ 2338-2340.

§ 453. Status of New Corporation.

[a] The consolidated corporation becomes a new and distinct corporation which may be organized for the term of fifty years, irrespective of the term of existence of the constituent corporation, and it cannot be objected to the consolidation that it has the effect to extend the existence of the constituent corporations beyond the period of fifty years fixed for each of them.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

§ 454. Right to Stock in Consolidated Corporation.

[a] Civil Code, section 309, prohibits the directors of a corporation from dividing, withdrawing, or paying to stockholders any part of the capital. Held, that where a mining corporation conveys its lands to another corporation in consideration of a part of the stock of the latter, such stock becomes capital of the former corporation, which neither the directors nor the stockholders can distribute among themselves.—Kohl v. Lilienthal, 81 Cal. 378, 22 Pac. 689, 6 L. R. A. 520, reversing (1889) 81 Cal. 378, 20 Pac. 401.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., cols. 2351-2354, §§ 2341-2342.

§ 455. Rights and Liabilities of New Corporation.

[a] An association of individuals, calling themselves the "Experimental Tunnel Company," located a mining claim and began work. Afterward the active members of this company, uniting with others, formed a corporation known as the "Table Mountain Tunnel Company," which was put in possession by these members. Held, that whatever

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rights the first company had passed to the second by the new transfer of possession, and that, when the possession of the second company was assailed, proof of the acts of the first was pertinent, to show the character and extent of its possession, and that the second was entitled to the benefit of them.—Table Mountain Co. v. Stranahan, 20 Cal. 198.

[b] If new corporation receiving transfer assumes debts of original corporation, the transfer is lawful.—Martin v. Zellerbach, 38 Cal. 318.

[c] Where a corporation furnishing water to a city under a contract providing that, if more favorable terms are granted to any other corporation, they shall extend to it, is absorbed by another corporation, to which more valuable terms have been granted, the latter corporation is not bound to furnish water under the contract, but is entitled to the terms given it before the purchase.—City and County of San Francisco v. Spring Valley Waterworks, 48 Cal. 493.

[d] Where a corporation's charter had been forfeited by the state, an application by it for a receiver to administer its affairs cannot be sustained on the ground that to allow its directors to retain control of its assets would defeat the forfeiture.—Havemeyer v. Superior Court of City and County of San Francisco, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[e] Code of Civil Procedure, section 946, provides that an appeal "stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matters embraced therein." Held, that where an appeal had been taken from a judgment abrogating the charter of a corporation because of abuse of its corporate privileges, the subsequent appointment of a receiver to sell its property and wind up its affairs was a proceeding upon the judgment, within the meaning of the statute, and was therefore void.—Havemeyer v. Superior Court of City and County of San Francisco, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[f] Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter corporation will be regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt, and return of execution unsatisfied, as required by Civil Code, section 3441, which declares that "a creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his rights to take the property affected by the transfer or obligation."—Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

[g] Where a consolidated corporation has expressly assumed and made itself liable for all the antecedent liabilities of the consolidating corporation it cannot be permitted to divide up the obligation and reduce its responsibility, but must be held to be liable precisely as though it had been the sole actor from the outset; and though such assumption of liability does not, without their consent, bind the creditors of a consolidating corporation, yet suit brought by any creditor thereof against the consolidated corporation, which has agreed to pay the demand, is of itself sufficient evidence of acceptance of the new debtor in lieu of the old.—Smith v. Los Angeles etc. Ry. Co., 98 Cal. 210, 33 Pac. 53.

[h] There can be no novation of the indebtedness of the constituent corporations without the consent of the creditors of those corporations; but where the consolidation corporation has assumed the liabilities of the several constituent companies which the creditors are not compelled to have recorded to the new company, they may elect to do so and recover.—Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

[i] A corporation held a lease under which it mined asphalt on a royalty basis. One individual held substantially all of its stock. A new corporation, with the same object, officers, and place of business, was organized, and substantially all of its stock was issued to the principal stockholder of the old one, the sole consideration being a debt which the old corporation owed him. He afterward sold some of his stock, but the old corporation received no part of the consideration. The old corporation transferred its lands and all of its business and assets, with the exception of the mining lease, to the new corporation, and practically went out of business. Held, that the new company was only the old one under another name, and hence was liable on the mining lease for royalties subsequently accruing; the transfer being fraudulent as to the lessor. Higgins v. California Petroleum etc. Co., 122 Cal. 373, 55 Pac. 155.

FOR AUTHORITIES FROM OTHER STATES:

Consolidation of railroads and its effect on pre-existing debts and liens: 59 Am. St. Rep. 554, note; 23 L. R. A. 231, note. See, also, 12 Cent. Dig., cols. 2364-2370, §§ 2354-2360.

§ 456. Actions by or Against Consolidated Corporation.

[a] Two mining corporations, owning adjoining claims, conveyed their lands to a third corporation, organized for the promotion of their mutual interests, each receiving in consideration a certain amount of the capital stock of the new corporation. One of the original corporations distributed such stock among its stockholders, and subsequently certain stockholders of the other brought an action against it to compel a like distribution, in pursuance of an alleged agreement. Held, that evidence of the distribution made by the former corporation was inadmissible, as it was not organized under the laws of the same state as the latter, and as there was no contract between them as to the disposition to be made

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of such stock.—Kohl v. Lilienthal, 81 Cal. 378, 22 Pac. 689, 6 L. R. A. 520.

[b] Under Civil Code, section 309, declaring that the directors of corporations must not divide or pay to the stockholders, or any of them, any part of the capital stock, except what remains after the payment of all its debts on its dissolution or the expiration of its term of existence, the capital stock of one corporation, issued to a number of persons, all but one of whom were the stockholders of another corporation, in consideration of the transfer to the former of all the latter's property, capital, patents, and assets, was in fact the property of such latter corporation, and a fund for the payment of its debts; hence all such corporation's stockholders who had received any of the stock issued by the former corporation were proper parties to a suit against the latter corporation.—Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025.

[c] Where a corporation issued part of its capital stock to the stockholders of another corporation in consideration of the transfer of all the latter's property, assets, and patents, including the right to use and authorize the use of certain patented machines outside a certain territory, with notice that such transfer created a liability against the latter corporation, and that such corporation could not discharge the same, it took the property charged with that liability, and was a proper party to a suit against the other corporation on the same.—Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025.

[d] Where a complaint seeking to recover a certain per cent of the profits accruing to a corporation by reason of the sale of certain property states that such corporation received no consideration for the transfer of the property, but further alleges that the corporation to which it was sold issued two thousand eight hundred and eighty-eight shares of its capital stock to the stockholders of the corporation selling it, in payment for such property, the statement as to consideration did not prevent the facts alleged from constituting a cause of action, since it was a conclusion of law erroneously drawn from the facts.—Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025.

FOR AUTHORITIES FROM OTHER STATES:

See 10 Cyc. 310-313; 12 Cent. Dig., cols. 2377-2380, §§ 2368-2372.

§ 457. Necessity for Reincorporation Under Act of 1858.

[a] The sixth section of the act of 1858, which provides that any corporation heretofore formed for the purposes specified in the act "shall have the right to reincorporate," etc., is not mandatory, but permissive only; and it is not necessary that the corporation reincorporate in order to become the recipient of the privileges and benefits intended by the act.—People v. Blake, 19 Cal. 579.

X. DISSOLUTION AND FORFEITURE OF FRANCHISE.

MODES OF DISSOLUTION, § 458.
GROUNDS IN GENERAL, § 459.
FAILURE TO COMMENCE BUSINESS WITHIN ONE YEAR, § 460.
FAILURE TO TRANSACT BUSINESS, § 461.
MISCONDUCT OF AFFAIRS, § 462.
VIOLATION OF CHARTER, § 463.
ILLEGAL LEVY OF ASSESSMENTS, § 464.
SALE OF CORPORATE PROPERTY, § 465.
FRANCHISE IN HANDS OF LESSEE, § 466.
NECESSITY FOR JUDICIAL PROCEEDINGS, § 467.
JURISDICTION OF PROCEEDINGS, § 468.
PROCEEDINGS TO ENFORCE DISSOLUTION OR FORFEITURE, § 469.
—— PARTIES, § 470.
—— ORDER TO SHOW CAUSE, § 471.
—— SALE OF PROPERTY PENDING PROCEEDINGS, § 472.
EFFECT OF FORFEITURE, § 473.
DIRECTION AS TRUSTEE TO WIND UP AFFAIRS, § 474.
RECEIVERSHIP—RIGHT OR AUTHORITY TO APPOINT, § 475.
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DISTRIBUTION OF ASSETS, § 477.

Stay of judgment dissolving corporation by appeal. See Appeal and Error, § 532.
Dissolution of unincorporated associations. See Associations, § 18.
Dissolution and forfeiture of charter of beneficial association. See Beneficial Associations, § 28.
Dissolution of insurance companies. See Insurance, § 9.
Dissolution of joint stock companies. See Joint Stock Companies, §§ 9-11.
Dissolution of mining corporations. See Mines and Minerals, § 90.
Forfeiture of franchise of street railroad corporation. See Street Railroads, § 13.

FOR AUTHORITIES FROM OTHER STATES:

Effect of dissolution: 12 Am. Dec. 239, note.

Effect of upon debts and pending actions: 40 Am. Dec. 737, note.

§ 458. Modes of Dissolution.

[a] In the absence of any statutory provision defining the mode, a corporation may dissolve itself by a surrender of its franchise, by proper proceedings for such purpose.—People v. California College, 38 Cal. 166.

[b] Corporations can only be dissolved in manner prescribed by law.—Merrill Lodge v. Ellsworth, 78 Cal. 168, 20 Pac. 399; Kohl v. Lilienthal, 81 Cal. 387, 22 Pac. 689.

[c] Corporation may be dissolved by expiration of term of existence; by consent of holders of two-thirds of its shares; or upon judgment of court.—Kohl v. Lilienthal, 81 Cal. 386, 22 Pac. 689.

§ 459. Grounds in General.

[a] The use of an abbreviation of its corporate name by a corporation is not a usurpa-

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tion, and will not support a proceeding by quo warranto to oust it from the enjoyment of its franchise.—People v. Bogart, 45 Cal. 73.

[b] It is an insufficient ground on which to base a judgment of forfeiture of a corporation formed to reclaim lands within a certain district of the state that that reclamation is impracticable.—People v. Reclamation Dist. No. 108, 53 Cal. 346.

[c] Railroad corporation organized to impose on the court by condemnation for private purposes may be dissolved at suit of state.—People v. Pittsburgh R. R. Co., 53 Cal. 694.

[d] Refusal to allow stockholders to inspect books of concern or that it is carrying on a losing business are not grounds for dissolution.—Burham v. San Francisco F. M. Co., 76 Cal. 25, 17 Pac. 940.

[e] To work forfeiture there must be either perversion by act inconsistent with nature of grant amounting to injury to public, or usurpation by exercise of unauthorized power regardless of injury to public.—People v. Dashaway Assn., 84 Cal. 119, 24 Pac. 277.

[f] State may forfeit franchise and dissolve corporations failing to perform duties they were organized to perform or doing acts either not authorized or forbidden.—People v. Dashaway Assn., 84 Cal. 117, 24 Pac. 277.

FOR AUTHORITIES FROM OTHER STATES:

24 L. R. A. 462, note. See, also, 10 Cyc. 1279-1293; 12 Cent. Dig., cols. 2382-2389, §§ 2373-2381.

§ 460. Failure to Commence Business Within One Year.

[a] Where the uncontradicted testimony showing that defendant corporation had organized, elected officers, adopted by-laws and a seal within thirty days after incorporating, commenced and continued business from that date, and legally changed its name thereafter, such evidence was sufficient to support a finding of the trial court that the corporation adopted and used a seal, organized and commenced the business for which it was incorporated immediately after issuance of said certificate of incorporation, and continued the same from that time on, and hence was not liable to forfeiture of its charter, or dissolution, under Civil Code, section 358, providing that, if a corporation does not organize and commence business within one year from the date of its incorporation, its corporate powers cease.—People v. Rosenstein-Cohen Cigar Co., 131 Cal. 153, 63 Pac. 163.

§ 461. Failure to Transact Business.

[a] Statutes of 1862, page 110, section 6, providing that the existence of a corporation shall not be inquired into collaterally, applies to a de facto corporation, the existence of which is attacked on the grounds of its failure to proceed and do business, since a corporation once formed is not dissolved by its mere failure to transact business.—San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1274-1276, 1281-1283, 1299-1303; 12 Cent. Dig., cols. 2390-2395, §§ 2386, 2387.

§ 462. Misconduct of Officers.

[a] Public corporation will not be dissolved by judgment of forfeiture for misconduct of officers.—People v. Reclamation Dist., 53 Cal. 346, 350.

[b] Willful acts and neglects of officers are regarded as those of corporation, and render it liable to forfeiture unless done in violation of duties imposed or instructions given by corporation.—People v. Dashaway Assn., 84 Cal. 117, 24 Pac. 277.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1283-1291; 12 Cent. Dig., cols. 2304, 2403, § 2395.

§ 463. Violation of Charter.

[a] Principle of forfeiture is that franchise is trust; terms of charter are conditions of the trust, and if those conditions be violated, charter is forfeited.—People v. Dashaway Assn., 84 Cal. 119, 24 Pac. 277.

[b] If the corporation does not sell lands which it cannot hold more than five years, penalties may be provided by the legislature for its failure to do so; or, possibly, some judicial procedure might be invoked to compel a sale of the land or a forfeiture of its franchise.—People v. Stockton Sav. etc. Soc., 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1284; 12 Cent. Dig., cols. 2405-2408, §§ 2397, 2398.

§ 464. Illegal Levy of Assessments.

[a] The illegal levy of assessments on the stock of a corporation would be no cause for its dissolution in an action brought by the state for that purpose.—People v. Rosenstein-Cohn Cigar Co., 131 Cal. 153, 63 Pac. 163.

§ 465. Sale of Corporate Property.

[a] Ownership of property is not essential to existence of corporation, nor is a corporation dissolved by the sale of its property.—Sullivan v. Triunfo Min. Co., 39 Cal. 459.

§ 466. Franchise in Hands of Lessee.

[a] Franchise and property of corporation are liable in hands of lessee to forfeiture at instance of state or execution levy at instance of one wrongfully injured by lessor.—Lee v. Southern Pacific R. R. Co., 116 Cal. 101, 58 Am. St. Rep. 140-n, 47 Pac. 932.

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FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1297; 12 Cent. Dig., cols. 2410, 2411, § 2403.

§ 467. Necessity for Judicial Proceedings.

[a] Charter of corporation cannot be forfeited for misuse or abuse of charter powers, except by direct judicial proceedings.—Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

[b] Court cannot treat a corporation as already dissolved because its condition or business arrangements are such that it will be necessary or proper for it to institute proceedings for its dissolution.—Sullivan v. Triunfo Min. Co., 39 Cal. 459.

[c] While a forfeiture at common law does not operate to devest the title of the owner until a suit is instituted for that purpose, and the rights of the state are established by judgment, yet it is otherwise when a forfeiture is declared by statute.—Oakland R. R. Co. v. Oakland etc. R. R. Co., 45 Cal. 365, 13 Am. Rep. 181.

[d] Acts sufficient to cause a forfeiture of a franchise conferred upon a corporation do not per se produce a forfeiture; but the corporation continues to exist until the sovereignty which created it shall, by proper proceedings in proper court, procure an adjudication of forfeiture, and enforce it.—People ex rel. Sabichi v. Los Angeles E. Ry. Co., 91 Cal. 338, 27 Pac. 673.

[e] Under Civil Code, section 502, providing that, where a franchise has been granted to a street railroad, work on the road must be commenced within one year from the date of the grant of right of way, and finished within three years thereafter, and that a failure to comply with such provision "works a forfeiture" of the right of way as well as of the franchise, when a street railroad fails to comply with that provision, its right of way and franchise continue to exist until declared forfeited by a court or by legislative authority, said section not being self-executing.—Santa Rosa City R. Co. v. Central St. Ry. Co., 38 Pac. 986.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1293-1299; 12 Cent. Dig., cols. 2421-2430, §§ 2416, 2417.

§ 468. Jurisdiction of Proceedings.

[a] The aid of courts can be invoked only as against such officers as are intrusted by law with the management of the affairs of a corporation, and as against these the remedy is at law, and not in equity.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508-n.

[b] A court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508.

[c] Equity jurisdiction over corporations is confined to fraudulent breaches of trust.—French Bank Case, 53 Cal. 551.

[d] Transfer of proceedings in insolvency against a corporation after an order of adjudication, from the department in which they had been pending, to the department in which the action for dissolution of the corporation was pending, cannot confer upon the court any greater jurisdiction in the latter matter than it previously had.—State Investment etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

[e] The jurisdiction of the superior court to decree a dissolution of any corporation exists only by virtue of statutory authority; and its jurisdiction is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction.—State Investment etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

FOR AUTHORITIES FROM OTHER STATES:

Power of the courts to decree dissolution: 96 Am. Dec. 756, note. See, also, 10 Cyc. 1305, 1306; 12 Cent. Dig., cols. 2431-2435, §§ 2420-2422.

§ 469. Proceedings to Enforce Dissolution or Forfeiture.

[a] Forfeiture must be clearly and strictly proved.—Von Schmidt v. Huntington, 1 Cal. 71.

[b] Upon application of the corporation, a writ of prohibition must be granted to prevent the superior court from proceeding upon the judgment and orders appointing a receiver with reference to any property of the corporation and from interfering with or disturbing the possession or control of the corporation as to any of its property or effects, pending its appeal from the judgment of dissolution.—State Investment and Insurance Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

[c] An order of injunction issued by the superior court at the commencement of proceedings for the dissolution of a corporation, enjoining the corporation, and its agents, attorneys, and creditors, and their agents, attorneys, and solicitors, from carrying on any litigation, or interfering with the assets of the corporation, is without jurisdiction; and an attorney for the creditors of the corporation, who, in disobedience to such order, prosecuted their petition in involuntary insolvency against the corporation is not guilty of contempt in disregarding the injunction; and a writ of prohibition will be granted to prevent the judge who had issued the order of injunction from hearing an order to show cause why such attorney should not be judged guilty of contempt and punished therefor.—Harrison v. Hebbard, 101 Cal. 152, 35 Pac. 555.

[d] In a proceeding in quo warranto against a mutual life association, organized upon the assessment or co-operative plan, for the pur-

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pose of paying to the nominee of such members as may die stipulated sums of money to be collected of surviving members, a judgment by which the corporation was excluded from the privilege and franchise usurped by it of making ordinary contracts of life insurance, does not work a dissolution of the corporation, when it was not alleged or found that the defendant was usurping the franchise of being a corporation, and the judgment did not exclude it from exercising that franchise.—Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

[e] Where the state sought to forfeit defendant's charter because it had not begun business within one year from the date of its incorporation, its objection to defendant's minute-book was properly overruled, since this would tend to show all the details of the business of the corporation and the time of its organization.—People v. Rosenstein-Cohn Cigar Co., 131 Cal. 153, 63 Pac. 163.

FOR AUTHORITIES FROM OTHER STATES:

See 10 Cyc. 1304-1310; 12 Cent. Dig., cols. 2443-2460, §§ 2431-2444.

§ 470. —— Parties.

[a] Conditional acts or requirements not made prerequisite to the exercise of corporate powers, but nonperformance of which operates as a forfeiture of its franchises, can only be taken advantage of in a direct proceeding by the state.—Spring Valley Waterworks v. City of San Francisco, 22 Cal. 434.

[b] Private stockholder or creditor cannot sue to dissolve an insolvent corporation.—French Bank Case, 53 Cal. 553.

[c] If it is claimed that corporation is usurping powers not belonging to it, corporation is proper and only party.—People v. Stanford, 77 Cal. 363, 18 Pac. 85, 19 Pac. 693.

[d] An information in the nature of quo warranto to forfeit the charter of a corporation for perversion of its franchise may be brought by the people under Constitution, article 6, section 5.—People v. Dashaway Assn., 84 Cal. 114, 24 Pac. 277.

[c] Where the right to the forfeiture of a corporate privilege or of a franchise exists, it can be invoked only at the instance of the state.—City of San Pedro v. Southern Pacific R. R. Co., 101 Cal. 333, 35 Pac. 993.

FOR AUTHORITIES FROM OTHER STATES:

Right of stockholder to maintain bill to dissolve and to distribute assets: 91 Am. St. Rep. 33, note. See, also, 10 Cyc. 988, 1304-1310; 12 Cent. Dig., cols. 2450-2452, § 2435.

§ 471. —— Order to Show Cause.

[a] When the attorney general commences an action to dissolve a corporation, the only order which the court is authorized to make is one requiring the corporation to show cause why its business should not be closed, and, until the return day of this order, the court has no power either to enjoin the corporation from doing business, or to disturb it in the possession of its estate by the appointment of a receiver, or to assume control or management of the estate of the corporation.—State Investment etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

§ 472. ——Sale of Property Pending Proceedings.

[a] Corporation's power to dispose of its property honestly and in good faith is not affected by pendency of proceedings to forfeit its franchise.—Havemeyer v. Superior Court, 84 Cal. 385, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[b] Purchase of property of corporation pending suit to forfeit its charter is not void as to state, which has no lien on the property. Havemeyer v. Superior Court, 84 Cal. 385, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent Dig., cols. 2460, 2461, § 2446.

§ 473. Effect of Forfeiture.

[a] Where forfeiture of a corporate franchise is declared by statute, title thereto vests in the state on happening of the contingency provided for.—Oakland R. Co. v. Oakland etc. R. Co., 45 Cal. 365, 13 Am. Rep. 181.

[b] Property of corporation is not forfeited on forfeiture of its charter.—Havemeyer v. Superior Court, 84 Cal. 379, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

FOR AUTHORITIES FROM OTHER STATES:

Effect of dissolution: 7 Am. St. Rep. 717, note; 69 L. R. A. 124, note. See, also, 10 Cyc. 1310-1331; 12 Cent. Dig., cols. 2462-2471, §§ 2448-2456.

§ 474. Directors as Trustees to Wind up Affairs.

[a] Prior to the codes, when a corporation was dissolved, the directors continued to be trustees of the creditors and stockholders for certain purposes, or, in case the directors died subsequent to the dissolution, the district court could appoint new trustees for like purposes; such trustees were necessary parties to an action affecting the property of the corporation, without whose presence as parties the legal title of the corporation to real estate could not be transferred, its affairs settled, or its property distributed.—Clark v. San Francisco, 53 Cal. 306.

[b] Under our codes administration and distribution of corporations dissolved voluntarily or involuntarily is left to directors in office at date of dissolution.—Havemeyer v. Superior Court, 84 Cal. 365-367, 369, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

FOR AUTHORITIES FROM OTHER STATES:

10 Cyc. 1325, 1326, 1329; 12 Cent. Dig., cols. 2474-2476, §§ 2459, 2460.

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§ 475. Receivership—Right or Authority to Appoint.

[a] Jurisdiction of equity is over officers personally, and not over corporation as such, and hence it is error in the court to appoint a receiver and decree a sale of the property and a settlement of affairs of corporation.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508-n.

[b] Decree appointing a receiver necessarily results in dissolution of the corporation, and would be doing indirectly what the court has no power to do directly.—Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508-n.

[c] In proceeding to forfeit corporate franchise, judgment of forfeiture ends proceeding and court has no jurisdiction to appoint receiver unless on new proceeding by creditor or stockholder.—Havemeyer v. Superior Court, 84 Cal. 361, 380, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[d] In absence of statute, receiver may be appointed to administer property of dissolved corporation, at instance of creditor or stockholder.—Havemeyer v. Superior Court, 84 Cal. 362, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[e] Appointment of receiver of dissolved corporation is only made when required for protection of rights of creditor or stockholder.—Havemeyer v. Superior Court, 84 Cal. 365, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[f] Where an insolvent insurance company is dissolved on application of the attorney general, the court has no power to appoint a receiver to take charge of its effects "during the pendency of" an appeal by the corporation.—State Investment etc. Co. v. Superior Court of City and County of San Francisco, 101 Cal. 135, 35 Pac. 549.

[g] The fact that a fine was imposed upon the corporation in the quo warranto proceedings, payable to the people of the state, does not authorize the state to commence a subsequent action to appoint a receiver of the corporation; and the court has no jurisdiction to appoint such receiver, under section 565 of the Code of Civil Procedure, which only authorizes such action to be commenced upon the dissolution of the corporation, and the court will be restrained by writ of prohibition from further proceeding with respect to a receiver of the property of the corporation. Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

[h] In an action by the attorney general to dissolve an insolvent insurance company, the court has no authority, on decreeing dissolution, to appoint a receiver, and restrain such corporation, its directors, agents, attorneys, creditors, etc., from carrying on any litigation, and from interfering with or taking possession of any of its assets.—Harrison v. Hebbard, 101 Cal. 152, 35 Pac. 555.

[i] Code of Civil Procedure, section 565, and Civil Code, section 406, do not authorize the court to appoint a receiver of an insurance company on dissolution thereof in an action brought by the attorney general.—State Investment etc. Co. v. Superior Court of City and County of San Francisco, 101 Cal. 135, 35 Pac. 549.

FOR AUTHORITIES FROM OTHER STATES:
See 10 Cyc. 990; 12 Cent. Dig., cols. 2476-2484, §§ 2461-2469, 2471.

§ 476. —— Who may Apply for Receiver.

[a] State has no interest in appointment of receiver for corporation dissolved by judgment of forfeiture.—Havemeyer v. Superior Court, 84 Cal. 371, 373, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

§ 477. Distribution of Assets.

[a] Upon dissolution of corporation for literary purposes, having no debts, personal property and real estate purchased will vest in state, but real estate donated will revert to donor.—People v. President and Trustees, etc., 38 Cal. 166.

[b] The property of a corporation organized for literary purposes, and having no stockholders, vests in the state, on its dissolution by a surrender of its franchise, where it owes no debts.—People v. Trustees of California College, 38 Cal. 166.

[c] Stockholders cannot compel a conveyance of property to themselves upon dissolution, without regard to creditors or legal rights of trustees.—Clark v. San Francisco, 53 Cal. 306, 312.

[d] Upon dissolution of trading corporation its assets belong, after payment of its debts, to those who were stockholders at date of dissolution.—Havemeyer v. Superior Court, 84 Cal. 362, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[e] When corporation ceases to exist for any cause, its property must be disposed of according to law.—Havemeyer v. Superior Court, 84 Cal. 362, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

FOR AUTHORITIES FROM OTHER STATES:
12 Cent. Dig., cols. 2485-2494, §§ 2472-2481.

XI. FOREIGN CORPORATIONS.

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FILING OF ARTICLES, § 479.
CITIZENSHIP, § 480.
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—— PLEADING, § 491.
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Foreign insurance companies. See Insurance, § 4.
Foreign surety companies. See Principal and Surety, § 15.
Taxation of foreign corporations. See Taxation, § 35.

§ 478. Grounds of Recognition.

[a] It is only by comity that foreign corporations are permitted to transact business in another state than that of their creation.—Pierce v. Southern Pacific Co., 120 Cal. 163, 47 Pac. 874, 52 Pac. 302.

FOR AUTHORITIES FROM OTHER STATES:

7 C. C. A. 419, 24 C. C. A. 13, notes; 24 L. R. A. 289, note. See, also, 19 Cyc. 1204-1208; 12 Cent. Dig., cols. 2501-2512, §§ 2487-2504.

§ 479. Filing of Articles.

Law requiring foreign corporations to file certificate as discriminating legislation. See Constitutional Law, § 230.

[a] Section 299, Civil Code, requiring corporation to file articles in county where its property is located, does not apply to foreign corporations.—South Yuba Water & Mining Co. v. Rosa, 80 Cal. 336, 22 Pac. 222.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cyc. 1254, 1255, 1287; 12 Cent. Dig., cols. 2516, 2517, § 2512.

§ 480. Citizenship.

[a] Foreign corporations are citizens of state of their creation.—Pierce v. Southern Pacific Co., 120 Cal. 163, 47 Pac. 874; 52 Pac. 302.

§ 481. Situs of Property.

[a] A debt due from residents of this state to a foreign corporation has no situs in this state, but is in contemplation of law in the state of its charter, and is there vested in the corporation, up to the time of a legal assignment thereof by the corporation.—Fenton v. Edwards, 126 Cal. 43, 77 Am. St. Rep. 141, 58 Pac. 320.

§ 482. Evidence of Incorporation.

[a] Under Statutes of 1871-72, page 826, chapter 566, section 1, as amended by Statutes of 1899, page 111, chapter 94, section 1, concerning foreign corporations, certified copy of designation of agent filed with Secretary of State held sufficient evidence of incorporation thereof.—Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

FOR AUTHORITIES FROM OTHER STATES:

24 L. R. A. 289, note; 12 Cent. Dig., cols. 2510, 2511, § 2503.

§ 483. Power to Regulate.

[a] Legislature cannot impose on foreign corporation a condition in violation of state constitution.—San Francisco v. Insurance Co., 74 Cal. 119, 15 Pac. 380.

[b] Regulation of foreign corporations distinguished from taxation.—San Francisco v. Insurance Co., 74 Cal. 121, 15 Pac. 380.

[c] State may deal with foreign, as absolutely as with domestic, corporations.—San Francisco v. Insurance Co., 74 Cal. 119, 15 Pac. 380.

FOR AUTHORITIES FROM OTHER STATES:

Power of the states to discriminate against: 95 Am. Dec. 536, note; 24 L. R. A. 289, note. See, also, 19 Cyc. 1251; 12 Cent. Dig., cols. 2512-2515, §§ 2505-2509.

§ 484. —— Validity of Provision Against Removal of Cause to Federal Court.

[a] Provision that foreign corporation removing cause to federal court forfeits its rights is void.—San Francisco v. Insurance Co., 74 Cal. 119, 15 Pac. 380.

§ 485. What Constitutes "Doing Business" Within State.

[a] A single transaction does not constitute "doing business within the state" by a foreign corporation, authorizing service, under Code of Civil Procedure, section 411.—Jameson v. Simonds Saw Co. (Cal. App.), 84 Pac. 289.

[b] Facts held insufficient to establish that a foreign corporation was "doing business" in California, so as to render it subject to the jurisdiction of the California courts.—Jameson v. Simonds Saw Co. (Cal. App.), 84 Pac. 289.

§ 486. Designation of Resident Agent.

[a] Act of March 17, 1899 (Stats. 1899, p. 111, c. 94), provides that a foreign corporation which has failed to designate some person in the state on whom process may be served shall not maintain or defend any action in the courts of the state until the provisions of the act have been complied with. Act of March 8, 1901 (Stats. 1901, p. 108, c. 93), requires foreign corporations to file their articles of incorporation with the Secretary of State, and makes them subject to a fine for a failure to comply with the provisions of the act. Held, that the latter act does not repeal the former.—Keystone Driller Co. v. Superior Court of City and County of San Francisco, 138 Cal. 738, 72 Pac. 398.

[b] Act of April 1, 1872 (Stats. 1871-72, p. 826, c. 566), as amended by acts of 1899 (Stats. 1899, p. 111, c. 94), requiring foreign corporations to file designation of an agent on whom process may be served, is not objectionable as denying to such corporations the right at any time to commence actions.—Black v. Vermont Marble Co. (Cal. App.), 82 Pac. 1060.

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[c] Act of April 1, 1872 (Stats. 1871-72, p. 826, c. 566), as amended by acts of 1899 (Stats. 1899, p. 111, c. 94), requiring foreign corporations to designate a resident on whom process may be served, does not prohibit such corporation from engaging in business, nor affect contracts made before filing such designation.—Black v. Vermont Marble Co. (Cal. App.), 82 Pac. 1060.

[d] An allegation in the complaint in an action against a foreign corporation, held to bring the case within Statutes of 1899, page 111, chapter 94, relating to foreign corporations appointing persons as agents on whom process may be served.—Olender v. Crystalline Min. Co. (Cal. Sup.), 86 Pac. 1082.

FOR AUTHORITIES FROM OTHER STATES:

19 Cyc. 1206, 1257; 12 Cent. Dig., cols. 2517, 2518, §§ 2513-2515.

§ 487. Capacity to Sue and be Sued.

[a] Civil Code, section 299, does not preclude a foreign corporation from maintaining an action in California because of its failure to comply with such section before commencing the action, where it was accomplished before the filing of its amended complaint.—Ward Land etc. Co. v. Mapes, 147 Cal. 747, 82 Pac. 426.

[b] While a corporation confines the exercise of its powers within the state where it was incorporated, it is beyond the reach of the process of courts of other states.—Jameson v. Simonds Saw Co. (Cal. App.), 84 Pac. 289.

FOR AUTHORITIES FROM OTHER STATES:

24 L. R. A. 315, note. See, also, 19 Cyc. 1314-1316; 12 Cent. Dig., cols. 2539, 2540, § 2544; cols. 2550-2553, §§ 2563-2567.

§ 488. Actions by or Against—Jurisdiction and Venue.

[a] Where a foreign corporation employed and retained a managing agent in California who openly exercised authority to act in its behalf, the corporation may be sued in the courts of that state.—Lawrence v. Ballou, 50 Cal. 258.

[b] Foreign corporation doing business here has no residence within the state, and an action against it may be tried in any county designated by the plaintiff in his complaint. Thomas v. Placerville G. Q. Min. Co., 65 Cal. 600, 4 Pac. 641.

FOR AUTHORITIES FROM OTHER STATES:

Jurisdiction: 85 Am. St. Rep. 905, note, See, also, 19 Cyc. 1324-1330; 12 Cent. Dig., cols. 2571-2587, §§ 2595-2600.

§ 489. —— Service of Process.

[a] Corporations are included as nonresidents under Statutes of 1851, title 3, page 55, section 30, relating to service of process thereon by publication, and providing that "when the person on whom the service is to be made resides out of the state," etc.—Douglass v. Pacific Mail S. S. Co., 4 Cal. 304.

[b] Where a foreign corporation employed a managing agent in California who openly exercised authority therefor, service of process personally made on such agent constitutes service on the corporation.—Lawrence v. Ballou, 50 Cal. 258.

[c] When a foreign corporation, doing business in this state, has not designated a person upon whom service of summons may be made, it may be made upon its managing agent.—Thomas v. Placerville etc. Min. Co., 65 Cal. 600, 4 Pac. 641.

[d] Service of summons upon a foreign corporation is sufficient by service on a person designated by the corporation to receive the same, under the act of April 1, 1872, though, at the time of service, such person was not the agent, cashier, secretary, or other officer of the corporation.—Eureka Lake etc. Canal Co. v. Superior Court of Yuba County, 66 Cal. 311, 5 Pac. 490, 493.

[e] A preliminary injunction against a foreign corporation may be served by leaving with the agent designated to receive service of process a copy of the writ, showing the original, and explaining its contents, and delivering to him a copy of the complaint.—Eureka Lake etc. Canal Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490.

[f] Where process was served in Alabama on a former agent of defendant insurance company, which was organized under the laws of, and had its office and principal place of business in, California, and had ceased to do business in Alabama before the action was brought, the courts of Alabama did not maintain jurisdiction of the defendant's person, and hence a judgment by default in Alabama would not sustain a suit against it in the California courts.—Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393.

[g] Under Code of Civil Procedure, section 670, providing that in case of judgment by default, the judgment-roll consists of the summons, with affidavit of proof of service, the complaint, with memorandum indorsed thereon of defendant's default, and a copy of the judgment, a certificate of the Secretary of State, attached to a summons served on him for a foreign corporation, under Statutes of 1899, page 111, chapter 94, section 1, providing for such service in case no person is designated by the foreign corporation as an agent for the service of process, is not a part of the record and cannot be looked to, on a motion made on the record to quash the service and return, to supply an omission of the return to recite that the corporation had not designated an agent for the service of process.—Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

[h] Under Statutes of 1899, page 111, chapter 94, section 1, requiring foreign corporations to designate an agent for the service of process, and to file such designation with the Secretary of State, in such case process may be served on the agent, or, if no person is designated, on the Secretary of State, a

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return reciting service on the Secretary of State, but failing to state that there was no designation of an agent on file, is insufficient to confer jurisdiction over the corporation, and cannot be aided and rendered sufficient by a certificate of the Secretary of State, attached to the summons as returned, showing that the corporation had not made the required designation.—Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

[i] Statutes of 1899, page 111, chapter 94, held to substitute the service of process on the Secretary of State, in an action against a foreign corporation having no agent in the state for service by publication prescribed by Code of Civil Procedure, section 412.—Olender v. Crystalline Min. Co. (Cal. Sup.), 86 Pac. 1082.

FOR AUTHORITIES FROM OTHER STATES:

Service of process: 66 Am. Dec. 119, note; 45 C. C. A. 3, note; 23 L. R. A. 490, note. See, also, 12 Cent. Dig., cols. 2591-2618, §§ 2603-2627. See 12 Cent. Dig., cols 2631-2632, §§ 2641, 2642.

§ 490. —— Limitation of Actions and Right to Plead.

[a] A foreign corporation, having a local existence and domicile in this state for the purpose of suing and being sued, may rely on the statute of limitations to the same extent as though chartered by the state.—Lawrence v. Ballou, 50 Cal. 258.

[b] Foreign corporations are citizens of state of their creation and are, in contemplation of law, absent from all other states—Pierce v. Southern Pacific Co., 120 Cal. 163, 47 Pac. 874, 52 Pac. 302.

[c] Foreign corporation must prove compliance with act of 1872, page 826, before it can avail itself of benefit of statute of limitations.—Pierce v. Southern Pacific Co., 120 Cal. 162, 163, 47 Pac. 874, 52 Pac. 302.

[d] Act of April 1, 1872 (Stats. 1871-72, p. 826, c. 566), as amended by acts of 1899 (Stats. 1899, p. 111, c. 94), section 3, held prospective, so that a corporation not having filed the required designation of a person on whom service might be made prior to an action against it was not entitled to plead limitations as a defense.—Black v. Vermont Marble Co. (Cal. App.), 82 Pac. 1060.

FOR AUTHORITIES FROM OTHER STATES:

18 L. R. A. 524, note; 12 Cent. Dig., cols. 2567-2570, §§ 2590-2593.

§ 491. —— Pleading.

[a] Complaint by a foreign corporation must show that it has capacity to sue by the law of its creation.—Parks C. & M. Co. v. Hoyt, 57 Cal. 44.

FOR AUTHORITIES FROM OTHER STATES:

19 Cyc. 1318-1322, § 1348; 12 Cent. Dig., cols. 2632-2640, §§ 2645-2649.

§ 492. —— Evidence.

[a] In a suit against a foreign corporation on issue that the corporation was "doing business" within the state, the burden was on plaintiff.—Jameson v. Simonds Saw Co. (Cal. App.), 84 Pac. 289.

FOR AUTHORITIES FROM OTHER STATES:

19 Cyc. 1322; 12 Cent. Dig., col. 2641, § 2650.

§ 493. Insolvency—Jurisdiction of State Court.

[a] Under the California Insolvency act of 1880, which provides, in section 8, that the petition shall be filed in the county where the debtor resides, or has his place of business, and, in section 21, makes certain provisions in case of a nonresident debtor, the California courts have jurisdiction of involuntary proceedings against a foreign corporation which has property and a place of business in the state.—Castle Dome Min. etc. Co., In re, 18 Pac. 794.

FOR AUTHORITIES FROM OTHER STATES:

34 L. R. A. 743, note. See, also, 12 Cent. Dig., cols. 2652-2657, §§ 2664-2668.

§ 494. Ancillary Receivers.

[a] As against attaching domestic creditors of insolvent foreign corporation, ancillary receiver will not be appointed in action by foreign receiver to collect and turn over to the latter funds attached.—Clark v. Supreme Council of Order of Chosen Friends, 146 Cal. 598, 80 Pac. 931.

FOR AUTHORITIES FROM OTHER STATES:

12 Cent. Dig., col. 2657, § 2668.

CORPORATIONS SOLE.

See Corporations, §§ 6, 33, 63, 268.

CORPSES.

Property rights in. See Dead Bodies.

CORPUS DELICTI.

Burden of proving. See Criminal Law, § 82.
Sufficiency of proof of, in homicide cases. See Homicide, § 137.
Instructions relating to, in homicide cases. See Homicide, § 169.

CORRECTION.

Of defects in appeal bonds. See Appeal and Error, §§ 459-464.
Power to correct errors after appeal. See Appeal and Error, § 518.
Of error in citation in brief. See Appeal and Error, § 974.
Of defects in record on appeal. See Appeal and Error, §§ 868-876.
Of errors in judgment of lower court by amending or modifying. See Appeal and Error, § 1388 et seq.

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Of error in record of appearance. See Appearance, § 18.
Of award of arbitrators. See Arbitration and Award, §§ 45, 46.
Of return to attachment writ. See Attachment, § 160.
Of court records. See Courts, § 103.
Of record of criminal sentence or judgment. See Criminal Law, § 595.
Of minutes of court in criminal case. See Criminal Law, § 329.
Of errors at trial of criminal case. See Criminal Law, §§ 501-507.
Of verdict in criminal case. See Criminal Law, § 497.
Of errors in bill of exceptions on criminal appeal. See Criminal Law, § 698.
Of registration lists. See Elections, § 43.
Of judgment in civil case. See Judgment, VIII.
Of survey of government land. See Public Lands, § 16.
Action to correct or reform written instruments. See Reformation of Instruments.
Houses of correction. See Reformatories.

CORRESPONDENCE.

See, also, Letters.

Contracts by. See Contracts, § 16.
Place of making contract by mail. See Contracts, § 149.
Letters as evidence in criminal cases. See Criminal Law, § 212.
Admissibility of letters and telegrams in evidence in civil cases. See Evidence, §§ 338, 366.

CORROBORATION.

Of confession of accused. See Criminal Law, § 261.
Of testimony of accomplices. See Criminal Law, §§ 250, 251.
Sufficiency of corroboration of accomplice as question for jury. See Criminal Law, § 383.
Admissibility of corroborating evidence. See Criminal Law, § 110.
Of testimony in divorce cases. See Divorce, § 49.
Of prosecution in prosecution for incest. See Incest, § 9.
Of prosecution in action for rape. See Rape, § 24.
Of witnesses in civil actions in general. See Witnesses, §§ 249, 250.

COSERVANTS.

See Master and Servant.

COST BILL.

See Costs, §§ 52-54.

COSTS.

Include pecuniary allowances made by law to parties prevailing in actions or other proceedings, civil or criminal, as reimbursement or indemnity for their expenses therein, payable by adverse parties or out of the subject matter of the litigation; statutory provisions relating to costs; nature, grounds, and extent of the right thereto in general; who are entitled to costs and who are liable therefor, as between parties, and discretion of courts to award costs; security for payment of costs; proceedings, disbursements, etc., for which costs are allowed, and items, rate, and amount of costs; taxation of costs, and review thereof; and payment and remedies for collection of costs.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL, §§ 1-26.
II. PERSONS AND PROPERTY LIABLE, §§ 27-30.
III. SECURITY FOR COSTS, §§ 31-35.
IV. ITEMS ALLOWABLE AS COSTS, §§ 36-48.
V. TAXATION, §§ 49-68½.
VI. COSTS ON APPEAL, §§ 69-75.
VII. PAYMENT AND ACTIONS FOR COLLECTIONS, §§ 76-82.
VIII. IN CRIMINAL PROSECUTIONS, §§ 83-90.

In action to foreclose agricultural lien. See Agriculture, § 14.
Right to appeal when costs only are involved. See Appeal and Error, § 25.
Appealability of decisions relating to costs. See Appeal and Error, §§ 182-185.
Acceptance of costs ordered as condition to grant of new trial as waiver of right to appeal. See Appeal and Error, § 219.
Review of discretionary orders relating to costs. See Appeal and Error, § 1211.
Harmless error in taxing. See Appeal and Error, § 1328.
Award of costs by arbitrators. See Arbitration and Award, § 56.
As damages for assault and battery. See Assault and Battery, § 12.
Right of assignee of cause of action to recover costs. See Assignments, § 49.
Of keeping attached property. See Attachment, § 116.
On dissolution of attachment. See Attachment, § 147.
In actions by or against state. See California, § 100.
Imposition of costs as condition to grant of continuance. See Continuance, § 30.
In action for breach of covenant. See Covenants, § 43.
As damages. See Damages, § 43.
In actions to establish and determine heirship. See Descent and Distribution, § 42.
In divorce cases. See Divorce, §§ 80, 81.
On appeal in divorce cases. See Divorce, § 82.
In proceedings for custody of children of divorced parents. See Divorce, § 162.
In proceedings to contest election. See Elections, § 135.
In condemnation proceedings. See Eminent Domain, § 151.
In proceedings supplementary to execution. See Execution, § 212.
On determination of claim to exempt property. See Exemption, § 27.
Of management and administration of estates of decedents. See Executors and Administrators, §§ 171-181.
Of proceedings for accounting by executors and administrators. See Executors and Administrators, § 564.

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In garnishment proceedings. See Garnishment, § 36.
On proceedings for allotment of probate homestead. See Homesteads, § 157.
In injunction proceedings. See Injunction, §§ 124.
In actions by or against insolvents' estates. See Insolvency, § 81.
In involuntary insolvency proceedings. See Insolvency, § 32.
On dissolution of joint stock company. See Joint Stock Companies, § 11.
Award of, on entry of default judgment. See Judgment, § 82.
Imposition of costs as condition to opening default. See Judgment, § 124.
Designation of amount of costs in judgment. See Judgment, § 149.
Undertaking for costs in actions for libel or slander. See Libel and Slander, § 23.
In mandamus proceedings. See Mandamus, § 86.
In actions to enforce mechanics' lien. See Mechanics' Liens, §§ 102-104.
Of foreclosure suit. See Mortgages, § 327.
In partition proceedings. See Partition, § 49.
In action for dissoluton of partnership and accounting. See Partnership, § 142.
In replevin suits. See Replevin, § 38.
As damages for wrongful detention of personal property. See Replevin, § 26.
In suit for taxes. See Taxation, § 138.
Disposition of costs collected in collecting taxes. See Taxation, § 203.
In action to quiet title. See Quieting Title, § 45.
In quo warranto proceedings. See Quo Warranto, § 14.
In actions to establish or probate wills. See Wills, §§ 97-203.
In actions to construe wills. See Wills, § 312.

FOR AUTHORITIES FROM OTHER STATES:

Allowance of costs in equity and at law: 16 Am. Dec. 405, note. See, also, 11 Cyc. 1-293; 13 Cent. Dig., cols. 13-1104.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

CONSTITUTIONAL AND STATUTORY PROVISIONS, § 1.
STIPULATIONS AND AGREEMENTS, § 2.
DISCRETION OF COURT—IN CIVIL ACTIONS IN GENERAL, § 3.
—— IN EQUITY SUITS, § 4.
—— INJUNCTION AND SPECIFIC PERFORMANCE, § 5.
—— PROCEEDINGS TO DETERMINE HEIRSHIP, § 6.
COSTS DEPENDENT UPON AMOUNT OF RECOVERY, § 7.
COSTS DEPENDENT UPON JOINDER OF CAUSES, § 8.
RIGHTS OF PREVAILING PARTY, § 9.
—— LITIGATED OR DEFENDED CASES, § 10.
—— WHO IS PREVAILING PARTY, § 11.
—— PARTIAL SUCCESS, § 12.
—— RIGHTS OF SEVERAL PARTIES TO AMOUNT ALLOWED, § 13.
COSTS INCURRED UNDER VOID ORDER, § 14.
EFFECT OF OFFER OF JUDGMENT OR TENDER § 15.
EFFECT OF OFFER OF COMPROMISE, § 16.
EFFECT OF PREMATURE COMMENCEMENT OF ACTION, § 17.
EFFECT OF ABATEMENT OF ACTION BY DEATH OF PARTY, § 18.
EFFECT OF DISCLAIMER, § 19.
—— JOINING ANSWER WITH DISCLAIMER, § 20.
ON GRANTING OF NONSUIT, § 21.
ON SECOND SUCCESSFUL TRIAL, § 22.
ON OPENING DEFAULT, § 23.
PROCEEDINGS AFTER REMAND BY APPELLATE COURT, § 24.
ENTRY OF JUDGMENT FOR COSTS, § 25.
ASSIGNMENT OF COSTS, § 26.

§ 1. Constitutional and Statutory Provisions.

[a] An act authorizing five per cent damages to be taxed as costs against the losing party in litigated cases in the city and county of San Francisco is not unconstitutional, as being in contravention of Constitution, article 1, section 11, which provides that all laws of a general nature shall have a uniform operation.—Corwin v. Ward, 35 Cal. 195, 95 Am. Dec. 93.

[b] The act of February 9, 1866, allowing the prevailing party, in certain actions tried in San Francisco, to include in his judgment five per cent on the amount recovered, is not repealed by the codes.—Whitaker v. Haynes, 49 Cal. 596.

[c] Acts of 1865-66, page 66, section 6, providing that the prevailing party shall be allowed five per cent costs on the amount recovered in litigated cases, not to exceed one hundred dollars, does not apply to an alternative judgment in replevin for the return of property or for its value.—Wheatland Mill Co. v. Pirrie, 89 Cal. 459, 26 Pac. 964.

[d] Code of Civil Procedure, section 1254, which provides that where, after an award in condemnation proceedings, a new trial is granted the owner, and he fails on such trial to obtain a greater compensation than on the first, the costs of the new trial shall be taxed against him, does not violate Constitution, article 1, section 14, providing that private property shall not be taken for public use without just compensation.—Los Angeles etc. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859.

[e] Political Code, section 4479, provides that any law passed at the session of the legislature which adopted the codes, and which is inconsistent with the provisions of either, must prevail over them. At the session of the legislature which adopted the codes of 1871-72, Practice Act, section 280, then in force, concerning referees' fees in partition was amended (Stats. 1871-72, page 230, chapter 187) so as to allow referees only the fees allowed by law, which were provided for by section 280 of the practice act (now section 1028, Code of Civil Procedure), at five dollars a day. Held, that a contention on appeal from an order fixing a referee's fee in partition that the amendment to practice act, being inconsistent with section 768 of the Code of Civil Procedure, which gives the trial court discretion in fixing fees of referees, superseded it, would not be sustained, section 768 having been contained in the code for many years, and the profession and courts having ac-

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cepted it as controlling with entire unanimity, and it being a serious question whether Political Code, section 4479, applies to matters of procedure.—Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 25-27; 13 Cent. Dig., cols. 15-17, §§ 2, 3.

§ 2. Stipulations and Agreements.

[a] Code of Civil Procedure, section 1195, relating to the foreclosure of mechanics' liens, provides that the court must allow, as part of the costs, reasonable attorneys' fees, etc. Held, that this should not be construed as a provision against an actual outlay only, but that where there was an agreement to pay attorneys' fees plaintiff was entitled to a reasonable allowance.—Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325; Chivell v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 328.

[b] A stipulation that certain designated persons should ascertain "the amount due" to the plaintiffs, and that "judgment shall be accordingly entered," does not exclude the attorney's fee which the court is to fix. Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325, 332.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 99, 100; 13 Cent. Dig., cols. 31-35, §§ 17-19.

§ 3. Discretion of Court—In Civil Actions, in General.

[a] Allowance of costs rests in the discretion of court of original jurisdiction.—Harvey v. Chilton, 11 Cal. 114.

[b] Costs are discretionary only when so specified in statute.—Stoddard v. Treadwell, 29 Cal. 281.

[c] In an action for the recovery of money or damages the prevailing party is entitled to his costs, and the court has no discretion in awarding them.—Stoddard v. Treadwell, 29 Cal. 281.

[d] Allowance of items of expense and disbursements incurred at trial must be left in nearly every instance to discretion of judge. Barnhart v. Kron, 88 Cal. 449, 26 Pac. 210.

[e] Code of Civil Procedure, section 1025, leaving the determination of the question of costs, with certain exceptions, to the discretion of the trial court, does not justify the court in allowing costs not properly chargeable.—Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

[f] In action for reconveyance of property, given to secure debt, award of costs is in discretion of court, and court is justified in imposing them on defendant when he repudiates plaintiff's title and refuses to account.—De Leonis v. Walsh, 140 Cal. 181, 73 Pac. 813.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 36-38; 13 Cent. Dig., cols. 35-48, §§ 20-25; cols. 269, 270, § 231.

§ 4. —— In Equity Suits.

[a] In suits in equity allowance of costs rests in discretion of court.—Harvey v. Chilton, 11 Cal. 114; Gray v. Dougherty, 25 Cal. 266.

[b] Costs in equity have no bearing on the merits, and are no part of the relief sought. Gray v. Dougherty, 25 Cal. 266.

[c] In equity, ordinary costs of action are awarded or withheld at discretion of the court.—Williams v. MacDougall, 39 Cal. 80.

[d] Allowance of costs in equity case is a matter within discretion of court.—Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021.

[e] A decree that neither party recover costs is within the equitable discretion of the trial court.—Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449.

FOR AUTHORITIES FROM OTHER STATES:

See 17 C. C. A. 368, note. See, also, 11 Cyc. 36-38; 13 Cent. Dig., cols. 38-44, § 21.

§ 5. —— —— Injunction and Specific Performance.

[a] Where in an action for damages and an injunction the plaintiff was awarded perpetual injunction and damages for less than two hundred dollars, the allowance of costs beyond the costs incurred by reason of the injunction was within the discretion of the court below.—Esmond v. Chew, 17 Cal. 336.

[b] In an injunction suit, where a perpetual injunction is awarded, the allowance of costs to the plaintiff is within the discretion of the court.—Davidson v. Devine, 70 Cal. 519, 11 Pac. 664.

[c] In action for specific performance of a contract obtained by fraud, where a decree is entered for defendant on the merits, it is an abuse of the court's discretion to tax costs against defendant.—Kelly v. Central Pac. R. Co., 74 Cal. 565, 16 Pac. 390.

§ 6. —— Proceedings to Determine Heirship.

[a] In proceeding to determine heirship, under 1664, Code of Civil Procedure, court has discretion to apportion costs, but may award costs to successful claimants.—Lindy v. McChesney, 141 Cal. 353, 74 Pac. 436.

§ 7. Costs Dependent upon Amount of Recovery.

[a] In an action to abate a nuisance damages are only an incident to the action, and failure to recover them does not affect question of costs.—Hudson v. Doyle, 6 Cal. 101.

[b] In action for damages, where verdict is less than jurisdictional sum, no costs allowed.—Shay v. Tuolumne Co., 6 Cal. 286.

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[c] In action to try right to use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. Marius v. Bicknell, 10 Cal. 217.

[d] One who sues to recover possession of an undivided part of real estate, and recovers an undivided part, but a less interest than he sued for, is entitled to full costs even if the answer concedes his right to the interest recovered, but raises an issue on the question of the ouster from the part recovered.—Lawton v. Gordon, 37 Cal. 202.

[e] Libel and slander act of 1872 does not give costs to plaintiff recovering judgment for less than three hundred dollars.—Jacobi v. Baur, 55 Cal. 554.

[f] In an action for damages and an injunction, where the injunction is denied, a judgment for less than three hundred dollars does not carry costs.—Himes v. Johnson, 61 Cal. 259.

[g] Where the aggregate of the judgments recovered by plaintiff in an action against several stockholders of a corporation to enforce their liability for a corporate debt exceeds three hundred dollars, but he does not recover any single judgment, joint or several, for three hundred dollars or more, he is not entitled to costs under Code of Civil Procedure, section 1022, entitling him thereto only in case of recovery of judgment for three hundred dollars or more.—Derby v. Stevens, 64 Cal. 287, 30 Pac. 820.

[h] Code of Civil Procedure, section 1025, providing that no costs can be allowed in an action for damages, where plaintiff recovers less than three hundred dollars, forbids recovery of costs by either party on a recovery of less than three hundred dollars.—Anthony v. Grand, 101 Cal. 235, 35 Pac. 859.

[i] Code of Civil Procedure, section 1025, applies to an action for assault and battery. Anthony v. Grand, 101 Cal. 235, 35 Pac. 859.

[j] Defendant is entitled to costs as of course, where he recovers one dollar on a counterclaim interposed to a complaint for over three hundred dollars, on which plaintiff recovers nothing, under Code of Civil Procedure, section 1022, giving plaintiff costs as of course on a recovery of over three hundred dollars, and providing that defendant shall recover costs, on recovering, in cases in which plaintiff would, on recovering, be entitled to costs.—Davis v. Hurgren, 125 Cal. 48, 57 Pac. 684.

[k] In an action for damages, where plaintiff recovered less than three hundred dollars, he was not entitled to costs.—Kishlar v. Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

[l] Although Code of Civil Procedure, section 1025, provides no costs can be allowed in an action for damages where plaintiff recovers less than three hundred dollars, in an action to recover damages for trespass to realty and to restrain threatened waste, wherein a receiver was appointed, and the judgment adjudicated property rights, and ordered the receiver to deliver such property to the respective parties in accordance with the terms of the judgment, thus showing that the action and relief granted were equitable, the trial court had discretion to award costs, although the damages recovered by plaintiff were less than three hundred dollars. Bemmerly v. Smith, 136 Cal. 5, 68 Pac. 97.

[m] Where jurisdiction of superior and justice's court is concurrent plaintiff is entitled to costs though judgment is for less than three hundred dollars.—Clark v. Brown, 141 Cal. 96, 74 Pac. 548.

[n] In suit in equity plaintiff is entitled to costs against all necessary parties who appear and defend, though judgment is for less than three hundred dollars.—Clark v. Brown, 141 Cal. 95, 96, 74 Pac. 548.

[o] In an action in the superior court, where plaintiff recovered less than three hundred dollars, he was not entitled to costs.—Boland v. Ashurst Oil etc. Co., 145 Cal. 405, 78 Pac. 871.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 39-46; 13 Cent. Dig., cols. 77-130, §§ 47-92.

§ 8. Costs Dependent upon Joinder of Causes.

[a] Where neglect of a city to repair a sewer, and of its officers to properly repair it, combine to cause sewage to overflow land, though land owner can have but one satisfaction in damages, since she must sue each separately, she is not within Code of Civil Procedure, section 1023, prohibiting recovery of costs in more than one action where defendants, sued separately, "might have been joined as defendants in the same action." Butler v. Ashworth, 110 Cal. 614, 43 Pac. 386.

[b] Where the vendor of land, who had retained the legal title until the purchase price was paid, sued on the note given therefor, without asking for a sale of the land, he cannot recover costs in a subsequent proceeding against the land.—Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 132, 133; 13 Cent. Dig., cols. 135-137, § 95.

§ 9. Right of Prevailing Party.

[a] Where the court, in the exercise of its discretion, divided the costs so as to award to each party the costs incurred in the trial of issues found in favor of each, if it appears that one of the issues was erroneously found in favor of the defendant, the cost of the trial of that issue should be retaxed in favor of the plaintiffs.—Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

[b] A party ultimately defeated is liable for the costs of previous trials, so far as they are legitimate and properly taxed.—Senior v. Anderson, 130 Cal. 290, 62 Pac. 563.

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[c] Under Code of Civil Procedure, section 1022, providing that costs are allowed of course to the plaintiff on a judgment in his favor in an action which involves the title or possession of real estate, that portion of the finding and judgment of the court directing that each party in a proceeding to quiet title should pay his own costs is erroneous, where judgment was rendered for plaintiff. Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470.

[d] Plaintiff who fails to recover against a defendant is not entitled to any costs against him, notwithstanding his costs were largely incurred against a counterclaim of such defendant, upon which the defendant also failed to recover. In such case the court is allowed no discretion as to the costs.—Benson v. Braun, 134 Cal. 41, 66 Pac. 1.

[e] A judgment against one defendant and the plaintiff in favor of the other defendants for their costs is not subject to objection by the defendant against whom it was rendered on the ground that he was a codefendant, where he filed a cross-complaint, and thereby made it necessary for the other defendants to defend against his claim.—Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

[f] Code of Civil Procedure, section 1022, provides that costs are allowed of course to the plaintiff upon a judgment in his favor in an action for the recovery of real property, and in an action which involves the title or possession of real property; and section 1025 declares that, in an action other than those mentioned in section 1022, costs may be allowed, or not, in the discretion of the court. Held, that where plaintiffs, in an action between heirs to set aside certain conveyances of real estate by deceased to defendants, were successful, they were entitled to costs as of right.—Gibson v. Anderson, 145 Cal. 454, 78 Pac. 953.

[g] Where in an action to recover land, the court, before the transcript of the testimony was written up, ordered that the same should be prepared at the equal expense of both parties, the successful party, having paid one-half of the cost, was entitled to have the amount thereof allowed as a part of the costs in the case.—Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957.

[h] Where the issue is found against plaintiffs, they are not entitled to recover any costs or disbursements incurred in the action. Lawrence v. Getchell, 4 Pac. 544.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 27-38, 86-90; 13 Cent. Dig., cols. 150-161, §§ 108-114.

§ 10 —— Litigated or Defended Cases.

[a] A case litigated on demurrer comes within a statute providing for an allowance to the prevailing party in litigated cases. Packard v. Wilson, 72 Cal. 124, 13 Pac. 220.

§ 11. —— Who is Prevailing Party.

[a] In an action to determine title, and to enjoin defendant from trespassing and asserting title, the court found plaintiff owner of part of the land, and not entitled to any relief. Code of Civil Procedure, sections 1022, 1024, allow costs to either party on judgment in his favor in an action which involves the title or possession of realty. Held, that defendant was entitled to costs.—Lawrence v. Getchell, 2 Pac. 746.

§ 12. —— Partial Success.

[a] Where plaintiff recovers judgment for a part of the demanded premises, and defendant for the residue in action of ejectment in which all the allegations of the complaint are denied, plaintiff is entitled to costs. Havens v. Dale, 30 Cal. 547.

[b] In an action of title, where defendants deny plaintiffs' title and ouster, and set up an adverse title, if the jury allow in a special verdict the land claimed by defendants, without passing on the question of title of plaintiffs, or of ouster, it will be considered a verdict for defendants, and entitle them to costs, if accepted by plaintiffs.—Gonzales v. Leon, 31 Cal. 98.

[c] When, in an action to determine an adverse claim to land, plaintiff succeeds in part and fails in part as to some of defendants, a judgment will not be reversed because the district court awarded costs against such defendants.—Brooks v. Calderwood, 34 Cal. 563.

[d] In an action to enjoin the continuation of a wrongful act, and for damages already sustained thereby, a judgment for fifty dollars damages, but for no part of the equitable relief demanded, will not carry costs.—Brown v. Delavau, 63 Cal. 303.

[e] Under Code of Civil Procedure, section 1025, which provides that in certain cases "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court," in a suit for an injunction against several defendants, though plaintiff has judgment against one of defendants, where the issues are found in favor of the others, it is not an abuse of discretion to allow such defendants cost against plaintiff. Abram v. Stuart, 96 Cal. 235, 31 Pac. 44.

§ 13. —— Right of Several Parties to Amount Allowed.

[a] Where action has been commenced against several defendants, and there has been judgment in their favor, they are not all entitled to recover separate costs to the amount allowed by the act, but can only recover jointly, as though there had been but one defendant.—Rice v. Leonard, 5 Cal. 61.

§ 14. Costs Incurred Under Void Order.

[a] The party who finally recovers in the case is not to lose costs necessarily incurred, because they were incurred under a void order, which was believed at the time to be valid.—Meyer v. City of San Diego, 132 Cal. 35, 64 Pac. 124.

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§ 15. Effect of Offer of Judgment or Tender.

[a] It is a general rule that a defendant who pleads a tender to entitle himself to costs must not only aver a tender, but that he has always been and is ready to pay the sum tendered, and the money must be brought into court.—Bryan v. Maume, 28 Cal. 238.

[b] Plaintiff may recover costs accruing before offer of judgment, though he obtain less favorable judgment than was offered. Duthitt v. Finch, 84 Cal. 215.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 71-82; 13 Cent. Dig., cols. 185-221, §§ 137-164.

§ 16. Effect of Offer of Compromise.

[a] Offer of compromise under section 997, Code of Civil Procedure, does not bar plaintiff's right to costs if trial be concluded within five days after it is made.—Scammon v. Denio, 72 Cal. 396, 14 Pac. 98.

[b] Offer of compromise under section 997, Code of Civil Procedure, need not be refused by defendant, except by failure to accept.—Scammon v. Denio, 72 Cal. 379, 14 Pac. 98.

[c] Under section 997 of the Code of Civil Procedure, the failure of the plaintiff to accept an offer of compromise does not preclude him from the right to recover costs, although the judgment rendered in his favor is for a less amount than the offer, if the trial is concluded within five days after the offer was made.—Scammon v. Denio, 72 Cal. 393, 14 Pac. 98.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 83-85; 13 Cent. Dig., cols. 222-225, §§ 165-170.

§ 17. Effect of Premature Commencement of Action.

[a] Where plaintiff in replevin had no right to the property at the time demand was made for it, and suit commenced, but he afterward acquired such right, and judgment was given in his favor for possession, defendant was entitled to costs.—O'Connor v. Blake, 29 Cal. 312.

§ 18. Effect of Abatement of Action by Death of Party.

[a] Costs are but an incident to a judgment; and if the court, by abatement of the action, loses power to render any judgment in the case before it, it is powerless to render any judgment for the costs incurred therein.—Begie v. Begie, 128 Cal. 154, 60 Pac. 667.

[b] Where no costs were allowed in the judgment, the appeal cannot be retained after the death of the appellant, to determine the question as to who is entitled to recover the costs upon appeal. Upon the abatement of an action or appeal by death of a party, there can be no judgment for costs in favor of the survivor, but each party must bear his own costs incurred prior to the death. Begie v. Begie, 128 Cal. 154, 60 Pac. 667.

§ 19. Effect of Disclaimer.

[a] Under Code of Civil Procedure, section 739, which provides that, if defendant in an action to quiet title disclaims in his answer any interest or estate in the property, plaintiff cannot recover costs, it is immaterial whether or not a defendant who, in his answer, makes such a disclaimer has ever before claimed an interest in the property, as in either event plaintiff would be entitled to judgment without costs.—Bulwer Consol. Min. Co. v. Standard Consol. Min. Co., 83 Cal. 589, 23 Pac. 1102.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 82; 13 Cent. Dig., cols. 233-237, §§ 185-191.

§ 20. —— Joining Answer with Disclaimer.

[a] In an action to determine an adverse claim to land, defendant will not be exonerated from payment of costs by disclaiming any title or interest in himself, when, if at the same time, he answers, denying the allegation of possession contained in the complaint, thereby compelling plaintiff to prove that issue, and plaintiff finally succeeds on such issue.—Brooks v. Calderwood, 34 Cal. 563.

§ 21. On Granting of Nonsuit.

[a] Costs, by way of indemnity, ought not to be taxed in case of a nonsuit.—Rice v. Leonard, 5 Cal. 61.

[b] Where a nonsuit is granted in a civil case, and the jury discharged, the jury fees must be paid by the plaintiff, and no further proceedings should be allowed in the case until such payment.—Lukes v. Logan, 66 Cal. 33, 4 Pac. 883.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 65-69; 13 Cent. Dig., cols. 237-256, §§ 192-210.

§ 22. On Second Successful Trial.

[a] When there have been two trials of an action for the recovery of money or damages, in both of which the plaintiff was successful, he is entitled as of right to his costs on both trials.—Stoddard v. Treadwell, 29 Cal. 281.

§ 23. On Opening Default.

[a] Where costs are imposed as condition for reopening case after the adjournment of the term, the acceptance of the costs by the opposite party will not be construed into a consent to have the cause reinstated.—Carpentier v. Hart, 5 Cal. 406.

[b] Under Practice Act, section 68, authorizing the setting aside of a judgment rendered through excusable neglect on such terms as may be just, and on payment of costs, it is error to set aside such a judgment without imposing the payment of costs as a condition of setting it aside.—People v. O'Connell, 23 Cal. 281.

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[c] An order vacating a judgment by default is erroneous if it does not require payment of previous costs as a condition of vacating it, in view of the statute requiring the payment of costs when such a judgment is vacated.—(1865) Howe v. Independence Consol. Gold etc. Min. Co., 29 Cal. 72; (1866) Bailey v. Jaaffee, 29 Cal. 423.

[d] In order to release a party from a default judgment taken against him under Practice Act, section 68, it should only be granted on the promise of payment of all costs accruing to the adverse party to the time of service and filing of motion therefor. Leet v. Grants, 36 Cal. 288.

§ 24. Proceedings After Remand by Appellate Court.

[a] Where judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs.—Visher v. Webster, 13 Cal. 58.

[b] The party responsible for erroneous proceedings after a remittitur has been sent down from the supreme court must pay the costs of those proceedings, and also the costs of an appeal caused by them.—Argenti v. City of San Francisco, 30 Cal. 458.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cent. Dig., cols. 283-286, § 254.

§ 25. Entry of Judgment for Costs.

[a] Since Statutes of 1861, page 494, authorizes the clerk to insert the amount of the costs within two days after they have been taxed or ascertained, in a blank left in the judgment for that purpose, such insertion may be made after the judgment is entered, and after the court has adjourned for the term.—Antoine Co. v. Ridge Co., 23 Cal. 219.

[b] Under Practice Act of 1851, section 511, requiring the clerk to include the costs in the judgment, he had no authority to enter the judgment, and then, at a subsequent time, insert the costs. Any execution under such a so-called judgment for costs would be void. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

[c] The clerk has no authority to enter a judgment for costs while a motion to retax is pending.—Santa Clara Mill etc. Co. v. Board of Supervisors, 71 Cal. 268, 12 Pac. 129.

§ 26. Assignment of Costs.

[a] Since costs are only an incident of the verdict, where the verdict is from its nature unassignable, an attempt to assign it will not pass costs.—Lawrence v. Martin, 22 Cal. 173.

II. PERSONS AND PROPERTY LIABLE.

PERSONS LIABLE, § 27.
—— INTERVENERS, § 28.
APPORTIONMENT OF COSTS, § 29.
PROPERTY LIABLE, § 30.

§ 27. Persons Liable.

[a] Where defendants, wife and husband, in an action to set aside a deed to the wife, answered that the deed was made in good faith, for a valuable consideration, costs may be awarded against both defendants; for their answer, in effect, claimed a joint interest in the property, within Civil Code, section 164, providing that property acquired after marriage by a husband or wife is community property.—Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327.

[b] In an action of interpleader, where no issue is joined on the right of the plaintiff to bring the action, and the plaintiff is dismissed therefrom, he ceases to be a party to the action; and where the defendants litigate between themselves the right to the money deposited in court, the costs of appeal awarded to the appellant from the judgment between them can only be enforced against the respondent upon that appeal, and where they were sought to be enforced against the plaintiff in the action the court properly made an order perpetually staying execution against the plaintiff.—San Francisco Savings Union v. Long, 137 Cal. 68, 69 Pac. 687.

[c] Under Code of Civil Procedure, §§ 1031, 1509, it is not necessary that there be a finding of mismanagement or bad faith before costs may be awarded against an executor.—Meyer v. O'Rourke, 88 Pac. 706.

[d] In the absence of statute authorizing imposition of costs against executors, etc., under Code of Civil Procedure, section 1022, providing for the allowance of costs to plaintiff on judgment in his favor, costs will be imposed upon an executor individually, leaving him the right to seek reimbursement from the estate should he be fairly entitled to it.—Meyer v. O'Rourke, 88 Pac. 706.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 90-97; 13 Cent. Dig., cols. 374-413, §§ 369-399.

§ 28. —— Interveners.

[a] Where the supreme court reverses a judgment for intervener, and orders the intervention dismissed, the costs of the trial should be taxed, with those of the appeal, against intervener.—Reay v. Butler, 99 Cal. 477, 33 Pac. 1134.

§ 29. Apportionment of Costs.

[a] In an action against several defendants for severally diverting water from a stream, so as to diminish the flow, it is proper to apportion the costs and damages recovered by plaintiff equally among defendants.—Hillman v. Newington, 57 Cal. 56.

[b] In equity costs may be apportioned by court.—Cerf v. Ashley, 68 Cal. 421, 9 Pac. 658.

[c] When court orders transcription of evidence without direction as to mode of payment therefor, each party must pay half.—Barkly v. Copeland, 86 Cal. 494, 25 Pac. 3.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 36-38; 13 Cent. Dig., cols. 292-309, §§ 261-276.

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§ 30. Property Liable.

[a] On a bill to dissolve a joint-stock association and distribute its assets, it being for the interest of all parties concerned that the company should be legally dissolved, held, that the costs and a counsel fee on each side should be paid out of the fund.—Von Schmidt v. Huntington, 1 Cal. 55.

[b] In an action by the creditors and assignee in insolvency of a grantor to set aside a conveyance, a decree of sale which allows the creditors' attorney's fees to be deducted from the proceeds of sale of the land, and, after paying the creditors, the residue to be paid to the grantee, and giving the assignee no share in the fund, is erroneous, as counsel fees are not recoverable by the successful parties against one who is adversely interested, nor is an assignee entitled to costs where the case was decided against him.—Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485.

[c] The sheriff cannot apply the proceeds of sale under execution to the payment of keeper's fees and expenses under a writ of attachment which were not included in the cost-bill and judgment, and they are not part of the accruing costs allowed under section 697 of the Code of Civil Procedure, which include only such fees and expenses as are incurred in the execution of the judgment.—Hotchkiss v. Smith, 108 Cal. 285, 41 Pac. 304.

[d] Where it appears that, exclusive of the item of keeper's fees under a writ of attachment constituting no part of the judgment, the property sold under the execution is sufficient when properly applied, to satisfy the judgment, including the amount of costs claimed in the cost-bill and accruing costs, the defendant is entitled to have the proceeds so applied, and to have the judgment satisfied.—Hotchkiss v. Smith, 108 Cal. 285, 41 Pac. 304.

[e] Where an attachment of property of an insolvent building association is a valid lien, the costs of the action are secured by it, and should be paid in full from the proceeds of the sale of the attached property, the same as the original debt sued on.—Bories v. Union Building etc. Assn., 141 Cal. 79, 74 Pac. 554.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 96; 13 Cent. Dig., cols. 408, 409, § 397.

III. SECURITY FOR COSTS.

STATUTORY PROVISIONS, § 31.
TIME TO MOVE FOR SECURITY, § 32.
EFFECT OF FAILURE TO FILE IN TIME, § 33.
WAIVER OF FAILURE TO FILE IN TIME, § 34.
TIME TO FILE ADDITIONAL SECURITY, § 35.

In action for libel or slander. See Libel and Slander, § 23.

§ 31. Statutory Provisions.

[a] Under Statutes of 1871-72, page 533, requiring plaintiff in an action for slander to file an undertaking with sureties who shall annex to such undertaking an affidavit that they are residents "within the county," and whose qualifications "shall be as required in their affidavits," such sureties must be residents within the county in which the action is brought.—Smith v. McDermott, 93 Cal. 421, 29 Pac. 34.

[b] A school district, being a distinct corporation, though having the same name and embracing the same territory as a city, is not within Code of Civil Procedure, section 1058, exempting a county or city from giving security in a civil action.—Mitchell v. Board of Education of City and County of San Francisco, 137 Cal. 372, 70 Pac. 180; Reeves v. Board of Education of City and County of San Francisco, 137 Cal. 372, 70 Pac. 180.

[c] In an action by a foreign corporation against residents of this state who demand security for costs and charges, under section 941 of the Code of Civil Procedure, the undertaking must be of the same nature as a cost bond upon appeal, that the sureties will pay such costs and charges as may be awarded against the plaintiff by the judgment, not exceeding three hundred dollars. The court has no power to fix a less sum, or to change the amount or condition of the bond fixed by the statute; and after the lapse of thirty days without the giving of the statutory bond, the action was properly dismissed.—Meade County Bank v. Bailey, 137 Cal. 447, 70 Pac. 297.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 176; 13 Cent. Dig., col. 415, §§ 401, 402.

§ 32. Time to Move for Security.

[a] Notice requiring security for costs from a nonresident plaintiff was served December 12th, unaccompanied by an order staying proceedings. The following day, judgment was rendered for defendant, and January 19th the plaintiff perfected his appeal. Held, that defendant's motion to dismiss the appeal for plaintiff's failure to give security below was properly refused, as it was too late, after judgment, to move to dismiss the action.—Comstock v. Clemens, 19 Cal. 77.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 176-178; 13 Cent. Dig., cols. 452-458, §§ 463-468; cols. 465-468, §§ 479-481.

§ 33. Effect of Failure to File in Time.

[a] Acts of 1871, page 553, section 1, requiring an undertaking for costs, in actions for damages for libel, does not deprive the court of jurisdiction in case such undertaking is not filed; and the object of the statute is effected if, when the objection is made, an undertaking be executed and the defendant thus secured the costs and charges which may be awarded to him.—Dixon v. Allen, 69 Cal. 527, 11 Pac. 179.

§ 34. Waiver of Failure to File in Time.

[a] Where, in an action for slander, no undertaking for costs is filed before the is-

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suance of the summons, as required by act of March 23, 1872, but a few days afterward such an undertaking is filed, it is error to dismiss the complaint on an objection being made, months after the filing of the undertaking, that it was not filed in time.—Stinson v. Carpenter, 78 Cal. 571, 21 Pac. 304.

§ 35. Time to File Additional Security.

[a] A provision of an order requiring contestants to give additional security for costs requiring the security to be furnished within ten days, held ineffectual; contestants being entitled to thirty days under Code of Civil Procedure, sections 1036, 1037.—Dean's Estate, In re (Cal. Sup.), 13.

IV. ITEMS ALLOWABLE AS COSTS.

ATTORNEY'S FEES, § 36.
JURY FEES, § 37.
CLERK'S FEES, §§ 38, 39.
REPORTER'S FEES, § 40.
RECEIVER'S FEES, § 41.
PUBLICATION OF SUMMONS, § 42.
EVIDENCE—MAPS, § 43.
—— CERTIFICATE AND COPIES, § 44.
DEPOSITIONS, § 45.
WITNESS' FEES, § 46.
—— WITNESS SUBPOENAED BUT NOT EXAMINED, § 47.
—— EXPERTS, § 48.

§ 36. Attorney's Fees.

[a] Counsel fees not taxable as costs.—Selby v. Bark Alice Tarlton, 1 Cal. 103.

[b] As general rule counsel fees are not recoverable as costs by a successful party in actions either at law or in equity.—Williams v. MacDougall, 39 Cal. 80.

[c] A reasonable attorney's fee, though not a part of the costs, is a necessary incident to a judgment for plaintiff in an action to foreclose mechanic's lien.—Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325.

[d] Counsel fees are not, as a general rule, recoverable in actions either in law or in equity, although in some equity cases they may be awarded at the discretion of the court; but where the parties to an action in equity are hostile litigants, and each employs his own attorney, and contests the main issues of the case, the refusal of the court to allow the successful party his attorney's fees is not an abuse of discretion.—Salmina v. Juri, 96 Cal. 418, 31 Pac. 365.

[e] General rule is that counsel fees are not recoverable by a successful party in an action either at law or in equity, except in enumerated instances where they are expressly allowed by statute.—Miller v. Kehoe, 107 Cal. 340, 40 Pac. 985.

[f] Counsel fees are not costs or disbursements and cannot be recovered unless specifically asked for in prayer.—Brooks v. Forrington, 117 Cal. 221, 48 Pac. 1073.

[g] Defendant accepted stock from a partnership without consideration, not in the usual course of business, and within thirty days prior to insolvency proceedings against it, but ignorant that the transfer was in fraud of creditors. When sued by the assignee for the stock, he denied the assignee's right to it, but did not set up the right of anyone else except the partners, and he was not requested by them to defend their titles as partners or as individuals. Held, that he was not entitled to counsel fees, on rendition of a judgment for plaintiff, because of being in doubt whether it was individual or partnership property, nor because an individual creditor of one of the partners had attempted to attach that partner's interest in the stock. Sanger v. Ryan, 122 Cal. 52, 54 Pac. 522.

[h] Under Code of Civil Procedure, section 1195, providing that the court must allow reasonable attorney's fees, no allegation and finding as to attorney's fees being necessary, a claim that a finding that an allegation that plaintiff was informed that a certain amount was a reasonable attorney's fee was insufficient to support the judgment for attorney's fees, is without force.—Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41; Geung Hong v. Harwood, 140 Cal. 500, 74 Pac. 41.

[i] Counsel fees are not recoverable in an action of slander by a defendant in whose favor a judgment is rendered, unless such fees are included in his memorandum of costs.—McKinney v. Roberts, 8 Pac. 3.

[j] Statement of defendant's right under Statutes of 1871-72, pages 533, 534, chapter 377, sections 6, 7, and Code of Civil Procedure, section 581, to have counsel fees taxed as costs where a libel or slander suit is dismissed.—Gaffey v. Mann (Cal. App.), 84 Pac. 424.

[k] In an action on note by pledgor, allowance of attorney's fees held improper.—Graham v. Light (Cal. App.), 88 Pac. 373.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 104-107; 13 Cent. Dig., cols. 634-658, §§ 665-690.

§ 37. Jury Fees.

[a] When the case was set for trial, plaintiff waived a jury, and defendant stated that, while he did not demand a jury, he did not expressly waive it. On the day set for trial a jury was in attendance, and the parties then announced that they had agreed to try the case without a jury. Plaintiff did not pay or become liable for any jury fees. Held, that he could not recover the jurors' attendance fees as costs.—Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87.

§§ 38, 39. Clerk's Fees.

[a] An item of clerk's fee held properly stricken from the cost-bill as an expense unnecessarily incurred.—Gaffey v. Mann (Cal. App.), 84 Pac. 424.

§ 40. Reporter's Fees.

[a] Reporter's fees for transcribing evidence at request of one party alone are not

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chargeable as costs.—Barkly v. Copeland, 86 Cal. 494, 25 Pac. 3.

[b] When transcript of evidence is made by order of court, half of reporter's fees paid by successful party may be recovered as costs.—Barkly v. Copeland, 86 Cal. 494, 25 Pac. 3.

[c] Verbal direction that reporter transcribe his notes and file them with clerk is sufficient order under section 274, Code of Civil Procedure.—Taylor v. McConigle, 120 Cal. 128, 52 Pac. 159.

[d] Under Code of Civil Procedure, section 274, as amended by Statutes of 1880, page 54, requiring a party ordering the reporter to transcribe any portion of the testimony to pay the fees therefor, the cost of a transcription should not be taxed as costs where the parties arranged with the reporter, out of court, to furnish each a copy thereof at an agreed price.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

[e] Where the court refuses to order the transcribing of reporter's notes unless plaintiff will consent, and he refuses such consent, the reporter's fees for transacting such notes cannot be charged as costs.—Senior v. Anderson, 130 Cal. 290, 62 Pac. 563.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 125-127; 13 Cent. Dig., cols. 700-704, §§ 744-749.

§ 41. Receiver's Fees.

[a] The compensation allowed a receiver is properly costs of suit.—Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 103; 13 Cent. Dig., col. 662, § 696.

§ 42. Publication of Summons.

[a] In an action by the state to annul a certificate of sale of state lands for failure of the purchaser to make certain payments thereon, where jurisdiction is acquired by defendant by publication of the summons, the cost of publishing it must be taxed against him, on the state's recovering.—Lawrence v. Booth, 46 Cal. 187.

§ 43. Evidence—Maps.

[a] A charge of five hundred dollars for a map in a bill of costs is not a necessary disbursement, appearing as such on its face, which, unless controverted, will control the court on taxation.—Miller v. Highland Ditch Co., 91 Cal. 103, 27 Pac. 536.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 112, 113; 13 Cent. Dig., cols. 672-674, §§ 712-714.

§ 44. —— Certificates and Copies.

[a] Fees paid the clerk for certifying copies which are not required by law to be certified cannot be recovered as costs.—Edmondson v. Mason, 16 Cal. 386.

[b] In an action to quiet title to water rights, expenses for copies of papers containing certain homestead rights of a riparian proprietor, under whom one of the parties claimed, are not chargeable as costs, where it was not shown that such copies were likely to be needed in the case.—Senior v. Anderson, 130 Cal. 290, 62 Pac. 563.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 112; 13 Cent. Dig., cols. 673, 674, § 714.

§ 45. Depositions.

[a] Cost of taking depositions are properly allowed, though they are not used at trial, unless shown that it was unnecessary to take them or they should not be allowed for some special reason.—Lindy v. McChesney, 141 Cal. 353.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 121-124; 13 Cyc. 1028, 1029; 13 Cent. Dig., cols. 560-568, §§ 596-604.

§ 46. Witness' Fees.

[a] Character of testimony given by witnesses is not a test of necessity for incurring expense of subpoenaing them.—Barnhart v. Kron, 88 Cal. 449, 26 Pac. 210.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 114-121; 13 Cent. Dig., cols. 675-700, §§ 715-743.

§ 47. —— Witness Subpoenaed, but not Examined.

[a] Fees of witnesses summoned and attending, but not sworn on the trial, may be taxed, unless it appear that they were unnecessarily or unjustly summoned.—Randall v. Falkner, 41 Cal. 242.

§ 48. —— Experts.

[a] In the taxation of costs, expert witnesses should be allowed only the usual fees for daily attendance and mileage as witnesses, and the costs allowed cannot properly include their pay as experts, nor the expenses incurred by them in making surveys or preparing maps, when not acting under the direction of the court.—Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 118; 13 Cent. Dig., cols. 696, § 738.

V. TAXATION.

JURISDICTION, § 49.
TIME FOR APPLICATION, § 50.
—— AMENDMENT, § 51.
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REMEDIES FOR ERRONEOUS TAXATION—RECEIVING COSTS ON APPEAL FROM MAIN JUDGMENT OR ORDER, § 56.
—— AMENDMENTS, § 57.
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—— HEARING AND DETERMINATION, GENERALLY, § 66.
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—— RETAXATION BY SUPREME COURT, § 68.
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§ 49. Jurisdiction.

[a] Where a will is contested, and the probate court frames issues and sends them to the district court, where the issues are tried by a jury, and the verdict is certified back to the probate court, the probate court has power, under the act relating to decedents' estates (section 35), to tax the costs accruing in the district court to the unsuccessful party.—Abila v. Padilla, 19 Cal. 388.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 154; 13 Cent. Dig., cols. 705-708, §§ 752-755.

§ 50. Time for Application.

[a] Under Code of Civil Procedure, section 1033, requiring the party prevailing, and who claimed his costs, to secure a memorandum of the items thereof within five days after the verdict, or "notice" of the decision of the court or referee, he is not entitled to "notice" from the adverse party, but the five days begin to run from the verdict, or the prevailing party's actual knowledge of the decision.—O'Neil v. Donahue, 57 Cal. 226.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 709-711, § 762.

§ 51. —— Amendment.

[a] Where the original bill of costs is filed within the time prescribed by the act, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part.—Burnham v. Hays, 3 Cal. 115.

§ 52. Cost-bill or Memorandum—Contents.

[a] Where the fees and expenses of a sheriff for the keeping of property held under a writ of attachment are not claimed by the plaintiff in the memorandum of costs, and are not included in the judgment, the failure so to claim and include them in the manner required by the statute is a waiver of such costs, and precludes a recovery thereof from the defendant.—Hotchkiss v. Smith, 108 Cal. 285, 41 Pac. 304.

[b] Under a judgment in a divorce proceeding, requiring "all costs, expenses, and disbursements provided for and contemplated in this decree or judgment" to be paid by the plaintiff exclusively out of his separate property, defendant has no right to include in her cost-bills items not taxable as costs.—White v. White, 33 Pac. 399.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 156, 157; 13 Cent. Dig., cols. 717-719, §§ 772-774.

§ 53. —— Filing and Service.

[a] Under the Practice Act, as it stood in 1854, a party who failed to file with the clerk a memorandum of costs within the time limited, waived his right to costs, whether they were clerk's and sheriff's fees or other costs; and, in the absence of such memorandum, the clerk had no power to include costs in the judgment.—Chapin v. Broder, 16 Cal. 403.

[b] Where a will is contested, and the probate court frames issues and sends them to the district court, where the issues are tried by a jury, and the verdict is certified back to the probate court, a bill of costs accruing in the district court must be filed in the probate court within the statutory time after the verdict was certified to that court, and a failure so to file the bill of costs operates as a waiver thereof, and the probate court has no power to render judgment therefor.—Abila v. Padilla, 19 Cal. 388.

[c] A memorandum of the costs of filing notice and undertaking on appeal and preparing the transcript for the supreme court should be filed in the office of the clerk of the court below at the time of filing the remittitur there, or within the time thereafter prescribed by the statute in other cases.—Ex parte Burrill, 24 Cal. 350.

[d] In the provision of the code prescribing the time within which a memorandum of costs must be filed the decision referred to is the finding of facts and conclusions of law signed by the court and filed with the clerk as the basis of the judgment.—Porter v. Hopkins, 63 Cal. 53.

[e] Memorandum of costs is not filed in time when filed more than five days after claimant knows of decision, though no notice of decision is served.—Mullally v. Irish etc. Soc., 69 Cal. 561, 11 Pac. 215.

[f] Under section 1033 of the Code of Civil Procedure, a judgment for costs entered by the clerk, in the absence of the filing or service of a memorandum of costs on the opposite party, is without jurisdiction and void. Riddell v. Harrell, 71 Cal. 254, 12 Pac. 67.

[g] Under Code of Civil Procedure, section 1011, providing for the service of papers on an attorney at his office, or, if it is not open, at his residence, and, if the residence is unknown, by depositing the paper in the post-office, though the attorney of plaintiff, who

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desired to serve a cost-bill on defendant's attorney, lived at a different postoffice from that of the latter, a deposit in the postoffice at the residence of defendant's attorney is not a valid service; the act requiring a service at his own residence to be personal.—Thompson v. Brannan, 76 Cal. 618, 18 Pac. 783.

[h] Costs cannot be recovered when cost-bill is not properly served.—Thompson v. Brannan, 76 Cal. 620, 18 Pac. 783.

[i] Under Code of Civil Procedure, section 1033, which provides that "the party in whose favor judgment is rendered, and who claims his costs, may deliver to the clerk and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court, ... a memorandum of the items of his costs and necessary disbursements in the action or proceeding," etc., where a judgment was rendered for defendant on October 5th, his attorney having actual notice at the time, though no written notice was served on him, and he failed to file his memorandum of costs until the 11th of the same month, such filing was too late, and he was not entitled to costs.—Dow v. Ross, 90 Cal. 562, 27 Pac. 409.

[j] An affidavit by the attorney does not show "excusable neglect," under Code of Civil Procedure, section 473, when it sets out that he had notice of the judgment on October 5th, but was too busy to make the memorandum; that the 6th was Sunday; that the 7th he was unable to obtain the items; that on the 8th, he partly prepared it; and then forgot about it until the 11th, when it came to his attention, and he immediately prepared, served, and filed the same.—Dow v. Ross, 90 Cal. 562, 27 Pac. 409.

[k] Where a party appeals from a judgment in his favor, and the judgment-roll fails to show a cost-bill filed, or a motion for costs, he cannot complain that the court refused to allow the costs.—Crane v. Forth, 95 Cal. 88, 30 Pac. 193.

[l] Under Code of Civil Procedure, section 1033, which provides that a cost-bill must be filed within five days after the notice of the decision of the court, a cost-bill filed four days before the judgment is unauthorized, and should be stricken out.—Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795.

[m] Where entry of judgment is stayed, cost-bill may be filed any time before entry.—Taylor v. McConigle, 120 Cal. 127, 52 Pac. 159.

[m] Where the entry of judgment is stayed, a bill of costs may be filed at any time before such entry is made, though more than five days may have elapsed after notice of the decision; and under section 274 of the Code of Civil Procedure as it existed before the amendment of 1895, the service of notice upon the clerk that the reporter's fees had not been paid worked a stay of the entry of judgment, unless the court otherwise ordered. Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159.

[n] A party entitled to costs, who had filed a cost-bill within five days after verdict or notice of decision, as required by Code of Civil Procedure, section 1033, which contemplates that a failure to comply with that section shall be deemed a waiver of costs, should not be permitted to file an amended cost-bill after the time limited for filing the original has expired, where there is no showing that his failure to claim omitted items within the time limited was due to mistake, inadvertence, or excusable negligence, as provided by section 473.—Galindo v. Roach, 130 Cal. 389, 62 Pac. 597.

[o] A motion to strike out a cost-bill as not being filed in time will not be sustained where the cost-bill was presented for filing within the proper time, but the clerk, without notifying such party, did not file it because a former item of cost was unpaid. Judgment (1899) 59 Pac. 387, reversed.—Beck v. Pasadena Lake Vineyard Land etc. Co., 130 Cal. 50, 62 Pac. 219.

[p] The service and filing of a cost-bill is fully within a proper construction of section 1054 of the Code of Civil Procedure, authorizing extensions of time of "a notice other than of appeal," and the trial judge has power to grant an extension of time therefor. Beilby v. Superior Court of Santa Cruz County, 138 Cal. 51, 70 Pac. 1024.

[q] A cost-bill in the probate court, in case of costs for any purpose other than the charges of officers appointed by the court, should be filed within the time specified for filing cost-bills in civil cases.—In re Ricaud, Myr. Prob. 158.

§ 54. —— Affidavit or Verification.

[a] If original affidavit to a bill of costs was a nullity, the defendant should have taken proper steps to set it aside, or have appealed from the judgment on the ground that the costs had been waived by operation of the statute.—Burnham v. Hays, 3 Cal. 115.

[b] Under the Practice Act an attorney is competent to swear to an affidavit of costs.—Burnham v. Hays, 3 Cal. 115, 58 Am. Dec. 389.

[c] Uncontroverted affidavit to cost-bill should control decision of court as to necessity for disbursements.—Barnhart v. Kron, 88 Cal. 450, 26 Pac. 210.

[d] Code of Civil Procedure, section 1033, requiring a cost-bill to be "verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney," is sufficiently complied with when the affidavit is made by one who is familiar with the facts, and assisted at the trial, although not an attorney of record.—Yorba v. Dobner, 90 Cal. 337, 27 Pac. 185.

FOR AUTHORITIES FROM OTHER STATES:

See Cent. Dig., cols. 719-723, §§ 775-778.

§ 55. Proof of Items.

[a] Where the prevailing party inserts a charge in his memorandum of costs which does not appear upon its face to be a necessary and proper disbursement, the burden of proof is upon the claimant.—Miller v. Highland Ditch Co., 91 Cal. 103, 27 Pac. 530.

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[b] Where an item is included in the verified memorandum of costs, properly filed, it is prima facie correct, and the burden is upon one disputing its correctness to show that it was improper.—Meyer v. City of San Diego, 132 Cal. 35, 64 Pac. 124.

[c] Statement of proof of incurring expense on motion to tax costs.—Gaffey v. Mann (Cal. App.), 84 Pac. 424.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 160; 13 Cent. Dig., cols. 725-728, §§ 782-787.

§ 56. Remedies for Erroneous Taxation—Reviewing Costs on Appeal from Main Judgment or Order.

[a] An error in respect to costs cannot be corrected on an appeal from an order denying a new trial.—Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107.

[b] If court adds to judgment costs, after time for filing same has expired, and after an appeal has been perfected, the error can only be corrected by an appeal from the order.—Jones v. Frost, 28 Cal. 245.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 160-170; 13 Cent. Dig., cols. 731-765, §§ 790-826.

§ 57. —— Amendment.

[a] Where the defendant moved a retaxation of the plaintiff's bill of costs it was proper for the court, in its discretion, to allow such amendments as were just and necessary.—Burnham v. Hays, 3 Cal. 115.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., col. 733, §§ 792, 793; col. 750, § 808.

§ 58. —— Appeal from Taxation.

[a] Where a party is dissatisfied with the decision of the prothonotary as to costs, his remedy is by appeal from the taxation.—Empire Gravel Min. Co. v. Bonanza Gravel Min. Co., 67 Cal. 406, 7 Pac. 810.

[b] Under Code of Civil Procedure, section 1033, providing that "a party dissatisfied with the costs claimed may, within nve days after the notice of filing of the bill of costs, file a motion to have the same taxed by the court," the service and filing of a written notice of the motion within the five days, and making the motion viva voce on the day designated, though after the five days have expired, is sufficient.—Kishlar v. Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 735-737, § 797.

§ 59. —— Retaxation on Motion.

[a] The mere fact that some of the items of costs are not legally taxable affords no ground for recalling an execution or denying another. The remedy is by motion to retax.—Meeker v. Harris, 23 Cal. 285.

[b] The improper taxation of costs is no ground for a collateral attack on the judgment, the remedy being by motion to retax the costs.—Rogers v. Druffel, 46 Cal. 654.

[c] An objection to the taxation of costs will not be considered where no motion was made to retax, and no exception reserved.—Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

[d] Code of Civil Procedure, section 1033, provides that a party may, within five days after notice of filing of a bill of costs, file a motion for taxation thereof. Prior to amendment by act of March 24, 1874, section 1033, did not require service of the bill of costs on the adverse party, and made no provision for relief against improper items in the bill, but the practice had been settled that relief should be had by motion to retax. Defendant served proper notice of motion for retaxation, and made the motion orally, which the court refused to hear because not in writing. Held error, since the amendment was only declaratory of existing law as defined by the practice of the court, except in fixing the time and place for the motion, and an oral motion is a substantial compliance with the statute.—Carpy v. Dowdell, 129 Cal. 244, 61 Pac. 1126.

[e] A notice of motion to retax costs, not accompanied by any affidavit specifying the grounds of objection, but stating that the items mentioned were not legally chargeable, and were not necessary disbursements, is sufficient, since Code of Civil Procedure, section 1033, providing for motions for the taxation of costs by the court, does not specify what the notice shall contain.—Senior v. Anderson, 130 Cal. 290, 62 Pac. 563.

[f] On the hearing of a motion to retax costs, not accompanied by an affidavit specifying the grounds of objection to the items mentioned, but stating that such items were not legally chargeable as costs, and that the motion would be heard on the papers and any other testimony that might be procured, any evidence competent to prove the items of costs is admissible, over objection that no affidavit specifying the facts on which the objection was based accompanied the notice, since such notice was sufficient without the affidavit.—Senior v. Anderson, 130 Cal. 290, 62 Pac. 563.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 762-764, § 823.

§ 60. Review of Order Granting or Refusing Retaxation.

[a] An order denying a motion to retax costs, made before final judgment, should be reviewed by an appeal from the judgment, raising the question of the correctness of the taxation by a statement annexed to the judgment-roll, and not by an appeal from such order.—Levy v. Getleson, 27 Cal. 685.

[b] Practice Act, section 343, authorizing an appeal from a final judgment, does not include an order made on motion to retax costs

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after entry of judgment, but such an order may be reviewed on an appeal from the judgment, as the order becomes a part of the judgment.—Lasky v. Davis, 33 Cal. 677.

[c] If an order on a motion to retax costs is made before the entry of judgment, it may be reviewed by an appeal from the judgment with a statement annexed to the record. If made after the entry of judgment, it is a special order made after final judgment, from which an appeal lies.—Dooly v. Norton, 41 Cal. 439.

[d] Where a motion to strike out the costs, if permitted, would have effected a modification of the judgment, the order refusing the motion can be reviewed only on an appeal from the judgment.—Flubacher v. Kelly, 49 Cal. 116.

[e] On appeal from a judgment, where the supreme court have only the judgment-roll before them, they cannot review an order denying a motion to retax costs. The memorandum of costs constitutes no part of the judgment-roll.—Kelly v. McKibben, 54 Cal. 192.

[f] Where the amount of costs allowed by the court is less than three hundred dollars, the action of the trial court relating thereto is not reviewable upon appeal, and a separate appeal from the order taxing the costs will be dismissed.—Foley v. California Horseshoe Co., 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42.

§ 61. —— Necessity of Raising Question in Lower Court.

[a] A decree will not be reversed for error in calculating costs where the matter was not brought to the attention of the trial court by motion to correct or to retax costs, or by some proceeding analogous to exceptions to a master's report.—Gronfier v. Minturn, 5 Cal. 492.

[b] Error in the taxation of costs cannot be reviewed, in the absence of a motion to retax in the trial court.—Guy v. Franklin, 5 Cal. 416; (1889) Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

[c] The objection that costs were improperly taxed will not be reviewed unless presented to the court below.—(Cal. 1865) Stoddard v. Treadwell, 29 Cal. 281.

§ 62. —— Necessity of Taking Exception.

[a] An objection to the taxation of costs will not be considered on appeal where no exception was reserved below.—Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

§ 63. —— Necessity of Retaxation in Lower Court.

[a] A mistake in the calculation of interest, or taxation of costs, cannot be attacked for the first time in an appellate court. The party complaining must move, in the district court, to retax, and thus obtain, distinctly, the judgment of the court of original jurisdiction, upon the disputed items, before resort can be had to a higher tribunal.—Guy v. Franklin, 5 Cal. 416.

§ 64. —— Time for Making Motion or Application for Retaxation.

[a] Where a new trial is granted on condition that the applicant pay the costs of the adverse party within a given time, and the bill of costs is erroneous, the court may retax the costs after the expiration of the time fixed for their payment in the order granting a new trial where the applicant tendered the real sum due within such time.—Higuerra v. Bernal, 46 Cal. 580.

§ 65. —— Bill of Exceptions.

[a] Where, on an appeal to retax costs, the various notes and affidavits filed are not embodied in a bill of exceptions or statement, judgment will be affirmed, on the presumption that the court below decided correctly upon all the evidence before it.—Gates v. Buckingham, 4 Cal. 286.

§ 66. —— Hearing and Determination Generally.

[a] The decision of a motion to retax costs will not be disturbed where the items appear proper on their face, and the objections thereto were heard and determined on conflicting evidence.—Hoyt v. Selby Smelting etc. Co., 90 Cal. 339, 27 Pac. 288.

§ 67. —— Questions Considered.

[a] Where plaintiff asked for an attorney's fee, and defendant contended that a smaller fee would be sufficient, and it was left to the discretion of the court to fix the amount, its decision will not ordinarily be disturbed.—Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890.

§ 68. —— Retaxation by Supreme Court.

[a] When the supreme court has obtained jurisdiction of the case by appeal from a sufficient judgment, it can then correct the costs which are inserted in the judgment, as to any item which is improperly charged.—Votan v. Reese, 20 Cal. 89.

§ 68½. Curing Error by Reducing Amount.

[a] Error of the clerk in entering a judgment for costs against defendant in the sum claimed in plaintiff's cost-bill, before the determination of defendant's motion to tax costs, is cured by an order of court reducing the amount.—Foley v. California Horseshoe Co., 115 Cal. 184, 47 Pac. 42.

VI. COSTS ON APPEAL.

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§ 69. In General.

[a] Costs upon appeal are properly the costs in supreme court, and the costs of making up the appeal in the court below, including the cost of making out the transcript.—Gray v. Gray, and Eaton v. Palmer, 11 Cal. 341.

[b] Appellant held entitled to costs on appeal.—Cannon v. Handley, 72 Cal. 145, 13 Pac. 315.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 204-253; 13 Cent. Dig., cols. 769-960, §§ 832-1016.

§ 70. Effect of Failure to Consolidate Appeals.

[a] Distinct appeals, which might be brought up together, may affect the question of costs.—Mazion v. Pioche, 8 Cal. 522.

§ 71. Prevailing Party.

[a] Under Code of Civil Procedure, section 1022, entitling the prevailing party to costs whether his recovery be for the whole of a part of his claim, appellant is not entitled to costs, where respondent dismisses as to the part of his claim contested in the supreme court, and takes judgment as to the balance. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731.

§ 72. Affirmance.

[a] When allowance of interest below was excessive, judgment was affirmed, less interest, without costs to either party.—Lambert v. Schmalz, 118 Cal. 38, 50 Pac. 13.

[b] Upon the affirmance of an appeal from a judgment enforcing a mechanic's lien, the supreme court will not make any directions to the lower court respecting the allowance of an attorney's fee for defending the appeal. Under section 1195 of the Code of Civil Procedure, that matter rests exclusively with the trial court.—San Joaquin Lumber Co. v. Welton, 115 Cal. 1, 46 Pac. 735, 1057; Evans v. Judson, 120 Cal. 282, 52 Pac. 585.

[c] Where, on an appeal from an order granting a new trial, the order is at first reversed, but finally affirmed on a ground first suggested on the rehearing, costs of the appeal should be allowed to appellant.—Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 205-207; 13 Cent. Dig., cols. 831-836, §§ 884-891.

§ 73. Amendment or Modification.

[a] The judgment in this case, being for too much interest, was modified by the supreme court in that particular, and then permitted to stand, at appellant's cost, on the principle that where the supreme court modifies the judgment below for an apparent error, which appellant might have corrected below, on motion, respondent will not be taxed with costs.—Cassin v. Marshall, 18 Cal. 689.

[b] Where a judgment was reported by a referee payable in gold coin, and there was nothing in the record warranting it, the supreme court will direct the judgment to be modified, but without costs to appellant, if he failed to ask the court below to make the modification.—Noonan v. Hood, 49 Cal. 293.

[c] A decision on appeal, in an action of claim and delivery, directing the trial court to correct its judgment so as to make it in the alternative is a clear and important modification of the judgment within the meaning of rule 24 of the supreme court, and, if the decision contains no direction as to costs of appeal, the clerk may properly enter upon the record, and insert in the remittitur a judgment for such costs in favor of the appellant, in compliance with that rule.—Meads v. Lasar, 93 Cal. 530, 29 Pac. 125.

[d] A defect in the decree of distribution in failing to contain a provision for the payment of small legacies, of five dollars each, will be ordered corrected in that respect by the trial court, without costs to the appellant.—Estate of Langdon, 129 Cal. 451, 62 Pac. 73.

[e] Costs held not to be awarded for modification on appeal of a decree for which the appeal was not taken.—Southside Improvement Co. v. Burson, 147 Cal. 401, 81 Pac. 1107.

[f] Costs on appeal from two improper judgments which, if enforced, would have cast heavy expense on appellant, are properly chargeable to respondent, on a reformation thereof.—Schaeffer v. Hofmann, 37 Pac. 932.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 214-216; 13 Cent. Dig., cols. 836-841, §§ 892-899.

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§ 74. Dismissal.

[a] On the dismissal by the county court of an appeal from a justice court for want of jurisdiction of the subject matter, costs may be awarded against appellant.—Blair v. Cummings, 39 Cal. 667.

[b] On the dismissal of an appeal for want of prosecution, costs may be awarded against appellant.—Blair v. Cummings, 39 Cal. 667.

[c] Where an appeal is dismissed because a new trial was granted, appellant is entitled to costs.—Blackburn v. Abila, 39 Pac. 797.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 210-212; 13 Cent. Dig., cols. 825-831, §§ 877-883.

§ 75. Reversal.

[a] Appellant here made to pay costs where the only error was in entering judgment non obstante veredicto, and the judgment was reversed, with permission to the court to enter judgment on the verdict if the plaintiff desired it.—Reniff v. The Cynthia, 18 Cal. 669.

[b] On appeal from a judgment and order denying a new trial, where the court orders the submission set aside as to the appeal from the judgment, and the hearing thereon continued until further orders, but on the other appeal reverses the order denying new trial, appellant is entitled to costs.—Dixon v. Pluns, 35 Pac. 1047.

[c] On reversal of a judgment, appellant or plaintiff in error is entitled to costs.—Schaeffer v. Hofmann, 37 Pac. 932.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 207-210, 212-214; 13 Cent. Dig., cols. 841-851, §§ 900-907; cols. 866-869, § 929.

§ 76. Trivial Error.

[a] An error, in a judgment of foreclosure appealed from, in the rate of interest after judgment, held insufficient to entitle appellant to the costs of the appeal.—Thrasher v. Moran, 146 Cal. 683, 81 Pac. 32.

§ 77. Error Corrected or Correctable Below.

[a] Where correction in judgment made on appeal would have been made in lower court on mere suggestion, costs are on appellant. Cutting F. P.Co. v. Canty, 141 Cal. 697, 698, 75 Pac. 569.

[b] Where error in decree sustantially affecting appellant was corrected after appeal was taken, appellant is entitled to costs. Fay v. Stubenrauch, 141 Cal. 576, 75 Pac. 174.

§ 78. Apportionment.

[a] If judgment is affirmed in part, costs of appeal may be allowed to appellant, and of lower court to respondent.—Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288, 7 Cal. 148; Bradbury v. Barnes, 19 Cal. 120.

[b] Decree modified, each party to pay his own costs in the supreme court.—Bradbury v. Barnes, 19 Cal. 120.

§ 79. Security for Costs.

[a] Where defendant served on plaintiff, a nonresident, notice to give security for costs, the notice not being accompanied with an order staying proceedings, and on the next day judgment was rendered for defendant, and plaintiff appealed to the supreme court, held, on motion to dismiss the appeal, that after judgment it was too late to move to dismiss the action; that the undertaking on appeal is sufficient security for costs subsequently incurred, and that the motion must be denied.—Comstock v. Clemens, 19 Cal. 77.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 219; 13 Cent. Dig., cols. 886-889, §§ 947-950.

§ 80. Items—Attorney's Fees to Lien Claimants.

[a] Under Code of Civil Procedure, section 1195, providing that, in actions to enforce liens, the superior court must allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme court, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established, attorneys' fees in the supreme court are not costs, within Supreme Court Rule 24, providing that, where an order of reversal or modification contains no directions as to costs of appeal, the clerk will insert in the remittitur a judgment that appellants recover the costs.—Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 Pac. 622.

[b] Under section 1195, the allowance of attorneys' fees in lien cases is in the hands of the superior court, and though, on appeal from judgment allowing a lien, the superior court is directed to modify the judgment as to a certain item, it may still allow the lien claimant attorneys' fees in the supreme court.—Schallert-Ganahl Lumber Co., v. Neal, 94 Cal. 192, 29 Pac. 622.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 224-235; 13 Cent. Dig., cols. 890-896, §§ 951, 953, 955; cols. 898-901, §§ 957, 958, 960.

§ 81. Award.

[a] Costs in the supreme court follow the judgment as of course, unless otherwise specially directed by the court.—Hathaway v. Davis, 33 Cal. 161.

§ 82. —— Requisites and Sufficiency.

[a] Where the clerk of the supreme court, in entering up the judgment, adds the words "with costs," and annexes to the remittitur

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a copy of the bill of costs filed, these words are a sufficient awarding of costs for the clerk of the court below to issue execution for the same.—City of Marysville v. Buchanan, 3 Cal. 212.

§ 83. —— Construction of Judgment or Order, in General.

[a] Where a case is remanded for further proceedings, and the costs awarded in this court in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. Gray v. Gray, and Eaton v. Palmer, 11 Cal. 341.

§ 84. Expenses of Record, Abstract or Transcript on Appeal.

[a] Supreme Court Rule 11, allowing the costs of obtaining the clerk's certification to the transcript to be taxed to respondent on his refusal or failure to certify to the correctness of the transcript within five days after its presentation to him for that purpose, was merely intended to give respondent the opportunity to protect himself from the payment of such costs in case appellant is successful, and does not permit costs to be cast on him for such refusal where the appeal does not succeed.—Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328.

[b] Costs of appellant in procuring certification to transcript on failure of respondent to join in stipulation to its correctness cannot be taxed against respondent where judgment is affirmed.—Loftus v. Fischer, 117 Cal. 134, 48 Pac. 1030.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 224-231; 13 Cent. Dig., cols. 903-920, §§ 962-977.

§ 85. —— Where Another Record Exists.

[a] An appellant is entitled to such costs only as his appeal rendered necessary. Therefore, where, after procuring and paying for a transcript of the evidence, but before the statement was settled, appellant appealed on the judgment-roll, and the cause was reversed, appellant cannot recover costs of such transcript.—Woodland Bank v. Hiatt, 59 Cal. 580.

§ 86. —— Unnecessary Matter.

[a] Where irrelevant matter to any considerable extent has been introduced into the record on appeal, the party who insisted upon its introduction must pay the costs of that portion of the transcript, whether he succeeds upon the merits of the case or not. Harper v. Minor, 27 Cal. 107.

[b] Where a printed transcript in the supreme court is unnecessarily long, the party responsible therefor will be adjudged to pay the cost of printing thus unnecessarily incurred.—People v. Holden, 28 Cal. 123.

[c] If matter clearly immaterial is introduced into the statement on appeal, against the objection and exception of one of the parties, and this fact is made to appear in the record, the party insisting on its introduction will be taxed with the costs of the immaterial matter, irrespective of his success on the appeal.—Kimball v. Semple, 31 Cal. 657.

[d] Where appellant had included in his transcript a large amount of irrelevant matter, it was ordered and adjudged that he recover the costs of appeal, less one-half of the expense of procuring and printing the transcript.—Sichel v. DeCarrillo, 42 Cal. 493.

[e] When appellant inserts unnecessary and irrelevant matter in transcript, he cannot if he succeeds on the appeal, compel the respondent to pay for it.—McDougal v. Downey, 45 Cal. 165.

[f] A transcript being voluminous, twelve hundred and one folios long, consisting in great part of the shorthand reporter's notes in full, appellant was not allowed his costs.—People v. Miles, 56 Cal. 401.

[g] A transcript being unnecessarily voluminous, containing eleven hundred and eighty-two folios of printed matter, consisting of the reporter's notes at length, questions and answers, remarks of court and counsel, etc., defendant was not allowed his costs.—Bullard v. Creditors, 56 Cal. 600.

[h] The respondent will not be taxed with any part of the costs of printing the transcript by reason of having proposed amendments to the statement, by incorporating therein the greater part of the evidence in the case, for the purpose of showing that the exclusion of the testimony sought to be stricken out would not change the result. Duffy v. Duffy, 104 Cal. 602, 38 Pac. 443.

[i] Where a judgment is reversed, additional costs will not be imposed on the respondent on account of their inserting in the transcript a large amount of unnecessary matter, as by the reversal they will be required to pay the expenses of printing the same. Estate of Robinson, 106 Cal. 493, 39 Pac. 862.

[j] Where the transcript on appeal is filled with matters foreign to the case, full costs will not be awarded to appellant on reversal. Jones v. Iverson, 131 Cal. 101, 63 Pac. 135.

[k] Appellant, having filed a transcript unnecessarily long, held entitled to recover as costs of appeal only part of the cost of printing.—In re Pease's Estate (Cal. Sup.), 85 Pac. 149.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 225; 13 Cent. Dig., cols. 909-914, §§ 968-971.

§ 87. Damages for Frivolous or Delay Appeal.

[a] Where appellant's case is supported by neither law, justice, nor fact, the appeal will be affirmed with damages for the delay. Magruder v. Melvin, 12 Cal. 559.

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[b] Where appeal is clearly without merit, damages will be imposed by the appellate court.—Bates v. Vischer, 2 Cal. 355; Gannon v. Dougherty, 41 Cal. 661; Goodcell v. Davis, 62 Cal. 617.

[c] Where appeal is frivolous, damages will be imposed upon the appellant.—Adler v. Winkle, 53 Cal. 187; Kincaid v. Johnson, 47 Cal. 618; Russell v. Hill, 59 Cal. 21.

[d] If no briefs are on file and no error appears, and it appears that the appeal was taken for delay, the judgment affirmed with damages.—Van Slyke v. Miller, 60 Cal. 411.

[e] When appeal is evidently taken for delay, damages will be imposed by this court. Russell v. Williams, 2 Cal. 158; Bateman v. Blumenthal, 61 Cal. 628; Gieske v. Anderson, 77 Cal. 247, 19 Pac. 421; Dreyfuss v. Giles, 79 Cal. 409, 21 Pac. 840; Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40, 382; Langan v. Langan, 86 Cal. 132, 24 Pac. 852.

[f] If no error appears in the record on appeal from an order denying a new trial to the prejudice of the appellant the judgment and order will be affirmed with damages. Gross v. Kelleher, 80 Cal. 519, 22 Pac. 293.

[g] Judgment will be affirmed with damages where the appeal is frivolous.—Dougherty v. Ward, 89 Cal. 81, 26 Pac. 638.

[h] Where only ground urged is that court did not properly consider conflicting evidence the appeal will be treated as frivolous, and the order will be affirmed with damages. Long v. Saufley, 89 Cal. 437, 26 Pac. 902.

[i] Where it is evident that an appeal is frivolous, and taken purely for delay, the appellant will be mulcted in damages. Muller v. Rowell, 110 Cal. 318, 42 Pac. 804.

[j] Where an uncontradicted affidavit shows that the appeal was taken for delay, on dismissing the appeal damages will be allowed respondent.—McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777.

[k] Where an appeal is clearly frivolous, the judgment appealed from will be affirmed, with damages.—Hearst v. Hart, 128 Cal. 327, 60 Pac. 846.

[l] Where, in an action of unlawful detainer, plaintiff has recovered by way of penalty three times the amount of rent due, it would not be proper to also allow him damages for a frivolous appeal.—Block v. Kearney, 132 Cal. xviii, 64 Pac. 267.

[m] Where no circumstances showing peculiar hardship appear, damages for a frivolous appeal will not be awarded on a dismissal thereof.—Brite v. Briggs, 136 Cal. xix, 68 Pac. 973.

[n] Where an appeal is devoid of merit, and apparently is made for delay, damages in addition to costs will be imposed.—Boehm v. Gibson, 35 Pac. 1014.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 236-244; 13 Cent. Dig., cols. 924-951, §§ 983-1003.

§ 88. Power to Award.

[a] If the appellate court should, upon the hearing of an appeal in insolvency for an order settling his account by an assignee, be of the opinion that the legal rate of interest is not sufficient compensation for the delay, and that the appeal is taken solely for delay, it has the power to make an additional allowance by way of damages.—Matter of Sharp, 92 Cal. 577, 28 Pac. 783.

§ 89. —— On Dismissal.

[a] Where an appellant has failed to file a transcript of the record, showing that the appeal had been perfected, the court ordered it dismissed, with ten per cent damages and costs.—Pacheco v. Bemal, 2 Cal. 150.

[b] Where the respondents obtained a judgment on the 23d of December, 1851, and the appeal bond was filed on the 24th of December, and a certificate of the clerk of the same court, dated February 2, 1852, showed that no transcript, record, or other papers in the cause had been filed, and the affidavit of respondents showed that the appeal was taken for delay, the court ordered the appeal to be dismissed, with ten per cent damages and costs.—Buckley v. Stebbins, 2 Cal. 149.

[c] Upon the dismissal of an appeal for failure to file the transcript, damages cannot be imposed.—Vaughn v. Werley, 62 Cal. 181.

§ 90. —— Failure to File Briefs and Records or to Make Argument.

[a] Where, on failure of an appellant to appear with his cause is called, the judgment appealed from is affirmed, with damages for frivolous appeal, on motion of respondents, there being no brief on file, and it thereafter appears that failure to file a brief was due to appellant's ignorance that his cause was on the calendar, and an examination of the records shows that the appeal was not frivolous, that part of the judgment imposing damages for frivolous appeal will be set aside.—Emhoff v. McMann, 23 Pac. 302.

[b] Defendant in ejectment, after pleading the general issue and possession for the statutory period, filed a disclaimer of any interest, but from a judgment for plaintiff, after a trial by the court, findings of fact being waived, he appealed. The record, however, contained no bill of exceptions or other showing of error, and defendant filed no brief or points and authorities. Held that, the appeal being manifestly without merit, one hundred dollars damages would be directed for plaintiff as part of the costs on appeal.—De Pena v. Trujillo, 30 Pac. 560.

[c] To a complaint in the ordinary form of ejectment a general denial and the statute of limitations were pleaded. Findings of fact were waived, and judgment was rendered for plaintiff. Defendant, on appeal, furnished no bill of exceptions or other record of error, and filed neither brief nor points and authorities. Held that, the appeal being manifestly without merit, payment of one hundred dollars damages, as part of costs on appeal,

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would be directed for respondent.—Meyers v. Trujillo, 30 Pac. 579.

§ 91. What Constitutes Frivolous or Delay Appeal.

[a] Where the error relied on to reverse a judgment was that the trial was by reference and that the reference was not authorized, and the record showed that the reference was duly made on appellant's own motion, the judgment was affirmed with ten per cent damages and costs.—Bates v. Visher, 2 Cal. 355.

[b] Where questions raised by the record have been repeatedly settled by this court, or are decided by reference to plain elementary principles of law, the judgment of the court below will be affirmed with damages.—Pinkham v. Wemple, 12 Cal. 449.

[c] When an appeal is without merit, and it appears to the appellate court to have been taken for delay, the mere fact that the attorney for the appellant acted in good faith in its prosecution will not relieve the appellant from liability for damages under section 957 of the Code of Civil Procedure.—Lemon v. Rucker, 80 Cal. 609, 22 Pac. 471.

[d] An appeal from a judgment, upon a trivial error in the compution of interest, is without merit.—Rountree v. I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16.

[e] On motion to dismiss an appeal, respondent's attorney made affidavit that prior to giving notice of appeal, appellant urged him to take less than the amount of the judgment, and said that, unless such sum was accepted, an appeal would be taken, and collection definitely delayed; that delay was all he wanted; and that after his refusal, and after notice of appeal was given, and undertaking filed, appellant, through his attorneys, renewed the proposition to press the appeal if the less sum was not accepted. Appellant filed no transcript, and did not controvert such statement. Held, that the appeal should be dismissed, with damages against appellant for delay.—Koelling v. Rutz, 108 Cal. 664, 41 Pac. 781.

[f] Where an attorney's fee on foreclosure is taxable "in the bill of costs," an appeal from a judgment allowing costs, taxed at twenty-two dollars and ninety cents, and plaintiff's attorney's fee, of one hundred dollars, is frivolous.—Grogan v. Nolan, 36 Pac. 397.

[g] In view of the plain provisions of Code of Civil Procedure, section 662, and numerous decisions of the supreme court, an appeal taken on the ground that trial courts have no authority to set aside verdicts is frivolous. Poote v. Hayes, 39 Pac. 601.

§ 92. —— Affidavit of Frivolity or Delay.

[a] When it appears by the uncontradicted affidavit of respondent, on an appeal from a money judgment, that the appeal was taken merely for delay, and that there was no pretense of any defense, the court, on dismissing the appeal for failure to file a transcript, will award respondent damages for appellant's abuse of the right of appeal.—Duncan v. Grady, 99 Cal. 552, 34 Pac. 112.

[b] On the dismissal of an appeal, damages will not be awarded in the respondent's favor on his ex parte affidavit that he has been informed and believes the appeal to be without merit.—Kirby v. Harrington, 13 Pac. 218.

[c] Where an appeal appears to be frivolous, a mere oral assurance in argument, that it was taken in good faith, is insufficient to avoid the imposition of damages, but such assurance must find some support in the record.—Younglove v. Cunningham, 43 Pac. 755.

§ 93. —— Person Liable.

[a] Where only one defendant appeals, the twenty per cent damages ordered by the supreme court for frivolity is claim against him alone.—McMillan v. Vischer, 14 Cal. 232.

§ 94. —— Amount of Damages.

[a] Delay appeal affirmed with one hundred dollars damages.—Parker v. Bernal, 68 Cal. 123, 8 Pac. 696.

[b] Delay appeal affirmed with fifty dollars damages.—Johnson v. Klein, 70 Cal. 187, 11 Pac. 606.

[c] Delay appeal affirmed with ten per cent damages.—McCormick v. Central R. Co., 75 Cal. 509, 17 Pac. 542.

[d] Appeal without merit affirmed with five per cent damages.—Montgomery v. Robinson, 76 Cal. 229, 18 Pac. 261; Gieske v. Anderson, 77 Cal. 249, 19 Pac. 421; Gale v. Bradbury, 116 Cal. 40, 47 Pac. 778; Clark v. Nordholt, 121 Cal. 28, 26 Am. St. Rep. 20, 53 Pac. 400.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 243; 13 Cent. Dig., cols. 947-949, § 1001.

§ 95. Taxation of Costs.

[a] Section 510 of the code, which provides that the party who obtains a judgment shall, within two days after the verdit or judgment, file with the clerk his bill of costs, does not apply to costs on appeal to the supreme court.—Gray v. Gray, and Eaton v. Palmer, 11 Cal. 341.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 223, 224; 13 Cent. Dig., cols. 951-953, §§ 1004-1008.

VII. PAYMENT AND ACTIONS FOR COLLECTION.

MEDIUM OF PAYMENT, § 96.
RECOVERY OF COSTS PAID ON REVERSAL, § 97.
CONDITIONS AS TO PAYMENT OF, § 98.
STAYING PROCEEDINGS UNTIL FEES PAID, § 99.
EXECUTION, § 100.
ACTIONS FOR COLLECTION, § 101.
—— TAXATION AS PREREQUISITE, § 102.

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§ 96. Medium of Payment.

[a] Under the specific contract act of April 27, 1863, in an action on a contract for the payment of money in a specific kind of currency, costs and the interest will be made payable in the kind of money specified in the contract.—Carpentier v. Atherton, 25 Cal. 564.

§ 97. Recovery of Costs Paid on Reversal.

[a] While plaintiffs, in whose favor costs, have been decreed, are not estopped by receipt of them to question on appeal so much of the decree as is in favor of defendants, on reversal of the decree they will be required to refund such costs before they are allowed a new trial.—Stockman v. Riverside Land etc. Co., 64 Cal. 57, 28 Pac. 116.

§ 98. Conditions as to Payment.

[a] Where a motion to set aside a judgment is granted "on payment of all costs," a failure by the opposing party to file his cost bill, or to give notice under a rule of court allowing five days after notice for payment of costs will not operate to make the vacation of the judgment absolute.—Gregory v. Haynes, 21 Cal. 443.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 977-979, § 1044.

§ 99. Staying Proceedings Until Fees Paid.

[a] When a judgment is reversed by the supreme court, and the case remanded for further proceedings, and the clerk of the court below issues an execution for all costs, as well those of appeal as those accruing before notice of appeal was filed, the judge of the court below has power to make an order staying the execution in the hands of the sheriff, until an application can be made to the court to retax and adjust the costs.—Ex parte Burrill, 24 Cal. 350.

[b] Under section 274, Code of Civil Procedure, and act of 1872, page 188, court has power to stay proceedings until party in whose favor verdict is rendered has paid fees of jury and reporter.—Rhodes v. Spencer, 68 Cal. 200, 8 Pac. 855.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 260, 261; 13 Cent. Dig., cols. 979-995, §§ 1045-1060.

§ 100. Execution.

[a] Where a cause is remitted from the supreme court to a district court, the clerk of the district court may issue an exception for the costs accrued thereon without the order of the district court.—City of Marysville v. Buchanan, 3 Cal. 212.

[b] The clerk of the court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum, and the costs of the clerk of the supreme court as certified by him on the remittitur.—Burrill, Ex parte, 24 Cal. 350.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 261-264; 13 Cent. Dig., cols. 995-1004, §§ 1061-1071.

§ 101. Actions for Collection.

[a] A mandamus is not the proper remedy where an inferior court refuses to enter a judgment for costs. The party complaining may appeal, or bring his action for the costs. Peralta v. Adams, 2 Cal. 594.

[b] Officers for whose benefit costs are adjudged to be due and payable are entitled to sue for them.—Wickersham v. Denman, 68 Cal. 389, 9 Pac. 723.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 253, 254; 13 Cent. Dig., cols. 1010-1013, §§ 1077-1081.

§ 102. —— Taxation as Prerequisite.

[a] An action for the collection of costs will not lie before they have been taxed as such. Kellogg v. Howes, 93 Cal. 586, 29 Pac. 230.

VIII. IN CRIMINAL PROSECUTION.

JURISDICTION OF COUNTY COURT TO AWARD, § 103.
LIABILITIES OF COUNTY—FEES OF CITY RECORDER, § 104.
—— FEES OF ATTORNEY APPOINTED TO DEFEND INDIGENT ACCUSED, § 105.
EFFECT OF CHANGE OF VENUE OR OTHER TRANSFER, § 106.
REPORTER'S FEES, § 107.
REMEDY FOR ERRONEOUS TAXATION, § 108.
FUNDS LIABLE, § 109.
IMPRISONMENT FOR NONPAYMENT, § 110.

§ 103. Jurisdiction of County Court to Award.

[a] A county court has no jurisdiction, in a criminal case, to render a judgment for the costs against a prosecuting witness.—Warring, In re, 50 Cal. 30.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1016-1019, §§ 1086-1090.

§ 104. Liabilities of County—Fees of City Recorder.

[a] The recorder of the city of Sacramento is not a judicial officer who is prohibited from taking fees, but he stands on the same footing as a justice of the peace, who is allowed to take them. Hence, the county of Sacramento is not liable to such recorder for costs. Curtis v. Sacramento, 13 Cal. 290.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 273-277; 13 Cent. Dig., cols. 1032-1054, §§ 1109-1124.

§ 105. —— Fees of Attorney Appointed to Defend Indigent Accused.

[a] An attorney appointed by the court to defend indigent persons accused of crime,

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must trust to the possible future ability of such persons for his compensation.—Rowe v. Yuba County, 17 Cal. 61.

[b] Attorney appointed to defend a pauper cannot charge county for services.—Rowe v. Yuba County, 17 Cal. 61; Lamont v. Solano County, 49 Cal. 158.

[c] The compensation of an attorney for services rendered by him pursuant to an appointment by the court to defend a pauper indicted for a crime is not a charge against the county; nor can the attorney recover for moneys expended by him in conducting the defense.—Lamont v. Solano County, 49 Cal. 158.

§ 106. Effect of Change of Venue or Other Transfer.

[a] The order issuable under Criminal Practice Act, section 556, for paying a witness on behalf of the people, from without the county, etc., should, on a change in the venue of the action, direct the sum allowed, to be paid by the treasurer of the county where the indictment was found.—Sargent v. Cavis, 36 Cal. 552.

[b] Under act of 1851, concerning the costs of criminal actions, if a case is removed from the county where the indictment was found, for trial in another county, the county where the indictment was found is liable for the fees of the sheriff of the county to which the cause is removed, and the auditor of the latter county may draw his warrant on the treasurer of the former for the same, and mandamus will lie to compel such treasurer to pay it.—Needham v. Thresher, 49 Cal. 392.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 285, 286; 13 Cent. Dig., cols. 1050-1054, § 1124.

§ 107. Reporter's Fees.

[a] Fees of a reporter in a criminal case cannot be taxed as costs against defendant. Petty v. San Joaquin County Court, 45 Cal. 245.

§ 108. Remedy for Erroneous Taxation.

[a] Error in taxation of costs in a criminal cause should be corrected on motion in the county court, not upon certiorari.—Petty v. San Joaquin County Court, 45 Cal. 245.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 289, 290; 13 Cent. Dig., cols. 1088, 1089, §§ 1189-1191.

§ 109. Funds Liable.

[a] If a judgment of conviction imposes a fine without costs, or if a fine is collected, but the costs are not, the fees of the officers are to be paid out of the fine collected.—Petty v. San Joaquin County Court, 45 Cal. 245.

§ 110. Imprisonment for Nonpayment.

[a] Where a defendant is convicted of assault, and fined a certain amount and costs, he may be imprisoned for the fine, but not for the costs.—Petty v. San Joaquin County Court, 45 Cal. 245.

[b] A prisoner held in custody under Code, section 330, for a failure to pay a judgment for fine and costs for gaming, cannot pay by imprisonment at the rate of one dollar per day, as, in certain cases prescribed by other sections of the Code, he may do.—Harrison, Ex parte, 63 Cal. 299.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 291; 13 Cent. Dig., cols. 1097-1102, §§ 1202-1206.

COSURETIES.

Rights and remedies between. See Principal and Surety, §§ 56-59.

COTENANTS.

See Joint Tenancy; Tenancy in Common.
Right to bring action of forcible entry and detainer. See Forcible Entry and Detainer, § 49.
Of mines. See Mines and Minerals, § 34.

COTRUSTEES.

See Trusts.

COUNSEL.

See Amicus Curiae; Attorney and Client; Attorney General; District and Prosecuting Attorneys.

COUNSEL FEES.

See references under Attorneys' Fees.
Allowed assignee for creditors. See Assignments for Benefit of Creditors, § 57.
As element of compensation for property taken for public use. See Eminent Domain, § 75.
As costs in condemnation proceedings. See Eminent Domain, § 152.
On dissolution of joint stock companies. See Joint Stock Companies, § 11.

COUNTER-AFFIDAVITS.

On motion for new trial. See Criminal Law, § 564.
On motion to open default. See Judgment, § 119.
On application for new trial. See New Trial, § 105.
On application for change of venue. See Venue, § 40.

COUNTER-APPLICATION.

For retention of cause on application for change of venue. See Venue, § 41.

COUNTERCLAIM.

See Setoff and Counterclaim.
In interpleader proceedings. See Interpleader, § 10.
Mode of pleading. See Pleading, §§ 84-88.

COUNTERFEITING.

Include falsely and fraudulently imitating or altering coin or other money or government obligations or securities, and uttering, having, or pretending to have in possession, offering, advertising, etc., such counterfeits; nature and extent of criminal responsibility therefor; and prosecution and punishment of such acts as public offenses.

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NATURE AND ELEMENTS OF OFFENSE, § 1.
POWER OF STATES TO PUNISH, § 2.
JURISDICTION OF STATE COURTS, § 3.
INDICTMENT OR INFORMATION, § 4.
EVIDENCE, § 5.

§ 1. Nature and Elements of Offense.

[a] To constitute the crime of knowingly having in possession counterfeiting tools, etc., as created by section 78 of the statute in relation to crimes and punishments, the known possession by the defendant must be proved to have been with criminal intent.—People v. White, 34 Cal. 183.

[b] Both intent to fill up blanks and pass notes must concur.—People v. Ah Sam, 41 Cal. 656.

[c] Section 480 of the Penal Code punishes counterfeiting of all bank notes and bills, both foreign and domestic, current in this state or otherwise.—People v. McDonnell, 80 Cal. 287, 13 Am. St. Rep. 159, 22 Pac. 190.

[d] Under Penal Code, section 480, to constitute the crime a mere possession and intention to use, though without ability to use, is sufficient.—People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

FOR AUTHORITIES FROM OTHER STATES:

See 25 L. R. A. 341, note. See, also, 11 Cyc. 302, 303; 13 Cent. Dig., cols. 1107-1116, §§ 1-10.

§ 2. Power of State to Punish.

[a] Section 78 of the act concerning crimes and punishments, which provides for the punishment of persons engaged in counterfeiting money, etc., held not to be in conflict with section 8, article 1, of the United States constitution, conferring upon Congress the power to punish counterfeiting, etc.—People v. White, 34 Cal. 183.

[b] Fact that counterfeiting foreign money is made offense by act of Congress does not prevent state from punishing same offense.—People v. McDonnell, 80 Cal. 289-292, 13 Am. St. Rep. 159, 22 Pac. 190.

§ 3. Jurisdiction of State Courts.

[a] Under Penal Code, section 480, punishing one having in his possession anything employed in counterfeiting bank notes or bills, state courts have jurisdiction of a prosecution for having possession of tools for counterfeiting notes of the Bank of England, though the offense is also punishable under the federal statute.—People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 311; 13 Cent. Dig., cols. 1123-1125, §§ 21, 22.

§ 4. Indictment or Information.

[a] An indictment for the possession of counterfeit coin charged that defendants "willingly, feloniously, and knowingly did have in their possession," etc. Held, that their knowledge of its spurious character was as directly affirmed as their knowledge that it was in their possession, and that the knowledge of both facts was sufficiently affirmed. The circumstance that the affirmation was made in respect to the two facts in connection did not vitiate or weaken the force of the allegation as to each separately.—People v. Stanton, 39 Cal. 698.

[b] In indictment for possessing counterfeit notes with intent to utter them, if legal existence of corporation be not made an issue, it is not necessary to charge that banking house whose bills have been imitated was incorporated. It would be equally an offense whether company be actually incorporated or not, so it is acting as corporation, and issues bank bills which are current anywhere.—People v. Ah Sam, 41 Cal. 645.

[c] Indictment in one count charged defendant with having in his possession "five hundred certain false, forged, and counterfeit blank and unfinished bank bills, each made in the form and similitude of a bill for the payment of money made to be issued by . . . . the chartered bank of India, Australia, and China, a foreign corporation then lawfully organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland," doing business at Hongkong, with intent to procure the bills to be finished in order to utter them as genuine bills, and defraud the said bank. In a second count, which was preceded by a statement that the offense charged therein was the same as that described in the first count, it charged that the bills were in the form and similitude of bills for the payment of property. Held, that it was but a different description of the same offense, and that there was nothing repugnant in saying that the unfinished bills have the form and similitude of those which have been finished.—People v. Ah Sam, 41 Cal. 645.

[d] Information for counterfeiting notes of Bank of England need not allege incorporation of bank.—People v. McDonnell, 80 Cal. 288, 13 Am. St. Rep. 159, 22 Pac. 190.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 311-317; 13 Cent. Dig., cols. 1126-1150, §§ 23-40.

§ 5. Evidence.

[a] Where a person was indicted for having counterfeit coin in his possession, with intent to pass the same and to defraud F. and others, evidence tending to prove that he had in his possession counterfeit coin for sale, and that he was induced by F. to sell the same to him, was held sufficient to prove the intent to defraud others.—People v. Farrell, 30 Cal. 316.

[b] On the trial of a defendant, for the crime of knowingly having in his possession counterfeiting tools and implements, it is competent, for the purpose of showing the criminal intent of such possession, for the people to prove that the defendant had counterfeit money also in his possession.—People v. White, 34 Cal. 183.

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[c] In a prosecution, under Penal Code, section 480, providing for the punishment of anyone having in his possession anything employed in counterfeiting bank notes or bills, proof that the bank is known and acting as a corporate company, and as such issues bills which come within the statute, identifies the notes set out sufficiently to show that they are bank notes.—People v. McDonnell, 80 Cal. 285, 13 Am. St. Rep. 159, 22 Pac. 190.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 317-322; 13 Cent. Dig., cols. 1151-1159, §§ 41-45.

COUNTERFEIT MONEY.

Effect of payment of. See Payment, § 8.

COUNTERPARTS.

As evidence. See Evidence, §§ 191-194.

COUNTIES.

Include the primary territorial divisions of states or territories for political purposes, whether designated as counties or as parishes; their status as bodies politic and corporate; their creation, organization, boundaries, alteration, and discontinuance; local boards and officers, and their rights, powers, duties, proceedings, and liabilities; county property, contracts, indebtedness, bonds, and other securities; claims against counties and precincts, etc., thereof; and actions by or against counties.

I. CREATION, ALTERATION, EXISTENCE AND POLITICAL FUNCTIONS, §§ 1-13.

II. GOVERNMENT AND OFFICERS, §§ 14-102.

A. Organization, Powers and Seat of Government, §§ 14-18.

B. County Board, §§ 19-53.

C. Officers and Agents, §§ 54-102.

III. PROPERTY, CONTRACTS AND TORTS, §§ 103-125.

A. Property, §§ 103-107.

B. Contracts and Expenditures, §§ 108-121.

C. Torts, §§ 122-125.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES AND TAXATION, §§ 126-153.

V. CLAIMS AGAINST COUNTY, §§ 154-167.

VI. ACTIONS, §§ 168-186.

See, also, Drains; Levees; Municipal Corporations. Schools and School Districts, § 5; Towns.
Exemption of county or county officer from giving bond on appeal. See Appeal and Error, § 419.
County asylums. See Asylums.
Suit by county as suit by state. See California, § 90.
County clerks. See Clerks of Court.
County coroners. See Coroners.
Effect of omission of county from description in deed. See Deeds, § 31.
County attorneys. See District and Prosecuting Attorneys.
Drainage and swamp land districts. See Drains.
Judicial notice of classification of counties. See Evidence, § 10.
Judicial notice of authority of county officers. See Evidence, §§ 40-44.
County to which execution may issue. See Execution, § 30.
Public administrators. See Executors and Administrators, XV.
Health officers. See Health, § 6.
County roads. See Highways.
Highway districts. See Highways, § 55.
Highway officers. See Highways, §§ 56-60.
Location of roads in two counties. See Highways, § 36.
Liability for support of insane persons. See Insane Persons, § 26.
County license on sale of intoxicants. See Intoxicating Liquors, § 5.
Levee districts. See Levees.
Relation between county and city. See Municipal Corporations, § 2.
Counties to which process may issue. See Process, § 5.
School districts. See Schools and School Districts, §§ 5-10.
Regulation of counties by special laws. See Statutes, §§ 24-28.
Expression of subject in statute relating to. See Statutes, § 40.
County tax assessors. See Taxation, §§ 62-66.
County tax collectors. See Taxation, §§ 121-129.
County board of equalization. See Taxation, §§ 98-102.
Town officers. See Towns, § 2.
Irrigation districts. See Waters and Watercourses, § 262.

I. CREATION, ALTERATION, EXISTENCE AND POLITICAL FUNCTIONS.

NATURE, POLITICAL STATUS AND FUNCTIONS, § 1.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 2.
CREATION BY SPECIAL ACT, § 3.
BOUNDARIES—BETWEEN SONOMA AND NAPA, § 4.
—— BETWEEN SAN DIEGO AND SAN BERNARDINO, § 5.
—— BETWEEN MERCED AND STANISLAUS, § 6.
—— BETWEEN SUTTER AND YOLO, § 7.
—— BETWEEN MARIPOSA AND FRESNO, § 8.
—— ESTABLISHMENT, § 9.
—— CONSTRUCTION OF STATUTE ESTABLISHING, § 10.
ALTERATION, CONSOLIDATION AND DIVISION TO FORM NEW COUNTIES, § 11.
ADJUSTMENT OF RIGHTS AND LIABILITIES ON ALTERATION OR DIVISION, § 12.
CLASSIFICATION OF COUNTIES, § 13.

§ 1. Nature, Political Status and Functions.

[a] A county is not a person in any sense; it is not a corporation. It cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn or denied at any time the legislature may think proper.—Hunsaker v. Borden, 5 Cal. 288.

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[b] A county is not a corporation proper, but a quasi corporation.—Price v. Sacramento County Supervisors, 6 Cal. 254.

[c] Act making county a body politic and corporate does not make it a municipal corporation.—People v. Sacramento Supervisors, 45 Cal. 692.

[d] Counties are "political" not "municipal" corporations.—People v. McFadden, 81 Cal. 498, 15 Am. St. Rep. 66, 22 Pac. 851.

[e] County is governmental agency or political subdivision of state, a political and not a municipal corporation.—San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78, 621.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 341; 13 Cent. Dig., cols. 1166-1168, § 1.

§ 2. Constitutional and Statutory Provisions.

[a] County government act of 1883 is constitutional.—Logan v. Solano County, 65 Cal. 122; Miller v. Kister, 68 Cal. 143, 8 Pac. 813.

[b] Object of county government act of 1883 was to provide comprehensive system of government for counties and townships.—Fraser v. Alexander, 75 Cal. 151, 16 Pac. 757.

[c] Act of March 11, 1889, organizing county of Orange, is constitutional.—People v. McFadden, 81 Cal. 501, 15 Am. St. Rep. 66, 22 Pac. 851.

[d] Under subdivision 11 of section 25 of article 4 of the Constitution there may be a special law for holding and conducting an election "on the organization of new counties."—People ex rel. Scearce v. County of Glenn, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302.

[e] It must be presumed that the legislature intended, by the County Government Act of March 24, 1893, to comply with the constitutional requirements to provide for the election of county officers by a uniform law, applicable to all the counties in the state, and that the act should be operative throughout the state.—Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049.

[f] Statute providing for a system of county governments which in its terms is limited to a portion of the state, would be in contravention of the provisions of the constitution which require the legislature to pass a uniform system for the entire state.—Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 343-345; 13 Cent. Dig., cols. 1166-1208, §§ 1-19.

§ 3. Creation by Special Act.

[a] County is not corporation for municipal purposes within meaning of constitutional inhibition against creating such corporations by special act.—People v. McFadden, 81 Cal. 497, 15 Am. St. Rep. 66, 22 Pac. 851.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1168, 1169, § 2.

§ 4. Boundaries—Between Sonoma and Napa.

[a] Under Political Code, section 3872, the lines run by the surveyor general for the boundary between the counties of Sonoma and Napa are conclusive, and the section is not unconstitutional.—People v. Boggs, 56 Cal. 648.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 345-349; 13 Cent. Dig., cols. 1169-1177, §§ 3-6.

Judicial notice of county boundaries. See Evidence, § 8.

§ 5. —— Between San Diego and San Bernardino.

[a] Boundary between San Diego and San Bernardino counties fixed.—San Bernardino Co. v. Reichert, 87 Cal. 289, 290, 25 Pac. 692.

§ 6. —— Between Merced and Stanislaus.

[a] The act of February 13, 1868, defining the boundary lines between Merced and Stanislaus counties, was operative to establish the boundary as indicated at once, upon its passage, and was not dependent upon the surveys.—People v. Henderson, 40 Cal. 29.

§ 7. —— Between Sutter and Yolo.

[a] Statutes of 1851, pages 176, 179, and Statutes of 1857, page 108, declared the Sacramento river to be the boundary between Y. and S. counties. Subsequently the course of the river changed so as to run through Y. county, as then described, whereupon the boundary statutes were repealed by Statutes of 1866, pages 162, 223, which defined the boundary between the two counties as "the middle of the Sacramento river." Held, that the boundary line was the middle of the river as it ran on the date of the passage of the latter acts, and not the middle of the river as it previously existed.—Waters v. Pool, 130 Cal. 136, 62 Pac. 385.

§ 8. —— Between Mariposa and Fresno.

[a] Since act of April 1, 1872 (Stats. 1871-72, p. 891, c. 602), as amended by act February 11, 1874 (Stats. 1873-74, p. 100, c. 88), defining the boundary line between Mariposa and Fresno counties, was passed at the same session of the legislature as the Political Code, such act was entitled to precedence over conflicting provisions of the code by virtue of sections 4478, 4479, thereof, providing that with relation to laws passed at such session the Political Code must be construed as though passed on the first day of the session, and, if the provisions of any other law passed at such session are inconsistent with the Code, the provisions of the law should prevail.—Mariposa County v. Madera County, 142 Cal. 50, 75 Pac. 572.

[b] Act of April 1, 1872 (Stats. 1871-72, p. 891, c. 602), as amended by act of February

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11, 1874 (Stats. 1873-74, p. 100, c. 88), establishing the boundary between Mariposa and Fresno counties, which line was thereafter adopted by act of 1893 (Stats. 1893, p. 168, c. 143) establishing Madera county, was not superseded by Political Code, sections 3938, 3939, defining a conflicting boundary, since though the act of 1874, was not approved until after the Political Code, it went into operation before the code.—Mariposa County v. Madera County, 142 Cal. 50, 75 Pac. 572.

[c] Where the original boundary line between Mariposa and Fresno counties had been defined by act of April 19, 1856 (Stats. 1856, p. 183, c. 127), creating the latter county, act of April 1, 1872 (Stats. 1871-72, p. 891, c. 602), as amended by act of February 11, 1874 (Stats. 1873-74, p. 100, c. 88), defining the boundary line between such counties, was not objectionable for uncertainty of description in using the term "present boundary line" immediately following the words "original boundary line" between such counties.—Mariposa County v. Madera County, 142 Cal. 50, 75 Pac. 572.

§ 9. —— Establishment.

[a] Where a survey of county boundary is made by a surveyor authorized by the surveyor general to make it, and is surveyor sanctioned and approved by the surveyor general, the survey becomes his act, and is made by the surveyor general within the meaning of sections 483 and 3969 of the Political Code, although the surveyor making the survey is not a deputy surveyor general; and each of the counties adjoining upon the boundary is liable to the surveyor appointed by the surveyor general for its proportionate share of the cost of surveying and definitely marking out the boundary line.—Rice v. Trinity County, 110 Cal. 247, 42 Pac. 809.

[b] The law, in casting upon the surveyor general the duty of making public surveys, clothes him with the requisite power to enable him to perform that duty, and it is competent for him to employ surveyors and other functionaries usual and necessary in running the lines and doing the detail work required, and he is the agent of the state for the making of such surveys, and may delegate the mechanical part of the work to others, nor is it necessary that the field work should be done by or under the direct supervision of a deputy.—Rice v. Trinity County, 110 Cal. 247, 42 Pac. 809.

For Authorities from Other States:

See 11 Cyc. 346-348; 13 Cent. Dig., cols. 1171-1173, § 4.

§ 10. —— Construction of Statute Establishing.

[a] Intent of legislature at time of adopting line determines county boundary.—San Bernardino Co. v. Reichert, 87 Cal. 289, 25 Pac. 692.

[b] The court will not declare a statute defining a county boundary void and ineffective for uncertainty because of a mistake in description in one definition of the boundary, but will liberally construe the statute in support of the evident intention of the legislature.—County of Mariposa v. County of Madera, 142 Cal. 50, 75 Pac. 572.

§ 11. Alteration, Consolidation, and Division to Form New Counties.

[a] If the consolidation act for Sacramento be in conflict with the fifth section of the act of 1854 the former must yield.—English v. Supervisors of Sacramento, 19 Cal. 172.

[b] When a law is passed providing for the creation of a new county out of parts of counties already in existence, which act provides for the election of county officers, and fixes the time when they shall enter upon their duties, the territory described does not become a county until its organization is perfected by the election of officers.—People v. McGuire, 32 Cal. 140.

[c] City and county is a continuation of the city.—Wood v. Election Com., 58 Cal. 561.

[d] Power to subdivide counties or create new ones is exclusively in legislature.—Tulare County v. Kings County, 117 Cal. 197, 49 Pac. 8.

For Authorities from Other States:

New counties, their relation and that of their officers to old counties: 20 Am. St. Rep. 676, note.

Legal results of change of county boundaries and of the erection of a new county out of part of an old one: 85 Am. Dec. 100, note. See, also, 11 Cyc. 349-360; 13 Cent. Dig., cols. 1177-1200, §§ 7-15.

Power of legislature to apportion debts on creation of new counties. See Constitutional Law, § 166.

Organization of new county as affecting place of trial of criminal case. See Criminal Law, § 35.

Place of recording deed on creation of new county. See Deeds, § 71.

Effect of division of county on judgment lien. See Judgment, § 539.

Effect of division of county after commencement of suit on venue. See Venue, § 8.

§ 12. Adjustment of Rights and Liabilities on Alteration or Division.

[a] Under the statute which provides for an adjustment of indebtedness between Amador and Calaveras counties, payment of the warrants issued under it, and assigned as above, may be remanded at any time, and the treasurer may make partial payments thereon as he has funds, and a receipt and indorsement on the warrant will protect the officer and the county.—Beals v. Evans, 10 Cal. 459.

[b] When a new county is organized out of a part of the territory before constituting another county, the claim of the old against the new county for the payment of the new county's proportion of the debt of the old county is of an equitable nature only, and requires legislation to enable the old county

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to enforce it.—Beals v. Supervisors of Amador County, 28 Cal. 449.

[c] When one county is made from territory of another, and is obliged to give its warrant to the old county for an amount sufficient to cover its proportion of the old county's debt, the legislature may afterward pass an act providing that the new county shall pay interest on its indebtedness to the old county, as evidenced by the warrant.—Beals v. Amador County Supervisors, 35 Cal. 624.

[d] Constitution, article 11, section 3, provides that every county created from territory taken from any other county shall be liable for a just proportion of the existing debts of the last-named county. Act of March 11, 1889, creating the county of O. from the territory of L., provides that commissioners shall ascertain the indebtedness of the county of L., "existing at the time this act takes effect," and certify the amount due from the county of O. to the county of L. Held, that the county of O. is not chargeable with moneys expended on its territory by the county of L. between the date of the act and the organization of the county of O. Los Angeles County v. Orange County, 97 Cal. 329, 32 Pac. 316.

[e] Act of March 11, 1889, creating O. county out of a part of L. county, provides that certain commissioners shall ascertain and adjust the respective liabilities of the two counties. Held, that the commissioners are charged by such statute with the performance of quasi judicial duties, and an award by them is not a bar to a future action for a demand, not actually submitted to nor adjudicated by them, though it was in existence when the submission was made, and though the agreement was to submit all demands.—Orange County v. Los Angeles County, 114 Cal. 390, 46 Pac. 173.

[f] Where commissioners by mistake, and because they did not know of existence of a certain asset consisting of an indebtedness due L. county from the state, omitted to take it into consideration in adjusting the assets and indebtedness of counties, the court had no authority to adjust the matter, but it must be done by the legislature.—Orange County v. Los Angeles County, 114 Cal. 390, 46 Pac. 175.

[g] Where legislature makes no provision as to debts of old county, they remain with the old county.—Tulare County v. Kings County, 117 Cal. 200-202, 49 Pac. 8.

[h] Value of public property remaining in old county might justify imposition of entire debt on it.—Tulare County v. Kings County, 117 Cal. 199, 49 Pac. 8.

[i] Question of what, if any, proportion of debts of old county should be paid by new county is exclusively for legislature to determine.—Tulare County v. Kings County, 117 Cal. 198, 201, 202, 49 Pac. 8.

[j] New county is not bound to contribute proportionate share of county bonds charged to old county under section 1432, Civil Code. Tulare County v. Kings County, 117 Cal. 202, 49 Pac. 8.

[k] Old county cannot compel contribution from new county under section 2847, Civil Code.—Tulare County v. Kings County, 117 Cal. 202, 49 Pac. 8.

[l] The county of Glenn, having without right received a portion of taxes paid into the state treasury, is liable in an action for money had and received upon its implied promise to pay the same, to the county of Colusa.—County of Colusa v. County of Glenn, 117 Cal. 434, 49 Pac. 457.

[m] Division of swamp land fund on division of county is exclusively a legislative question.—Kings County v. Tulare, 119 Cal. 517, 518, 51 Pac. 866.

[n] Taxes paid to a new county upon the portion of the railroad traversed by it, under a subsequent reassessment made by the state board of equalization for previous years, in which the new county had no existence, and in which the original assessment and apportionment of county taxes had been made to the original county, may be recovered from the new county by the original county, whether the reassessment for those years be regarded as valid or invalid, the new county having received the money knowing that it was paid for county taxes assessed for those previous years.—County of Colusa v. County of Glenn, 124 Cal. 498, 57 Pac. 477.

[o] In an action by one county against another to recover the sum of money received by defendant county as taxes on a railroad beyond its apportionable amount, errors in the complaint as to the number of miles of railway on which defendant received taxes, making the complaint ambiguous, are not reached by a general demurrer. Judgment (1898) 55 Pac. 7, reversed.—San Diego County v. Riverside County, 125 Cal. 495, 58 Pac. 81,

[p] In an action by plaintiff county against defendant county, created out of territory part of which belonged to plaintiff, to recover money received by defendant as delinquent taxes beyond its apportionable amount according to a ratio established as the basis of division of the net assets of plaintiff at the time of the creation of defendant, where the complaint alleges that the taxes in question had been delinquent for a long period, owing to a question as to the validity of the assessments, and that the state board of equalization had made reassessments which were accepted by the county and the railroad company, it is sufficient to show a lawful reassessment as against a general demurrer, though there is no direct allegation that the first assessments were invalid. Judgment (1898) 55 Pac. 7, reversed. San Diego County v. Riverside County, 125 Cal. 495, 58 Pac. 81,

[q] Act of March 11, 1893 (Stats. 1893, p. 158), created a county, partly from territory of another county, and a board of commissioners to ascertain the indebtedness of the latter county. The new county sued the old

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county, after the commissioners had acted, and judgment was rendered setting aside the acts of the commissioners and sending the matter back to them, with instructions to readjust the settlement and directing them to find as to several maters in controversy in a certain manner and different from the former findings. Held, that such judgment could not be sustained, as, the board having performed the functions for which it was created, its authority was exhausted.—Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788.

[r] Act of March 11, 1893 (Stats. 1893, p. 158), erected a new county out of existing ones, and provided that commissioners should apportion the property and indebtedness of the old county and the new one. At that time certain railroad taxes were delinquent for each of the eight years, and the railroad company paid the first six years' taxes, but left the taxes for 1886-87 unpaid. Under the reassessment act of March 23, 1893 (Stats. 1893, p. 290), the state board of equalization reassessed the latter taxes, and apportioned the valuation and taxes between the two counties, according to the mileage in each. After the passage of the reassessment act, but before the reassessment, the commissioners apportioned the property of the old county, including taxes due, and fixed a ratio for the division of said taxes, excepting the taxes for 1886-87, and adjusted the indebtedness between the counties. The latter taxes were afterward paid into the treasuries of the new and old counties in the ratio established by the state board of equalization. Held that, the commissioners having made no adjustment of the respective rights of the counties in them, an action by the old county to recover the amount of said taxes paid to the new county would not lie.—San Diego County v. Riverside County, 55 Pac. 7.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 354-360; 13 Cent. Dig., cols. 1188-1200, §§ 12-15.

§ 13. Classification of Counties.

Judicial notice of classification of counties. See Evidence, § 16.

[a] The census referred to in Political Code, section 4007, providing that, "whenever a new census is taken, the counties, on the first day of July thereafter, are, by operation of law, classified under such census," is the census taken by the United States.—People v. Williams, 64 Cal. 87, 27 Pac. 939.

[b] Power of legislature to classify counties by population includes power to fix number of classes.—Longan v. County of Solano, 65 Cal. 122, 3 Pac. 463.

[c] It is duty of legislature to classify all counties and it may classify them by population.—People v. McFadden, 81 Cal. 500, 15 Am. St. Rep. 66, 22 Pac. 851.

[d] The act of March 16, 1889 (Stats. 1889, p. 232), adding a new class of counties numbered thirty-nine and a half, having a population between five thousand and five thousand six hundred and forty, must be construed so as to reconcile a plain conflict with the re-establishment by the same act of classes forty and forty-one which is done by assuming a mistake in the use of numbers, and that the legislature intended to make class thirty-nine and a half include only counties having a population between five thousand six hundred and five thousand six hundred and forty.—Donlon v. Jewett, 88 Cal. 530, 26 Pac. 370.

[e] The act of March 11th was not repealed for inconsistency with the latter act in classifying Glenn county.—Sanders v. Sehorn, 98 Cal. 227, 33 Pac. 58.

[f] Act of March 11, 1891, conditionally creating the county of Glenn, provided (section 14), with reference to county officers, that they should receive the same compensation then provided by general law in counties of the same class, and that until otherwise provided the county should belong to the thirty-seventh class. Under Constitution, article 11, section 5, the classification of counties is required to be made according to population. On March 11, 1891, Glenn county had a population of between six thousand five hundred and six thousand six hundred, which was the population of a county of the thirty-seventh class. On March 31, 1891, a county government act was passed, placing counties of from six thousand four hundred to seven thousand population in the forty-first class. Glenn county was organized May 11th. Held a county of the forty-first class; the act of March 11th not having been intended to fix its class irrespective of any future changes in the law, but only to determine its population.—Sanders v. Sehorn, 98 Cal. 227, 33 Pac. 58.

[g] In arriving at the population of a county under laws of 1893, section 235, providing that when a county is reduced by the creation of a new county therefrom the supervisors shall classify the county, the board need not be controlled by the federal census of 1890, but may determine the same from such source as it sees fit.—Kumler v. San Bernardino County Supervisors, 103 Cal. 393, 37 Pac. 383.

[h] The classification of counties referred to in the act of March 27, 1895 (Stats. 1895, p. 207), relating to primary elections, and which is made to apply only to counties of the first and second classes, is not that contained in section 4006 of the Political Code as originally enacted, but that made by the act of March 14, 1883 (Stats. 1883, p. 299), which revised the entire law on the subject of county government, and for the most part superseded the old law.—Gett v. Sacramento County Supervisors, 111 Cal. 366, 43 Pac. 1122.

[i] The constitution authorizes the classification of counties for the purpose of fixing the compensation of officers in each class, and it is the province of the legislature to determine how many and what classes may be necessary for that purpose; and a law fixing such compensation in all the counties of a specified class, as authorized by the

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constitution, is neither a local nor special law, but is a general law, having a uniform operation, though there be but one county in the class specified.—Summerland v. Bicknell, 111 Cal. 567, 44 Pac. 232.

[j] Legislature can classify counties only for purpose of regulating compensation of county officers.—Sanchez v. Fordyce, 141 Cal. 429, 75 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 362; 13 Cent. Dig., cols. 1206-1208, § 19.

II. GOVERNMENT AND OFFICERS,

A. Organization, Powers and Seat of Government, §§ 14-18.

B. County Board, §§ 19-53.

C. Officers and Agents, §§ 54-102.

A. ORGANIZATION, POWERS AND SEAT OF GOVERNMENT.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO ORGANIZATION, § 14.
UNIFORMITY IN COUNTY GOVERNMENT, § 15.
LEGISLATIVE CONTROL OF ACTS AND FUNDS OF COUNTY, § 16.
COUNTY SEAT—LOCATION AND ESTABLISHMENT, § 17.
—— REMOVAL, § 18.

§ 14. Constitutional and Statutory Provisions Relating to Organization.

[a] An act which submits to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county shall be annexed to it, and provides that if a majority of the votes are for annexation, that the organization of the adjoining county shall be abandoned, and its territory shall be divided and annexed, in part to the county in which the vote was taken, and in part to another adjoining county, is not unconstitutional—People ex rel. Love v. Nally, 49 Cal. 478.

[b] It is no objection to a bill creating and providing for the original organization of a county that it does not divide the county into supervisor districts, but allows supervisors to be in the first instance elected at large, who, under the general law, have power to divide the county into districts.—People v. Glenn County, 100 Cal. 419. 38 Am. St. Rep. 305, 35 Pac. 302.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1208-1217, §§ 20-24.

§ 15. Uniformity in County Government.

[a] Act of March 18, 1874, requiring the supervisors of two certain counties to issue bonds to provide funds for the construction of a certain road, does not violate the constitutional provision that county governments shall be as nearly uniform as practicable throughout the state.—People v. San Luis Obispo County, 50 Cal. 561.

[b] A law providing that all license taxes collected in counties of a certain class shall be returned to incorporated cities and towns where collected, for street improvements, violates the constitutional requirement of uniformity in county government.—San Luis Obispo County v. Graves, 84 Cal. 71, 23 Pac. 1032.

[c] Under section 4 of article 11 of the constitution the "system" or plan for the government of the several counties of the state is required to be uniform, so that its several parts shall be applicable to each county.—Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66.

[d] Act of March 31, 1891, section 162, creates counties of the thirty-third class, and section 195 allows the clerk of each of such counties a salary of three thousand dollars, and authorizes him to collect fees for services in settlement of estates based on the value thereof. Constitution, article 11, section 5, authorizes the classification of counties, for the purpose of regulating the compensation for county officers according to duties. Held, that section 195, in fixing a fee for official services in counties of the thirty-third class different from that in other counties, violates Constitution, article 11, section 4, directing the legislature to establish a system of county government which shall be uniform throughout the state.—Bloss v. Lewis, 109 Cal. 493, 41 Pac. 1081.

§ 16. Legislative Control of Acts and Funds of County.

[a] The legislature may compel a county to become a subscriber to a railroad already built, for the purpose of paying its debts, and to become a stockholder in the company, and issue its bonds for the stock, and to raise money by taxation, and appropriate it to the payment of the bonds.—Napa Valley R. Co. v. Napa County Supervisors, 30 Cal. 435.

§ 17. County Seat—Location and Establishment.

[a] When a legislature in establishing the county seat of a new county names a place that is outside the boundaries of the state, such establishment is absolutely void.—Reddy v. Tinkum, 60 Cal. 458.

[b] County of Mono is not liable for claims arising from fixing the seat of justice at Aurora, Nevada.—Reddy v. Tinkum, 60 Cal. 458.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 366-379; 13 Cent. Dig., cols. 1217-1251, §§ 25-47.

§ 18. —— Removal.

[a] Act of 1850 as to contesting elections relates only to persons elected to county offices, and does not apply to an election for selecting a county seat.—Calaveras County v. Brockway, 30 Cal. 325.

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[b] An act submitting to the electors of a county the question which of two towns should be their county seat provided that, prior to the election, the citizens of a town to which it was sought to remove the county seat should raise a specified sum of money to pay expenses of removal, and to be applied to the erection of county buildings, and should deposit it with a banking firm to be designated by the board of supervisors. The money was raised, and tendered to a banking firm so designated, who refused to receive, and it was deposited with another banking firm, subsequently approved of by the board. Held, that the condition was sufficiently complied with.—Calaveras County v. Brockway, 30 Cal. 325.

[c] Where an act for removal of a county seat provides that, before removal, the citizens of the town to which the removal is to be made, shall raise a certain sum of money, and deposit it with a banking firm to be designated, to defray the expenses of removal and of erecting new county buildings, and the money is raised and deposited, the citizens have no further power over it, and cannot designate for what purpose it shall be applied.—Calaveras County v. Brockway, 30 Cal. 325.

[d] When an election is held for the removal of a county seat, under Political Code, part 4, title 1, chapter 2, and a majority of the electors vote in favor of retaining the county seat where it is, the board of supervisors may, at any time, upon the presentation of a proper petition, order a second election for the same purpose. The statute does not restrict the number of elections which may be held, so long as the place of the county seat is not changed.—Atherton v. San Mateo County Supervisors, 48 Cal. 157.

[e] Under Political Code, section 3976 et seq., providing that the board of commissioners may order an election to remove the county seat after receiving a petition signed by at least one-third of the electors, a petition actually signed by less than one-third, but filled out with signatures cut from an identical petition which had been circulated in an other part of the county at the same time, does not authorize the board to order such an election.—Fox v. San Mateo County Supervisors, 49 Cal. 563.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 369-379; 13 Cent. Dig., cols. 1223-1249, §§ 30-46.

B. COUNTY BOARD.

CONSTRUCTION AND VALIDITY OF STATUTE AFFECTING, § 19.
APPOINTMENT—POWER OF SUPERIOR COURT, § 20.
ELIGIBILITY, § 21.
—— POWER OF SUPERIOR COURT TO DETERMINE ELECTION AND QUALIFICATION, § 22.
JUDICIAL CONTROL OVER, § 23.
OFFICIAL RESIDENCE, § 24.
TERM OF OFFICE, VACANCY AND HOLDING OVER, § 25.
COMPENSATION, § 26.
FIDUCIARY RELATION TO COUNTY, § 27.
POWERS AND FUNCTIONS, § 28.
—— TO ESTABLISH RULES OF EVIDENCE, § 29.
—— TO APPOINT OR EMPLOY SPECIAL COUNSEL, § 30.
—— TO CREATE OFFICES, § 31.
—— TO APPOINT OR DISCHARGE COUNTY PHYSICIAN, § 32.
—— TO FIX COMPENSATION OF COUNTY OFFICERS, § 33.
—— MODE OF EXERCISING, § 34.
SUPERVISION OF COUNTY OFFICERS, § 35.
APPROVAL OF OFFICIAL BONDS, § 36.
DELEGATION OF AUTHORITY, § 37.
MEETINGS, § 38.
—— CALLING, § 39.
—— POWER OF MAJORITY OF QUORUM, § 40.
—— ADJOURNMENT, § 41.
MINUTES AND RECORDS, § 42.
ORDERS, RESOLUTIONS AND ORDINANCES, § 43.
—— REQUISITES AND VALIDITY, § 44.
—— REASONABLENESS, § 45.
—— UNIFORMITY OF ORDINANCES IN EXERCISE OF POLICE POWER, § 46.
—— PUBLICATION, § 47.
—— RECORD, § 48.
—— TIME OF TAKING EFFECT, § 49.
—— REPEAL, § 50.
—— PLEADING, § 51.
—— PROOF OF ADOPTION, § 52.
CONCLUSIVENESS OF DECISIONS, § 53.

Jurisdiction of supervisors over roads in Yosemite Valley. See Highways, § 7.
County school boards. See Schools and School Districts, § 11.
County board of equalization. See Taxation, §§ 98-102.

§ 19. Construction and Validity of Statutes Affecting.

[a] The provision of act of March 20, 1855, section 2, that "the board of supervisors in these counties shall have authority at their last session before the general election in each year to change the boundaries of the [supervisor] districts in their said respective counties," is merely directory, and does not restrain the exercise of the same power at other sessions.—Tuohy v. Chase, 30 Cal. 524.

[b] Act of 1874 providing for removal and punishment of supervisors for malfeasance was repealed by County Government Act.—Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764.

[c] Section 13 of the County Government Act of 1897 (Stats. 1897, p. 454), permitting the electors of the county to frame and pass ordinances for the government of the county, "having the same force and equal effect as though adopted and ordained by the board of supervisors," is inconsistent with the legislative power granted under our system of government to the board of supervisors, and is invalid and void. (Beatty, C. J., dissenting.)—Anderson, Ex parte, 134 Cal. 69, 86 Am. St. Rep. 236, 66 Pac. 194.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 380, 381; 13 Cent. Dig., cols. 1252-1254, §§ 48, 49.

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§ 20. Appointment—Power of Superior Court.

[a] As the law now stands in California, the county government bill having been pronounced unconstitutional, the judges of the superior court are without the power to appoint a county supervisor.—Myers v. Alameda County Supervisors, 60 Cal. 287.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 381-383; 13 Cent. Dig., cols. 1254-1258, § 50.

§ 21. Eligibility.

[a] An elector who has resided in the district he was elected to represent for one year immediately preceding his election as supervisor was eligible to the office, though he was not entitled to vote at such election for the reason that his name has not been entered on the great register of the county, as directed by Political Code, section 1094.—Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 383-385, 411; 13 Cent. Dig., cols. 1254-1258, § 50; cols. 1261, 1262, § 52.

§ 22. —— Power of Superior Court to Determine Election and Qualification.

[a] Provision of consolidation act that board of supervisors shall be judge of election and qualification of its own members was superseded by present constitution giving superior court jurisdiction in quo warranto cases.—People v. Bingham, 82 Cal. 242, 22 Pac. 1039.

§ 23. Judicial Control Over.

[a] Liability to suit has no necessary connection with ability to sue. Boards of supervisors and bodies like them, without any legislative provision, by general law, are subject, with certain exceptions, to mandamus to enforce the performance of the duties devolved upon them, and to the writ of certiorari for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings.—Hastings v. City and County of San Francisco, 18 Cal. 49.

§ 24. Official Residence.

[a] While engaged in performance of his official duties, supervisor's official residence is county seat.—Howes v. Abbott, 78 Cal. 272, 20 Pac. 572.

§ 25. Term of Office, Vacancy and Holding Over.

[a] One who has held the office of supervisor is, after the expiration of his term, and the election and qualification of his successor, no longer an officer, either de jure or de facto, but if he attempts to act as such, is a mere naked usurper.—Trinity County v. McCammon, 25 Cal. 117.

[b] First board elected under provisions of section 752 of municipal corporation act holds only until the next election and until their successors qualify.—Ruggles v. Board of Trustees, 88 Cal. 430, 26 Pac. 520.

[c] Political Code, part 3, title 2, chapter 11, provides for the canvass of election returns by the board of supervisors. Section 1284 provides that the county clerk, on the result of the election being ascertained by the supervisors, shall deliver to the successful candidates certificates of election. Section 907 provides that the oath of office of a supervisor must be subscribed and filed within ten days after he has notice of his election, or within fifteen days from the commencement of his term of office, when no such notice has been given. Respondent was re-elected to the office of supervisor, and, as chairmen of the board, signed the minutes of that body so certifying. The term to which he was elected began on the first day of January, 1899. Prior thereto he filed an official oath and bond. The bond was void. The county clerk had never issued a notice of election to respondent. Within fifteen days after the commencement of his term, respondent executed and filed a sufficient bond. Held that, though a member of the canvassing board, he was entitled to notice from the clerk, and his abortive attempt to file a bond and oath of office did not work a forfeiture of his right thereto; and hence, a sufficient bond having been filed within fifteen days after the commencement of the term, there was no vacancy in the office, to which the governor could appoint another.—People v. Shaver, 127 Cal. 347, 59 Pac. 784.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 384; 13 Cent. Dig., cols. 1258-1261, § 51.

§ 26. Compensation.

[a] Supervisors are not entitled to any remuneration for their services as such to the county, except their per diem and mileage, as fixed by law; hence cannot charge for a sale, authorized by law, of stock belonging to the county.—Andrews v. Pratt, 44 Cal. 309.

[b] Supervisors of counties of thirty-third class are only entitled to one mileage for each session of board, and cannot charge for daily visits to and from their homes during session.—Howes v. Abbott, 78 Cal. 272, 20 Pac. 572.

[c] Under section 204, subdivision 15, of the County Government Act of 1893, the aggregate amount of the compensation that supervisors in counties of the forty-second class can receive is limited to four hundred dollars per annum, including both their per diem and mileage.—Chapin v. Wilcox, 114 Cal. 498, 46 Pac. 457.

[d] A county supervisor, elected in 1892 for the term of four years beginning in January, 1893, is not entitled to the compensation provided for county supervisors by Statutes of 1893, page 416, section 173, sub-

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division 15, to take effect in 1895, in view of page 512, section 234, providing that the compensation fixed therein "shall not affect the present incumbents."—Tulare County v. Jefferds, 118 Cal. 361, 50 Pac. 535.

[e] Supervisors are bound to perform their duties for compensation fixed by law and are entitled to compensation only in performing duties prescribed by law.—Irwin v. Yuba, 119 Cal. 688-691, 52 Pac. 35.

[f] Supervisors are not entitled to compensation and expense money in attending conventions called to consider matters relating to internal concerns of counties.—Irwin v. Yuba, 119 Cal. 688-691, 52 Pac. 35.

[g] Under the act of 1893, the intention was not to pay extra salaries as road commissioners to supervisors in those counties in which they were not provided for, and, the act being subsequent in point of time to section 2641, prevails over it.—Davis v. Post, 125 Cal. 210, 57 Pac. 901.

[h] Supervisor who, as ex-officio road commissioner, performs his duties within his road district, under the direction and supervision of the board, which, as a body, has general supervision of all the roads in the county (Pol. Code. secs. 2643, 2645), is in such respect a county officer, not a road district officer, and performs services "required of him by law" as a county officer, and his compensation is a "salary" to be paid out of the county salary fund.—White v. Hayden, 126 Cal. 621, 59 Pac. 118.

[i] Where plaintiff, a county supervisor, could not agree with the county auditor as to the amount due him as salary, his acceptance of the amount claimed by the auditor, under an agreement that it was to be on account, did not estop him from maintaining an action for the balance, since it was the duty of the auditor to issue the warrant for the amount due by law, and a partial performance did not exonerate him from further observance of his duty.—Ellis v. Jefferds, 130 Cal. 478, 62 Pac. 734.

[j] Statutes of 1893, page 416, section 173, provides that the supervisors of counties of a certain class shall receive a salary of eighteen hundred dollars per annum; and Statutes of 1897, page 522, section 170, changes the salaries of supervisors in such counties to one thousand dollars per annum, and provides that the section shall take effect immediately; and Statutes of 1897, page 577, section 233, declares that the provisions of sections 158 to 214, inclusive, of this act, so far as they change the compensation of any officer therein named, "heretofore paid a fixed salary," and not fees or per diem, shall not affect incumbents, unless otherwise provided in any of said sections. Held, that a supervisor in such county who held office at the time of the enactment of the law of 1897 was entitled from the first Monday in June, 1897, to the first Monday in November, 1898, to a salary of eighteen hundred dollars per annum.—Ellis v. Jefferds, 130 Cal. 478, 62 Pac. 734.

[k] A member of the board of supervisors, who attended a supervisors' convention in another county as one of a committee of the whole, authorized and appointed by the board so to do, cannot recover compensation from the county for his expenses, since not within the duties of the board as authorized by law.—Shepherd v. Keagle, 53 Pac. 702,

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 386, 387; 13 Cent. Dig., cols. 1262-1265, § 54.

§ 27. Fiduciary Relation to County.

[a] Supervisors are trustees of the property interests in their counties, and the same good faith toward the county is required of them as of an ordinary trustee toward his cestui que trust, or an agent toward his principal. Andrews v. Pratt, 44 Cal. 309.

[b] A member of board cannot be interested in or receive pay for work done on any contract growing out of or connected with public works or improvements.—Domingos v. Board of Supervisors, 51 Cal. 608.

§ 28. Powers and Functions.

[a] Supervisors exercise judicial, legislative and executive powers, from the necessity of the case, in matters relating to the police and fiscal regulations of counties.—People v. El Dorado County, 8 Cal. 58.

[b] The board of supervisors represents the county in legal proceedings.—People v. Marin Co. Supervisors, 10 Cal. 344.

[c] It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout this state, to transfer from the courts of sessions to the boards of supervisors the general and special powers and duties of a civil character which had before the passage of that act been vested in such court.—People v. Bircham, 12 Cal. 50.

[d] The board of supervisors of a county is the proper authority to canvass the votes cast at a special election for a county seat, and to declare the result, although the act providing for the election does not in express terms make them so.—Calaveras County v. Brockway, 30 Cal. 325.

[e] Act of March 28, 1863, authorizing the board of supervisors of Sonoma county to appropriate money for a map, the terms of which empower them and make it their duty to contract for a map, leaves the question to the judgment of the board, and is not mandatory on their part.—Bowers v. Sonoma County, 32 Cal. 66.

[f] Supervisors have no jurisdiction to revive a dead contract.—Fanning v. Schammel, 68 Cal. 429, 9 Pac. 427.

[g] Where services have been rendered for the benefit of the county in a manner authorized by law, the board of county supervisors, having had original power in the premises, may cure informalities in procedure by a subsequent ratification and recognition of its liability.—Power v. May, 114 Cal. 207, 46 Pac. 6.

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[h] Board of supervisors has no power other than conferred upon it by statute. Merriam v. Barnum, 116 Cal. 622, 48 Pac. 727.

[i] Board of supervisors has no authority to appoint any of its members to attend conventions called to consider matters relating to internal concerns of the county. Irwin v. Yuba, 119 Cal. 688, 52 Pac. 35.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 388-397; 13 Cent. Dig., cols. 1266-1270, § 55.

§ 29. —— To Establish Rules of Evidence.

[a] Board of supervisors has no power to establish rules of evidence for guidance of courts.—Christensen, Ex parte, 85 Cal. 212, 24 Pac. 640.

§ 30. —— To Appoint or Employ Special Counsel.

[a] The county board has power to employ counsel other than the official attorney to defend the county's interests in civil suits. Hornblower v. Duden, 35 Cal. 664.

[b] It not being the duty of the district attorney to prosecute or defend civil actions in which the county is interested pending in any other county than his own, the board of supervisors may decline his services when tendered in such an action, and employ other counsel.—Herrington v. Santa Clara County, 44 Cal. 496.

[c] The board of county commissioners have authority to employ counsel, other than the district attorney, to collect the money due to the county by the state for the support of indigent persons, and the choice of such counsel is a matter within their discretion, and cannot be reviewed.—Lassen County v. Shinn, 88 Cal. 510, 26 Pac. 365.

[d] The board of county supervisors has power to employ an attorney to collect a claim due the county from the state.—Lassen County v. Shinn (1891) 88 Cal. 510, 26 Pac. 365, followed.—Power v. May, 114 Cal. 207, 46 Pac. 6.

[e] The county board has no authority to employ counsel other than the official attorney to assist in the prosecution of criminal cases.—Modoc County v. Spencer, 103 Cal. 498, 37 Pac. 483.

[f] Board of supervisors has no power to employ special counsel for any purpose other than to prosecute or defend a suit.—Merriam v. Barnum, 116 Cal. 624, 48 Pac. 727.

[g] Supervisors only have power to employ counsel to assist district attorney or to take his place when he is disqualified from acting. Merced County v. Cook, 120 Cal. 277, 52 Pac. 721.

[h] County supervisors have no power to displace district attorney in conduct of county litigation and substitute other attorneys.—Merced County v. Cook, 120 Cal. 277, 52 Pac. 721.

§ 31. —— To Create Offices.

[a] The board of supervisors of a county have no authority to create the office of license tax collector.—County of Los Angeles v. Lopez, 104 Cal. 257, 38 Pac. 42.

[b] Board of supervisors cannot create office of license tax collector or fix his compensation.—Butte County v. Merrill, 141 Cal. 397, 74 Pac. 1036.

§ 32. —— To Appoint or Discharge County Physician.

[a] Supervisors cannot abolish office of county physician so as to impair contract for services.—McDonald v. Yuba County, 14 Cal. 444.

[b] The County Government Act cannot be construed, as making physicians employed by the county public officers, without involving an unconstitutional delegation of power to the board of supervisors, to fix their terms of office, prescribe their duties, and to regulate their salaries or compensation. The board has power under the act to appoint a number of physicians to take care of the indigent sick, and to fix their period of employment, duties, and compensation; and there is nothing in the act to indicate an unconstitutional intention on the part of the legislature to designate or treat as officers the physicians employed by the board. People v. Wheeler, 136 Cal. 652, 69 Pac. 435.

§ 33. —— To Fix Compensation of County Officers.

[a] In absence of any law fixing compensation of the county clerk the board of supervisors had authority to fix it.—Kinsey v. Kellogg, 65 Cal. 111, 3 Pac. 405.

[b] Supervisors cannot fix compensation of county officers.—Butte County v. Merrill, 141 Cal. 397, 74 Pac. 1036.

[c] Section 3678 of the Political Code, directing supervisors to provide for payment of additional clerical force to assist county assessor, is unconstitutional as leaving compensation of county officers to supervisors. Agard v. Shaffer, 141 Cal. 726, 75 Pac. 343.

[d] Purpose of section 5, article 11, of the Constitution is that legislature should regulate compensation of all county officers and it prohibits such regulation by board of supervisors directly or indirectly.—Agard v. Shaffer, 141 Cal. 727, 75 Pac. 343.

§ 34. —— Mode of Exercising.

[a] Board of supervisors of a county cannot settle with the county treasurer at a special meeting of such board, unless they have first given public notice of such meeting, and specified in such notice that such business will be transacted.—El Dorado County v. Reed, 11 Cal. 130.

[b] In order to give the amplest opportunity to the district attorney, or citizens who

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desire to do so, to contest the allowance of improper demands against the public treasury, the business of the supervisors is required to be transacted at the regular meetings required by law; or if at special meetings, public notice must be given of the business to be so transacted; and unless such notice be given, the acts of the supervisors are a nullity.—El Dorado County v. Reed, 11 Cal. 130.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1270-1277, §§ 56-60.

§ 35. Supervision of County Officers.

[a] Act of March 31, 1876, providing for the appointment of a superintendent for the house of correction of San Francisco by the board of supervisors, and "that said superintendent shall only be removed for just and sufficient legal cause after a fair and impartial investigation of his case by said supervisors," does not restrain or limit the power of removal to the manner indicated in the act, and the board of supervisors have power to remove the superintendent at their pleasure.—(1857) People v. Hill, 7 Cal. 97; (1881) Smith v. Brown, 59 Cal. 672; (1887) People v. Shear, 15 Pac. 92.

[b] A board of county supervisors, under its power to supervise the official conduct of all county officers and direct prosecutions for delinquencies, may employ an expert to examine the books and accounts of county officers.—Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292.

[c] A county treasurer, acting under Statutes of 1893, page 346, section 220, which permitted him to transfer money from the general fund to the salary fund when necessary, transferred a sum in excess of a sum necessary to pay salaries for the month in which the transfer was made. Held, under Statutes of 1893, page 346, section 25, subdivision 1, which authorizes the supervisors to review the official conduct of the county officers, the board was empowered to order the treasurer to retransfer the excess from the salary fund to the general fund, and to procure a mandate to compel obedience to the order.—Modoc County v. Madden, 120 Cal. 555, 52 Pac. 812.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols., 1318-1442, §§ 86-160.

§ 36. Approval of Official Bonds.

[a] Refusal of supervisors to act upon official bond duly presented does not release sureties, or work a forfeiture of office. Doane v. Scannell, 7 Cal. 393, 432.

[b] In determining upon the sufficiency of bond of officer, and whether officer, by his failure to comply with requisition of supervisors to file new bond, has vacated his office, the supervisors exercise powers of a judicial character.—People ex rel. De Fries v. Supervisors of Marin County, 10 Cal. 344.

[c] Board of supervisors has no jurisdiction to reject official bond, except for the reasons that it is not, in form and substance, in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties; and the supreme court will review on certiorari and annul an order of a board rejecting a bond for any other than one or more of said reasons.—Miller v. Sacramento County, 25 Cal. 93.

[d] Board of supervisors of a county, after the passage of the act of March 20, 1855, became the body authorized by law to approve of the official bonds of county treasurers.—People v. Evans, 29 Cal. 429.

§ 37. Delegation of Authority.

[a] Though counties have power to contract for the collection of debts due them (Pol. Code, secs. 4001-4003, 4046), the board of supervisors, in the exercise of such power, is not authorized to delegate it to others to determine whether to commence a suit, and to select attorneys, and prosecute the suit, nor to make a compromise or settlement dependent on the written consent of strangers. Scollay v. Butte County, 67 Cal. 249, 7 Pac. 661.

[b] In an action to recover unpaid liquor license taxes under an ordinance passed by a board of supervisors, Monday, October 1, 1883, it appeared that prior thereto, on August 6, 1883, the board, pursuant to County Government Act of March 14, 1883, section 22, requiring the supervisors to provide for the holding of regular meetings, and which act repealed Political Code, section 4045, passed March 13, 1883, requiring the supervisors, on the first Monday of October, to fix rates of county licenses, passed an ordinance for the holding of regular meetings on the first Monday in February, May, August, and November, to continue in session until the business was disposed of. The ordinance was passed at a special meeting of the board held for the fixing of county taxes only. Held, that the ordinance passed October 1st is void. People v. Dunn, 89 Cal. 228, 26 Pac. 761.

[c] The board of supervisors, in the absence of positive law authorizing it to do so, cannot in any case appoint an agent to exercise powers which it cannot itself exercise; though in the exercise of powers conferred upon it, it may appoint agents to discharge ministerial duties not calling for the exercise of reason and discretion, but cannot go beyond this and delegate to others duties, the discharge of which, calling for the use of reason and discretion, are regarded as public trusts.—House v. Los Angeles Co., 104 Cal. 73, 37 Pac. 796.

[d] Board of supervisors, to whose discretion is committed the fixing of the manner of giving notice of an election for the incorporation of a municipality, must themselves fix the manner or time of giving notice, and cannot delegate to the clerk such power. People v. Town of Linden, 107 Cal. 94, 40 Pac. 115.

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FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 391-397; 13 Cent. Dig., cols. 1277-1279, § 61.

§ 38. Meetings.

[a] A session of the board of supervisors of a county was commenced May 7th, under Political Code, section 4032, and continued from day to day until May 16th. Held, that the session of the board was not terminated by an act which went into effect May 14th, requiring the board to provide for regular meetings thereof at the county seat, and that an ordinance adopted by it on May 16th was valid.—Ex parte Benninger, 64 Cal. 291, 30 Pac. 846.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 392-396; 13 Cent. Dig., cols. 1280-1285, §§ 63-65.

§ 39. —— Calling.

[a] An order calling a special meeting of the board of supervisors sufficiently specifies the business to be performed when it sets forth that it is "for the purpose of considering a petition of the citizens of said county in reference to a railroad, and for the purpose of calling an election in and for said county, at which shall be submitted," etc.—Coleman v. Marin County Supervisors, 50 Cal. 493.

§ 40. —— Power of Majority of Quorum.

[a] Majority of a quorum of a board of supervisors, a quorum being present, can perform any act which a majority of the board could perform if all were present.—People v. Harrington, 63 Cal. 257.

§ 41. —— Adjournments.

[a] No irregularity in the proceedings of the board of supervisors of a county arises from the fact that the board took a recess as a board of supervisors from July 10th to July 19th, and, in the interim, acted as a board of equalization.—Ex parte Mirande, 73 Cal. 365, 14 Pac. 888.

[b] Board of supervisors has power to adjourn from time to time until its business is completed, and the use of the word "recess" instead of "adjourned" by the clerk is unimportant.—Ex parte Mirande, 73 Cal. 365, 14 Pac. 888.

§ 42. Minutes and Records.

[a] A deliberative body, like the board of supervisors, cannot be bound by acts in pais; the best and only evidence of its intentions is to be drawn from the record of its proceedings.—Phelan v. San Francisco, 6 Cal. 531.

[b] A board of supervisors is a body with limited jurisdiction, and the jurisdictional facts must appear in the record of its proceedings.—Finch v. Tehama County Supervisors, 29 Cal. 453.

[c] The effect of the statute requiring the clerk and chairman of the board of supervisors to sign the record of its proceedings is merely to make their signatures evidence identifying the minutes.—People v. Eureka Lake etc. Canal Co., 48 Cal. 143.

[d] Clerk of board of supervisors is not clothed with power, of his own account, to correct a record of the proceedings of the board, even if it is shown that he made the correction in accordance with the true state of facts.—Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589.

[e] Section 19 of the County Government Act, providing that the records and minutes of the board of supervisors must be signed by the chairman and clerk, merely has the effect to make their signatures evidence identifying the minutes; and their failure to sign the minutes does not render the record inadmissible as proof of the action of the board, in meeting and adjourning, for the purpose of showing the continuity of the session of the board at a regular meeting; but if the handwriting of the entries, their contemporaneous character, and the official custody from which the record is produced are proved, the minutes are competent to show the action of the board.—County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644.

[f] The order of a board of supervisors appearing in their minute book is a record which the clerk of the board has no right to alter or amend, and parol proof is inadmissible to correct or change the record. Swamp Land Reclamation Dist. No. 407 v. Wilcox, 14 Pac. 843; Swamp Land Reclamation Dist. 407 v. Ruble, 14 Pac. 846.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 397-401; 13 Cent. Dig., cols. 1285-1293, §§ 66-70.

§ 43. Orders, Resolutions and Ordinances.

[a] An order of a board of supervisors directing the auditor to issue a warrant need not specify on what fund it is to be drawn. Babcock v. Goodrich, 47 Cal. 488.

[b] Board of supervisors, though required by the county government act to proceed by ordinance for some purposes, can proceed "by order" in such case, as section 37 of that act so provides.—People v. Counts, 89 Cal. 15, 26 Pac. 612.

[c] An ordinance fixing rates, passed on the first Monday of October, without a regular meeting, or special meeting regularly called for that purpose, is void.—People v. Dunn, 89 Cal. 228, 26 Pac. 761.

[d] Object of statute requiring board to specify purpose for indebtedness is to be created and amount of bonds is to notify electors of these facts.—People v. Counts, 89 Cal. 19, 26 Pac. 612.

[e] A person who has performed important services for a county under the direction of the majority of the supervisors, who ap-

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proved his claim for the services, is entitled to compensation, though no formal resolution to employ him was spread on the supervisors' minutes.—Power v. May, 123 Cal. 147, 55 Pac. 796.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 402-404; 13 Cent. Dig., cols. 1293-1295, §§ 71, 72.

§ 44. —— Requisites and Validity.

[a] The County Government Act does not require that the ordinance imposing county licenses should be passed on the first Monday in October.—County of Santa Clara v. Southern Pac. R. R. Co., 66 Cal. 642.

[b] County ordinance in conflict with valid general law is void.—San Luis Obispo County v. Graves, 84 Cal. 74, 23 Pac. 1032.

[c] It seems that county ordinance applicable to town or village containing five hundred inhabitants not giving boundaries of such towns or means whereby population can be ascertained is void for uncertainty and indefiniteness.—People v. Pearne, 118 Cal. 158, 50 Pac. 376.

[d] That supervisors intended to discriminate against a publisher in fixing a lower rate for the official publication of the delinquent tax list than for other county advertising would not vitiate the order.—Dodge v. Kings County (Cal. Sup.), 88 Pac. 266.

[e] Evidence, in an action against a county to recover for county printing, held to sustain a finding that the action of the supervisors in fixing the rate for publication of delinquent tax list was not arbitrary or unnatural.—Dodge v. Kings County (Cal. Sup.), 88 Pac. 266.

§ 45. —— Reasonableness.

[a] A county ordinance prohibiting the running of automobiles on country roads between sunset and sunrise is not unreasonable.—Ex parte Berry, 147 Cal. 523, 82 Pac. 44.

§ 46. —— Uniformity of Ordinances in Exercise of Police Power.

[a] Any restrictions of the rights of individuals to pursue a lawful avocation by virtue of the police power must extend to all individuals who might exercise that right within the same district.—County of Los Angeles v. Hollywood Cemetery Assn., 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

§ 47. —— Publication.

[a] If the board of supervisors consolidate the offices of recorder and auditor of the county, the ordinance making the consolidation must not only be passed and published, but must be published by order of the board. People v. Bailhache, 52 Cal. 310.

[b] Order of supervisors consolidating county offices must, under Political Code, sections 4106, 4107, be published by order of the board and the publication of the proceedings of the board containing the order, in a newspaper, is insufficient.—People v. Williams, 64 Cal. 87, 27 Pac. 939.

[c] Section 26 of the County Government Act of March 14, 1883, providing that an ordinance of the board of supervisors shall be published once a week in some newspaper published in the county, and that an order entered in the minutes shall be prima facie proof that it has been duly published, does not require that an order for the publication of an ordinance shall be made; but if such order is made, and a certain paper designated therein, the fact that the ordinance was published in another paper in the county does not invalidate it.—San Luis Obispo County v. Hendricks, 71 Cal. 242, 11 Pac. 682.

[d] Under section 26 of the County Government Act of March 14, 1883, an ordinance of a board of supervisors of a county does not take effect until it has been published in its entirety, as required by that section; and a publication which omits the enacting clause of the ordinance is insufficient. People v. Russell, 74 Cal. 578, 16 Pac. 395.

[e] County Government Act does not apply to passage and publication of ordinances of San Francisco.—Christensen, Ex parte, 85 Cal. 210, 24 Pac. 640.

[f] An order of the board of supervisors establishing the boundaries, and providing for the submission of the question of the incorporation of certain territory, is not an ordinance, and therefore need not be published.—People v. Town of Linden, 107 Cal. 94, 40 Pac. 115.

§ 48. —— Record.

[a] County ordinance need not be recorded before it takes effect; publication and posting is only a prerequisite.—People v. Cole, 70 Cal. 60, 11 Pac. 481.

[b] The recording of an ordinance of a board of supervisors providing for the holding of regular meetings, is not essential to the validity of the ordinance.—Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825.

[c] Deering's Supplement, page 192, section 21, provides that the county board of supervisors must cause to be kept an ordinance book, in which must be entered all ordinances duly passed by the board. Held, that the record of an ordinance, with proof of proper publication, was sufficient to entitle it to be admitted in evidence, and is prima facie proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and the burden of showing its invalidity was on the party alleging the same.—San Diego County v. Siefert, 97 Cal. 594, 32 Pac. 644.

[d] Omission of a clerk of a board of supervisors to add the seal of the board to the record of an ordinance imposing a tax in the ordinance book does not render the ordinance

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invalid.—Santa Clara County v. Southern Pac. R. Co., 66 Cal. 642, 6 Pac. 744; Santa Clara County v. Central Pac. R. Co., 6 Pac. 745.

§ 49. —— Time of Taking Effect.

[a] Statutes of 1897, page 474, chapter 277, section 56, provides that changes in townships shall not affect any present incumbent of the office of justice of the peace or constable; and section 26 provides that ordinances of the board of supervisors shall not take effect within less than fifteen days after their passage. An ordinance by which certain townships were abolished and a new township created from the territory formerly embraced within the two provided that the ordinance was "intended to" and should "take effect and be in force for the next general election for county and township officers." Held, that the ordinance took effect fifteen days after its passage, so far as it would be effective, and was then in force for all purposes of the next general election, the recital of the ordinance as to when it should take effect being merely declaratory of the law; and hence a contention that the ordinance was invalid because it could not be determined when it took effect was without merit.—Proulx v. Graves, 143 Cal. 243, 72 Pac. 1025.

§ 50. —— Repeal.

[a] After the board of supervisors of a county has voted that act of March 31, 1891, establishing law libraries, shall be applicable to such county, it cannot evade the force and effect of the statute by repealing the adopting ordinance.—Board of Law Library Trustees v. Orange County Supervisors, 99 Cal. 571, 34 Pac. 244.

§ 51. —— Pleading.

[a] County ordinance held within Penal Code, section 963, relating to pleading of private statutes.—Childs, Ex parte, 1 Cal. App. 39, 81 Pac. 667.

[b] Under Penal Code, section 963, relating to pleading of private statutes, complaint for violation of county ordinance forbidding handling of intoxicating liquors without license held sufficient.—Childs, Ex parte, 1 Cal. App. 39, 81 Pac. 667.

§ 52. —— Proof of Adoption.

[a] The introduction of an ordinance from the record book of the board of supervisors, with the usual recitals as to its adoption, together with evidence that the board had acted in pursuance thereof, is prima facie proof that it was legally adopted, though there be no record evidence that such ordinance was ever published as required by law. People v. Baldwin, 117 Cal. 244, 49 Pac. 186.

§ 53. Conclusiveness of Decisions.

[a] The judgments of the board of supervisors are as conclusive as those of a court of record, and only reviewable upon an appeal or some other direct proceeding. Waugh v. Chauncey, 13 Cal. 11.

[b] Objections that a bill for county printing is exorbitant and the result of an illegal combination by county newspapers can only be raised and determined before the board of supervisors.—Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574.

[c] Statutes of 1893, page 347, authorizing a county to bring an action to recover money ordered paid by the board of supervisors, or paid by any officer without authority of law, does not authorize an action to recover money paid on the order of the board of supervisors for county printing, on the ground that such order was obtained by a fraudulent combination since the board is authorized to order such payment.—Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 404-410; 13 Cent. Dig., cols. 1298-1302, §§ 74, 75.

C. OFFICERS AND AGENTS.

POWER OF LEGISLATURE TO CREATE OFFICES, § 54.
FIDUCIARY RELATION TO STATE, § 55.
APPOINTMENT OR ELECTION, § 56.
—— TIME, § 57.
ELIGIBILITY—PHYSICIAN AND SURVEYOR, § 58.
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—— CLERK, § 71.
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—— ACTIONS BY COUNTY, § 88.
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County clerks. See Clerks of Court.
County coroners. See Coroners.
County attorneys. See District and Prosecuting Attorneys.
Judicial notice of authority of county officers. See Evidence, §§ 40-44.
Public administrators. See Executors and Administrators, XV.
Health officers. See Health, § 6.
Highway officers. See Highways, §§ 56-60.
Officers in general. See Officers.
County sheriffs. See Sheriffs and Constables.
County tax collectors. See Taxation, §§ 121-129.
County tax assessors. See Taxation, §§ 62-66.
Town officers. See Towns.

§ 54. Power of Legislature to Create Offices.

[a] Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action, in creating such office and raising such salaries, may be reviewed on certiorari.—Robinson v. Board of Supervisors of Sacramento, 16 Cal. 208.

[b] If a general act creats an office in all the counties of the state, to be filled by election once in two years, and a special act passed afterward takes one county away from the provisions of the act, and this special act is afterward repealed by an act which restores the office as to that county, the provisions of the general act are revived as to the office.—People v. Hunt, 41 Cal. 435.

[c] The County Government Act of March 14, 1883, did not go into effect for the purpose of creating county offices until January 1, 1885, and therefore prior to that date there was no such office as county assessor of Alameda county.—Rosborough v. Boardman, 6 Pac. 449, 67 Cal. 116, 7 Pac. 261; Robinson v. Boardman, 7 Pac. 264.

[d] Under Constitution, article 11, section 5, declaring that the legislature, by general and uniform laws, shall provide for the election or appointment in the counties of supervisors, sheriffs, clerks, and such other county and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office, a county cannot create the office of license tax collector, and make appointments therefor.—El Dorado County v. Meiss, 100 Cal. 268, 34 Pac. 716.

[e] Ordinance of supervisors creating office of license tax collector is void; duty of creating all county officers is vested in legislature.—San Luis Obispo v. Greenberg, 120 Cal. 305, 52 Pac. 797.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 415, 416; 13 Cent. Dig., cols. 1318, 1319, § 86.

§ 55. Fiduciary Relation to State.

[a] A county surveyor is, under the statute, one of the agents of the state for the sale of swamp and overflowed lands. He cannot receive and file his own application to purchase, and make a survey for himself of the lands mentioned in his application; nor can he do these things nominally on the application of another, but really for himself, in whole or in part.—Edwards v. Estell, 48 Cal. 194.

§ 56. Appointment or Election.

[a] Act of March 27, 1850, relating to the office of county treasurer, provided that vacancies in the office should be filled by the court of sessions. Act of March 20, 1855, relating to the board of supervisors, provided that when any vacancy occurred in any county office, except that of county judge or supervisor, the board of supervisors should appoint a person to fill the vacancy. Held that, by such later act, a change was made in the appointing power in the event of a vacancy in the office of county treasurer. People v. Wells, 11 Cal. 329.

[b] Appointee of governor will hold over person elected to the same office at a special election ordered by the board of supervisors of the county.—People v. Martin, 12 Cal. 409.

[c] The seventy-fourth section of the general revenue act of 1860, as to the election of county auditor in certain counties, and separating his duties from those of county clerk, etc., does not repeal the special act of 1858, entitled "An act to separate the offices of county recorder, county auditor, clerk of the board of supervisors, clerk of the board of equalization, from the office of county clerk in the county of Placer"; and a person elected in the fall of 1860, as county recorder for Placer county, under the act of 1858, will hold in preference to a person elected at the same time as county auditor, under the revenue act of 1860.—People ex rel. Dunham v. Supervisors of Placer County, 17 Cal. 411.

[d] The act making the county treasurer of San Joaquin county ex officio tax collector, passed April 2, 1866 (Stats. 1865-66, p. 689), in so far as it provided for the transfer of such office, to take place before an election of such treasurer should occur, held to be unconstitutional and void.—People v. Kelsey, 34 Cal. 470.

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[e] Act of March 14, 1883, entitled "An act to establish a uniform system of county and township governments," authorizing the several county supervisors to impose a license tax, and to provide for its collection, includes the power to appoint an agent to collect the tax, and does not conflict with Constitution, article 11, section 5, giving the legislature power, by general and uniform laws, to provide for the election of county officers, and fix their compensation, duties, and term of office.—People v. Ferguson, 65 Cal. 288, 4 Pac. 4; People v. Ponet, 65 Cal. 288, 4 Pac. 4.

[f] Provision of section 2642 of Political Code, as amended in 1883, requiring board of supervisors of each county, upon petition of a majority of the taxpayers of a road district to appoint a road overseer therefor, is merely directory.—Davisson v. Solano County, 70 Cal. 612, 11 Pac. 680.

[g] Supervisors may appoint a collector of license taxes, and the bond given by that officer is an official bond and should be made payable to the state.—People v. Stacy, 74 Cal. 373, 16 Pac. 192.

[h] The provisions of subdivision 26 of section 170 of the County Government Act of March 24, 1893, attempting to provide for biennial election of county officers in counties of the eighth class, are unconstitutional for lack of uniformity, and are to be disregarded and do not affect the validity of the act itself.—Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049.

[i] The word "deputy," in Constitution, article 11, section 8½, relative to county offices, includes employees, so that the civil service commission of the consolidated government of the city and county of San Francisco cannot hold examinations of copyists in the recorder's office, but the recorder may appoint them without examination.—Garnett v. Brooks, 136 Cal. 585, 69 Pac. 298.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1319-1326, §§ 87-90.

§ 57. —— Time.

[a] A board of supervisors who have passed an ordinance calling for the appointment by themselves of a superintendent "annually in October" may make a valid appointment to such office in December.—People v. Murray, 15 Cal. 221.

[b] The constitution made no change in the time of electing city and county officers in San Francisco.—Barton v. Kalloch, 56 Cal. 95.

[c] The provisions of act of March 7, 1881, known as the "Hartson Act," directing elections of city and county officers in the even-numbered years, apply to San Francisco, as well as to other cities and counties. An election of such officers, therefore, must be held in November, 1882, notwithstanding that the "consolidation act" provides for elections in San Francisco in the odd-numbered years.—Staude v. San Francisco Election Commissioners, 61 Cal. 313.

[d] Under acts of 1897 (Stats. 1897, p. 474) section 58, declaring that all elective county officers shall be elected at the time of the gubernatorial election, an election of a person at another time to fill the office of county auditor for the unexpired term or a former auditor was void, in the absence of other statutory provision for the election of county officers, and could not oust one regularly appointed to fill such vacancy.—People v. Col, 132 Cal. 334, 64 Pac. 477.

§ 58. Eligibility—Physician and Surgeon.

[a] County Government Act requiring county physician to be "suitable graduate in medicine" means that he be legally licensed to practice whether he holds degree of not.—People v. Eichelroth, 78 Cal. 143, 144.

[b] The election of a county surveyor who was in all respects qualified at the time of his election, with the exception that he had not then received the licensed land surveyor's certificate from the state surveyor provided for in section 135 of the County Government Act, which he obtained before his term of office commenced, cannot be successfully contested by an elector on that ground. The provision requiring such certificate does not go to his eligibility at the time of election, but only goes to his right to hold the office.—Ward v. Crowell, 142 Cal. 587, 76 Pac. 491.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 419-423; 13 Cent. Dig., cols. 1326-1333, §§ 91-96.

§ 59. Time to Qualify.

[a] County officers must qualify within ten days after receiving certificate of election.—People v. Perkins, 85 Cal. 512, 26 Pac. 245.

§§ 60, 61. Official Bonds.

[a] Where an official bond, proper in form and substance, is signed and sealed by a treasurer of a county and his sureties, and is approved by the proper officer, and filed in the office appointed by law, it is both executed and delivered.—Sacramento County Supervisors v. Bird, 31 Cal. 66.

[b] If statute providing for new county contains no provision in relation to official bonds, they must be given in conformity to the general law upon that subject.—People v. Ross, 28 Cal. 76.

§ 62. —— Approval.

[a] The county judge only, and not the supervisors, has authority to approve official bonds, and consequently to declare an office vacant for want of a bond.—People v. Marin County Supervisors, 10 Cal. 344.

[b] Since the special act of March 27, 1850, approval by the board of supervisors of a county treasurer's bond is sufficient.—People v. Breyfogle, 17 Cal. 504.

[c] Acceptance of a county treasurer's bond by the board of supervisors carries with it an

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approval as to the penalty, the form, and the sufficiency of the sureties.—People v. Breyfogle, 17 Cal. 504.

[d] A board of supervisors has no authority to reject an official bond unless it is not, in form and substance, in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties, and a rejection of a bond because the petitioner had resigned his office, where immediately before he gave the bond he filed notice of his withdrawal of the resignation, is ineffectual.—Miller v. Sacramento County Supervisors, 25 Cal. 93.

[e] In the approval of bonds of officers, boards of supervisors exercise judicial functions, and their action may be reviewed on certiorari.—Miller v. Sacramento County Supervisors, 25 Cal. 93.

§ 63. —— New Bonds.

[a] The consolidation act gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the 9th of July, the officers had the whole of the 10th and 11th of July to execute and present their bonds.—Doane v. Scannell, 7 Cal. 393.

[b] Supervisors are authorized to require new bonds "whenever they deem it necessary." The question is left not to their arbitrary, but to their sound legal, discretion, exercised after an examination of the facts in the case.—People v. Marin County Supervisors, 10 Cal. 344.

[c] Under a statute authorizing boards of supervisors to require new bonds of county officers whenever they deem it necessary, an order requiring a new bond must state the grounds on which it is made, or it is fatally defective.—People v. Marin County Supervisors, 10 Cal. 344.

§ 64. Term of Office.

[a] Officers first elected hold till the first general election for county officers throughout the state, after the expiration of the term of the two years fixed by the special act, and an election held before that time is void.—People ex rel. Vesey v. Church, 6 Cal. 76.

[b] Where act organizing a county only fixes term of officers first elected, future officers must be governed by general law.—People v. Colton, 6 Cal. 84.

[c] The constitution of 1879 changed the time for holding general elections to the Tuesday after the first Monday in November. It authorized the legislature to pass a general and uniform law for the election, in the several counties of the state, of such county, township and municipal officers, and provided that the first election held under the new constitution should be subject to the provisions of the old law. By it elections were held on the first Wednesday of September, and act of March 7, 1881, was passed, providing that elections for such county officers be held at the general elections in November. It did not provide for the filling of the office during the time between the September election and the November one. Held, that it did not attempt to extend the term of the then incumbents, contrary to the constitution prohibiting the extension of any officer's term beyond the period for which he was elected.—Treadwell v. Yolo County Supervisors, 62 Cal. 563.

[d] The treasurer, auditor, tax collector, and surveyor, being each required by the consolidation act to perform certain municipal duties not imposed upon officers of the same name by the County Government Act, are municipal officers, whose term of office is fixed at two years. Their successors are also to be elected at the general election to be held in November, 1896.—Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87.

[e] The term of office of the assessor was made four years by section 4109 of the Political Code, upon its adoption in 1872, and by section 3 of article 9 of the constitution the superintendent of schools is to be elected at each gubernatorial election. Such officers having been elected in 1894, for the term of four years, their successors are not to be elected at the general election to be held in 1896.—Kahn v. Sutro, 114 Cal. 316.

[f] Section 57 of the County Government Act of March 24, 1893, designating the several officers of a county, section 60 of that act providing that "all elective county and township officers, except otherwise provided for in this act, shall be elected at the general election to be held in November, 1894, and every four years thereafter," and subdivision 26 of section 170, providing that "the officers mentioned in section 57 of this act, except as hereinafter provided, shall be elected in the year 1894, and every two years thereafter," must be construed so as to harmonize their apparent conflict; and so construed, it must be presumed that the legislature did not intend the provisions of subdivision 26 of section 170 should be applicable to any other counties than those in the eighth class.—Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049.

[g] Acts of 1897 (Stats. 1897, p. 474), section 58, provides that all elective county officers shall be elected at the general election at which the governor is elected, and shall take office in January next succeeding their election. Section 25, subdivision 19, authorizes the board of supervisors to fill by appointment all vacancies that may occur in any elective county office; the appointee to hold office for the unexpired term, or until the next general election. Held, that the words "next general election" mean the next general election for the particular office so filled by appointment, and one appointed by the board of supervisors to fill a vacancy in the office of county auditor is entitled to that office until the next gubernatorial election.—People v. Col, 132 Cal. 334, 64 Pac. 477.

[h] The expressions, "unexpired term" and "the next general election," used in subdivision 19 of section 25 of the County

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Government Act, are not necessarily synonymous. There may be cases in which the "unexpired term" would not mean until the "next general election"; and the latter phrase imports the next general election for county officers, including the officer whose term became vacant.—People v. Col, 132 Cal. 334, 64 Pac. 477.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 423-425; 13 Cent. Dig., cols. 1333-1339, §§ 97, 98.

§ 65. Filling Vacancies—Power of Supervisors.

[a] Power to declare office vacant is vested under statute, where the duty to approve of the bond of officer is lodged. That duty is imposed upon the county judge, and not the supervisors; and where the supervisors declared the office of constable vacant, because the constable failed to comply with order to file new bond, they exceeded their jurisdiction.—People ex rel. De Fries v. Marin County, 10 Cal. 344.

[b] Proclamation of supervisors is essential to validity of election to fill vacancy in a county office.—Tenney v. Miners' Ditch Co., 11 Cal. 339.

[c] By Statutes of March 20, 1855, supervisors are to exercise all powers previously given to the court of sessions, unless inconsistent with that statute. They are also to fill all vacancies until the next election, except in cases of judges. By statutes of March 27, 1850, it is provided that vacancies in the office of treasurer shall be filled by the court of sessions, and that the appointee shall hold during the remainder of the term. Held, that one appointed by the supervisors to fill a vacancy in the office of treasurer should hold through the term, though beyond the next election, as the provision as to him was special, and would control the general regulation of the same statute.—People v. Wells, 11 Cal. 329.

[d] Boards of supervisors, in filling vacancies in office, appoint to office; they do not elect.—Conger v. Gilmer, 32 Cal. 75.

[e] A county board has no power to fill a vacancy which will certainly arise at a future time, when a different board is in control of the county affairs.—People v. Ward, 107 Cal. 236, 40 Pac. 538.

[f] Law does not favor repeal of statutes by implication; and legislation will not be implied to repeal the clause in consolidation act which devolves duty of filling vacancies in the office of superintendent of schools in San Francisco upon the board of education, by reason of the provision of the County Government Act giving the county boards of supervisors the power to fill vacancies in county offices generally.—People ex rel. Young v. Babcock, 114 Cal. 559, 46 Pac. 818.

§ 66. —— Vacancy Created by Forced Absence from State.

[a] Under Political Code, section 996, providing that an office shall become vacant before the expiration of the term on the incumbent's absence from the state, without permission of the legislature, beyond the period allowed by law; and section 4120, forbidding a county officer to absent himself from the state for more than sixty days, or for any period, without the consent of the board of supervisors—such absence, ipso facto, creates a vacancy in his office, and in the office of each of his deputies, and the appointing board may appoint another to fill the office. The fact that such treasurer was necessarily absent from the state on account of his health is immaterial.—People v. Shorb, 100 Cal. 537, 38 Am. St. Rep. 310, 35 Pac. 163.

§ 67. Removal.

[a] A physician under contract with the county for a definite term cannot be discharged within that term for a mere honest error of judgment as to the scope of his authority.—Grandley v. Santa Cruz County, 4 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 426-428; 13 Cent. Dig., cols. 1341-1345, §§ 100-103.

§ 68. Compensation.

[a] An officer whose duties are to be exercised only in and for certain portions of a county is not entitled to compensation from the county.—Knox v. Los Angeles County Supervisors, 58 Cal. 59.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 428-436; 13 Cent. Dig., cols. 1346-1375, §§ 104-117.

§ 69. —— Power of Legislature to Regulate.

[a] Legislature may regulate compensation of all county officers in proportion to duties and for that purpose classify counties by population.—Miller v. Kister, 68 Cal. 143, 8 Pac. 813.

[b] The legislature has peculiar discretion in determining the mode and measure of the compensation of county officers, and may provide that some officers may receive fees or per diem, and that others shall receive regular salaries, and may adopt diverse regulations applying severally to each class, and not to the other.—Vail v. San Diego Co., 126 Cal. 35, 58 Pac. 392.

§ 70. —— Constitutional and Statutory Provisions.

[a] A statute concerning the office, and fixing the salary of a county clerk, "providing that he should collect all official fees, and on the first of every month pay the same over to the county treasurer, less his salary for the next preceding month," does not evince any legislative intention to limit his salary to the amount of fees received.—Sewell v. Placer County, 42 Cal. 650.

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[b] The superintendent of irrigation, elected under act of March 10, 1874, entitled "An act to promote irrigation in the county of Los Angeles," was not a county officer, and was not entitled to compensation from the county; and act of March 7, 1878, providing from compensation for his services to be paid out of county funds, is unconstitutional. Knox v. Los Angeles County Supervisors, 58 Cal. 59.

[c] County Government Act of 1853 did not repeal acts allowing commissions and mileage to county officers on taxes and other revenue collected.—Smith v. Dunn, 68 Cal. 55, 8 Pac. 625.

[d] Provision fixing compensation of county officers at an annual sum must be construed as fixing rate of compensation to be paid for time officer actually serves.—Dillon v. Bicknell, 116 Cal. 115, 47 Pac. 937.

[e] Section 60 of County Government Act repealed section 4109 of the Political Code, and county officer is entitled to compensation, in proportion to his monthly salary, for time he holds over until his successor is qualified. Dillon v. Bicknell, 116 Cal. 113-115, 47 Pac. 937.

[f] Under acts of 1893, section 173, and acts of 1897, sections 59, 215, 233, the deputy county clerk of Tulare county who held office at the time of the enactment of the law of 1897 is entitled to the salary provided by the law of 1893.—McPhail v. Jefferds, 130 Cal. 480, 62 Pac. 735; Clark v. Jefferds, 130 Cal. 480, 62 Pac. 735; De Witt v. Jefferds, 130 Cal. 480, 62 Pac. 735; Bliss v. Jefferds, 130 Cal. 480, 62 Pac. 735.

[g] Under acts of 1893, section 173, and acts of 1897, sections 59, 215, 233, the deputy county superintendent of Tulare county who held office at the time of the enactment of the law of 1897 is entitled to the salary provided by the law of 1893.—McPhail v. Jefferds, 130 Cal. 480, 62 Pac. 735; Clark v. Jefferds, 130 Cal. 480, 62 Pac. 735; De Witt v. Jefferds, 130 Cal. 480, 62 Pac. 735; Bliss v. Jefferds, 130 Cal. 480, 62 Pac. 735.

[h] Under section 8½ of article 11 of the constitution, the city and county of San Francisco was authorized to fix the compensation of county officers, and to provide for the number of deputies that each shall have, and for the compensation payable to each of the deputies.—Matter of Dodge and the City and County of San Francisco, 135 Cal. 512, 67 Pac. 973.

[i] Political Code, section 3678, requiring the county recorder to transmit to the assessor abstracts of mortgages, etc., and providing that, "when necessary, the board of supervisors . . . . must provide for the payment of such additional clerical force" as the section necessitates, is in conflict with Constitution, article 11, section 5, providing that the legislature shall regulate the compensation of county officers.—Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343.

§ 71. —— Clerk.

[a] The special act of the legislature, approved April 4, 1857, fixing the compensation of the county clerk of the county of Placer at three thousand dollars, was intended in lieu of all fees for services rendered the county.—Mitchell v. Stoner, 9 Cal. 203.

§ 72. —— Auditor.

[a] Supervisors possess no power to allow county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer. Such claim is not authorized by law, and the power of the board to allow accounts against the county is confined to those "legally chargeable."—People ex rel. Raun v. Supervisors of El Dorado County, 11 Cal. 170.

§ 73. —— Persons Holding More than One Office.

[a] By act of February 28, 1876, the offices of county clerk, auditor, and recorder of Humboldt county were united in the same person, and the annual salary of the clerk for all services in these several offices was fixed at five thousand dollars. Subsequently the county was made of the second class, and the supervisors separated the offices of auditor and recorder from that of clerk, and fixed the latter's salary at two thousand seven hundred dollars. Held, that the clerk was not entitled to the five thousand dollars, and, as the act did not provide as to the proportion for each office on separation, it was inoperative.—Kinsey v. Kellogg, 65 Cal. 111, 3 Pac. 405.

§ 74. —— Reimbursement for Expenses and Clerk Hire.

[a] The county will not be liable for a new set of weights and measures purchased by a newly elected deputy sealer, who was aware that the county already owned a complete set, which were in the possession of the county clerk, who refused to give them up to him when demanded.—Levy v. Yuba County Supervisors, 13 Cal. 636.

[b] Constitution, article 11, section 5, provides that the legislature shall provide for county officers, and regulate their compensation; and by section 9 that such compensation should not be increased during their terms of office. Statutes of 1883, page 299, as amended by Statutes of 1885, page 178, fixed the salary of the county clerk of M. county, and made it full compensation for all services, including his deputy. Held that, where his term of office began January 7th, an order of the county board on the 10th, allowing him a deputy at a salary of fifty dollars per month, to be paid by the county, was an increase of his compensation, within the meaning of the constitution.—Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 16 L. R. A. 161.

[c] The fact that the law under which the supervisors acted was in force prior to the election of the county clerk is immaterial, as it was the order and not the act of the legislature which increased the compensation.—Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 16 L. R. A. 161.

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[d] County Government Act, section 182, as re-enacted March 31, 1891, providing that the salary of auditor in counties of the twentieth class shall be eighteen hundred dollars per annum "and one clerk at a monthly salary of not exceeding fifty dollars," authorizes a salary of eighteen hundred dollars per annum, plus the salary, not exceeding fifty dollars per month, of one clerk employed by the auditor.—Farnum v. Warner, 104 Cal. 677, 38 Pac. 421.

[e] Under Statutes of 1893, page 367, section 61 (Stats. 1897, p. 475, sec. 59), declaring that every county officer may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office, the county clerk may appoint additional deputies and assistants if the needs of his office so require; but allowance of compensation of these extra deputies and assistants out of the treasury is prohibited, as being in violation of constitution, article 11, section 13, providing that no person shall be granted power to control, appropriate, supervise, or in any way interfere with county funds.—City and County of San Francisco v. Broderick, 125 Cal. 188, 57 Pac. 887.

§ 75. —— Fixing and Altering or Increasing.

[a] Supervisors cannot increase compensation of officers fixed by law.—Foster v. Coleman, 10 Cal. 279; Jones v. Morgan, 67 Cal. 308, 7 Pac. 734.

[b] The board of supervisors cannot fix or alter the salary of a county treasurer which is, under the general law, derived from a percentage on money recovered by him.—San Joaquin County v. Jones, 18 Cal. 327.

[c] When a statute (Pol. Code, sec. 1552) provides that a county officer shall receive such salary and reasonable traveling expenses, "to be estimated by the board of supervisors," as may be allowed by such board, but sets a minimum limit therefor, no salary can be collected until the amount thereof has been fixed by the board.—Peachy v. Redmond, 59 Cal. 326.

[d] Provision that salary of county officer cannot be increased during his term of office applies to one appointed to fill vacancy for unexpired term.—Larew v. Newman, 81 Cal. 590, 23 Pac. 227.

[e] An ordinance of the board of supervisors diminishing the compensation of constables for services in criminal cases during the term is not in conflict with section 9 of article 11, of the constitution, which prohibits an increase of salary of an officer after his election, and during his term of office.—People ex rel. Atkinson v. Johnson, 95 Cal. 471, 29 Pac. 1092.

[f] Under Constitution, article 11, section 9, declaring that the compensation of any county officer shall not be increased after his election or during his term of office, and County Government Act of 1897 (Stats. 1897, p. 528), providing that the county clerk of H county shall be paid a stated salary, in full compensation for all services rendered unless in the act otherwise provided, where the county clerk of such county collects data from his records to aid the county in enforcing a claim against the state at the instance of members of the board of supervisors, he is not entitled to compensation therefor.—Humboldt County v. Stern, 136 Cal. 63, 68 Pac. 324.

§ 76. —— Payment.

[a] Act of February 27, 1878, provided that no county officer shall pay in any month demands against the treasury exceeding one-twelfth of the amount allowed for the year. The board of supervisors limited the expense of the county clerk's office to seventy-two thousand dollars per year. The auditor refused to audit the bills of said office for a certain month, because they aggregated eight thousand dollars. These bills included salaries fixed by law. On mandamus to compel the audit, the auditor based his answer on constitution, article 11, section 18, which provides that no county shall incur any indebtedness exceeding in any one year the income and revenue provided for it for such year, without the assent of two-thirds of the electors. Held, that the amount fixed by the board is not the limit of the revenue of the county clerk's office for salaries fixed by law, they being payable out of the general fund, and, in the absence of any showing that the general fund would be exhausted thereby, payment cannot be excused by the prohibition in the constitution.—Welch v. Strother, 74 Cal. 22, 16 Pac. 22.

§ 77. —— Actions to Recover.

[a] An action to recover compensation for services rendered as secretary of board of education is founded on a liability created by statute, and comes within the three years' limitation of section 338 of the Code of Civil Procedure.—Banks v. Yolo County, 104 Cal. 258, 37 Pac. 900.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 435, 436; 13 Cent. Dig., cols. 1374, 1375, § 117.

§ 78. Fees.

[a] Legislature may provide that county or township officers be compensated by fees.—San Luis Obispo Co. v. Darke, 76 Cal. 95, 18 Pac. 118.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 428-436; 13 Cent. Dig., cols. 1346-1375, §§ 104-117; cols. 1384-1387, § 125.

§ 79. —— Effect of Change from Fee to Salary Office.

[a] Where a county officer, whose compensation is derived wholly or in part from fees collected by him, is placed upon a fixed salary, the fees formerly retained by such officer are still to be collected by him, but are to be paid over to the county treasury.

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Smith v. Dunn (1885), 68 Cal. 54, 8 Pac. 625, applied.—Sacramento County v. Colgan, 114 Cal. 246, 46 Pac. 175.

§ 80. Powers and Duties—Source of Power.

[a] The district attorney, sheriff, county clerk, county recorder, coroner, and public administrator are officers whose powers and duties are given by the County Government Act, or by other general laws, and do not derive any authority from the consolidation act, or exercise any function in the municipal government of San Francisco. They are county officers, and their term of office, as well as the time of their election, are determined by the County Government Act of 1893.—Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87.

[b] County officers derive their authority from state government.—Sparks, Ex parte, 120 Cal. 399, 52 Pac. 715.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 436-440; 13 Cent. Dig., cols. 1377-1382, §§ 118-121.

§ 81. —— Clerk and Deputy.

[a] The authority of a deputy county clerk in taking and certifying to acknowledgments of conveyances is coextensive with that of his principal.—Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

[b] A county clerk may attest and sign as county clerk a certificate of acknowledgment, affixing thereto the seal of the court of which he is ex-officio clerk; and the seal affixed with its inscription will sufficiently designate the court of which, in that particular matter, he is acting as clerk.—Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 436; 13 Cent. Dig., cols. 1376, 1377, § 118.

§ 82. —— Auditor.

See, also, post, § 84.

[a] Auditor cannot refuse to draw county warrant because there is no money in the treasury.—Babcock v. Goodrich, 47 Cal. 488.

[b] Except in cases where board of supervisors have exceeded their powers the auditor cannot assume to set up his judgment in opposition to theirs, in respect to the issuance of a warrant on an account against the county.—Babcock v. Goodrich, 47 Cal. 488.

[c] Auditor is authorized to accept treasurer's receipt as sufficient evidence of payment.—Butte County v. Morgan, 76 Cal. 3, 18 Pac. 115.

[d] County auditor is not protected by order of board of supervisors allowing claim not chargeable against county, and in resisting such order is acting for county.—Lamberson v. Jeffers, 116 Cal. 494, 48 Pac. 485.

[e] Where auditor refuses to issue warrant without just cause, he has no claim against county to be reimbursed for costs.—Lamberson v. Jeffers, 116 Cal. 494, 48 Pac. 485.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 438; 13 Cent. Dig., cols. 1379-1381, § 120.

§ 83. —— Treasurer.

[a] Warrant drawn by auditor on treasurer of county without having been ordered by a majority of the board of supervisors is void; and should the treasurer pay such warrant he would be liable to the county on his official bond.—Trinity County v. McCammon, 25 Cal. 117.

[b] When a county treasurer is authorized by statute to advertise for bids for the surrender of county bonds, in order that he may redeem them with money in the treasury, he has no authority, in the advertisement, to insert a condition upon which bids will be received, which is not to be implied from the duty to advertise, and which is not necessary to the exercise of his authority; such as that the bonds must accompany the bid. It is his duty to accept the most favorable bid, even if not accompanied by the bonds.—Mills v. Bellmer, 48 Cal. 124.

[c] It is the duty of a county treasurer to pay an auditor's warrant upon the school fund, if it is regular and legal in form, unless he has notice that it is not based upon a lawful demand, or has notice of facts sufficient to put an ordinarily prudent treasurer upon inquiry, which, if diligently prosecuted, would lead to a discovery of the illegality of the claim upon which the warrant was founded.—Los Angeles v. Lankershim, 100 Cal. 525, 35 Pac. 153.

[d] Plaintiff paid a certain sum to a county treasurer, with the agreement that it was to be used to purchase certain land for a high-school site. The treasurer paid the money to the owner, who conveyed it to the supervisors, who failed to comply with the condition in the deed requiring them to begin the erection of a schoolhouse within two years, and the land reverted to the grantor. Held, that the county was not liable to plaintiff for what he had paid.—Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 437, 438; 13 Cent. Dig., cols. 1377-1379, § 119.

§ 84. —— Auditor.

See, also, ante, § 82.

[a] Auditor of county is the mere clerk of the board of supervisors, and he has no power or authority to draw his warrant on the county treasurer for the payment of a claim, unless the board of supervisors have made an express order that the claim be paid.—Connor v. Morris, 23 Cal. 447.

[b] In default of action by the board the auditor cannot fix the salary at the minimum provided in the code. The law does not authorize him to draw his warrant for the pay-

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ment of a salary which has not been fixed.—Peachy v. Redmond, 59 Cal. 326.

§ 85. Accounting and Settlement with County or Successor.

[a] If a county treasurer receives money as belonging to the county, he is afterward estopped from denying that it is the money of the county.—McKee v. Monterey County, 51 Cal. 275.

[b] Where a county clerk, acting in his official capacity, and under color of his office, collects advance charges contrary to law, he must, at the end of his term, turn over to the county treasurer, and not to his own successor in office, the amount thereof remaining in his hands.—People v. Hamilton, 103 Cal. 488, 37 Pac. 627.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 440-443; 13 Cent. Dig., cols. 1382-1401, §§ 122-134.

§ 86. —— Fees.

[a] The auditor of Placer county is not entitled to retain for his own use the fifty cents on each business license sold by the tax collector, and paid by him to the auditor under the revenue act of 1861. It is received for the use of the county.—Patton v. Placer County, 30 Cal. 175.

[b] If a county treasurer, upon his settlement with the controller of the state, is allowed by the latter officer to retain money, for official or other services, beyond the compensation to which he is entitled, it is his duty to pay such money into the county treasury, and to turn it over to his successor in office. He cannot claim the money on the ground that the controller exceeded his authority in making the allowance.—McKee v. Monterey County, 51 Cal. 275.

[c] Word "fees," as used in section 165, County Government Act of 1883, includes commissions.—Smith v. Dunn, 68 Cal. 56, 8 Pac. 625.

[d] A county clerk, whose salary was fixed by law, and who, under act of March 27, 1876, was ex-officio county recorder, and as such authorized to appoint a deputy county recorder, at a fixed salary to be paid by the county, came within the class of officers mentioned in such statute to whom no compensation should be allowed or paid other than the compensation and salaries prescribed, and who should collect and keep all fees and other compensation provided by law for services in their official capacity, and pay the same into the county treasury; and such an officer is liable to the county for fees so collected, and not paid over.—San Luis Obispo County v. King, 69 Cal. 531, 11 Pac. 178.

§ 87. —— Effect of Settlement.

[a] Where the controller of state made a settlement with a county treasurer, and allowed him his commissions, which settlement has been acquiesced in for several years, the state cannot, in the absence of fraud or clear mistake, set aside the settlement and hold the treasurer to a resettlement.—People v. Lattimore, 19 Cal. 365.

§ 88. —— Actions by County.

[a] Action does not accrue against officer receiving county funds until demand.—San Luis Obispo v. King, 69 Cal. 532, 11 Pac. 178.

§ 89. Personal Liability.

[a] The County Government Act of 1883, section 7, provided that "all supervisors, and any other officer, authorizing, or aiding to authorize or auditing, or allowing, any claim, ... against said treasury . . . . in violation of any of the provisions of this act, shall be liable in person . . . . to the person or persons damaged by such illegal authorization to the extent of his loss by reason of the nonpayment of his . . . . claim." A claim was allowed in favor of plaintiff's assignor, and a warrant therefor issued, but payment of the warrant was refused. It was admitted that the assignor's claim against the county and the warrant were invalid. Held, that no one had been "damaged" within the meaning of the statute; hence no action would lie against the supervisors and auditor. Bank of Santa Cruz County v. Bartlett, 78 Cal. 301, 20 Pac. 682.

FOR AUTHORITIES FROM OTHER STATES:

Liability to private individuals of registers of deeds, county clerks, clerks of court, prothonotaries, etc.: 95 Am. St. Rep. 85, note. See, also, 11 Cyc. 436-440, 444; 13 Cent. Dig., cols. 1376-1382, §§ 118-121; cols. 1401-1404, §§ 135, 136.

§ 90. Liability on Official Bonds.

[a] If a county treasurer receipts to persons who owe the state for land, without receiving the money, but with an understanding that such persons will pay him the money when he requires it to make a settlement, and the treasurer soon after dies, and such persons pay the money to his successor in office, who credits it to the account of the deceased, the treasurer's bondsmen cannot be holden for the money, the payment to the successor in office being a liquidation of the demand.—People v. Jacob, 49 Cal. 540.

[b] County Government Act, section 71, provides that the treasurer shall receive no money unless accompanied by the certificate of the auditor, as provided in section 115, or otherwise as provided by law. Section 115 provides that the auditor must settle the accounts of all persons holding money payable into the county treasury, and certify the amount to the treasurer, and, on the filing of the treasurer's receipt therefor, give him a receipt, and charge the treasurer with the amount. Political Code, section 3761, provides that the auditor must settle with the tax collector, and require from him the treasurer's receipt, or, if the treasurer is collector, require from him an immediate account for any existing deficiency. Held, that

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it is sufficient, where the same person is treasurer and collector, to charge him and his sureties as treasurer, that the auditor settled with him as collector, and handed him the certificate of the amount found due, which receipt was found in the county treasury, and at once credited him as collector, and charged him as treasurer with such sum.—Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115.

[c] The sureties upon the official bond of a county treasurer are not responsible for a loss resulting from the payment of a genuine auditor's warrant in due form, without notice, actual or constructive, of any fraud or infirmity in the claim upon which the warrant was based.—Los Angeles v. Lankershim, 100 Cal. 525, 35 Pac. 153.

[d] It is no part of the official duties of a county recorder, as such, to record notices of locations of mining claims, and any moneys which he may receive for so doing are not fees for which he or his bondsmen are accountable to the county.—County of San Bernardino v. Davidson, 112 Cal. 503, 44 Pac. 659.

FOR AUTHORITIES FROM OTHER STATES:

Sureties of county clerks, for what liable: 91 Am. St. Rep. 569, note. See, also, 11 Cyc. 445-456; 13 Cent. Dig., cols. 1405-1441, §§ 137-159.

§ 91. —— Defective Bond.

[a] The liability of the sureties on the official bond of a county treasurer is not affected by the fact that it was approved by the county judge, who had no authority to give such approval.—People v. Evans, 29 Cal. 429.

[b] The improper approval of a county treasurer's bond by the county judge, instead of the supervisors, does not render the bond invalid.—Mendocino County v. Morris, 32 Cal. 145.

[c] A bond for the faithful discharge of his duties, executed by a deputy county treasurer to the treasurer, and not to the state, as required by Political Code, section 958, which declares that the official bonds must be made payable to the state, is nevertheless an official bond, and may be sued on as such under section 963, providing that, if an official bond does not contain the conditions required by law, the party and sureties are equitably bound to the state or a party interested.—Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633.

§ 92. —— Contribution Among Sureties.

[a] In the case of sureties on the official bond of a county treasurer, they all contract together, and with reference to the common responsibility. In case of a breach or loss, each surety has his recourse for contribution on his fellows.—People v. Buster, 11 Cal. 215.

§ 93. —— Discharge of Sureties.

[a] A discharge of one surety on an official bond discharges the rest, in the absence of some statute to the contrary, as it takes away their right of contribution.—People v. Buster, 11 Cal. 215.

[b] A county judge has no jurisdiction in a proceeding to discharge the sureties on the official bond of a county treasurer, or to approve a new bond.—People v. Evans, 29 Cal. 429.

[c] Liability of surety on an official bond is not discharged by the failure of the county to present its claims arising on the bond to the executor of the estate for allowance, within the period fixed for notice to creditors.—Los Angeles v. Lankershim, 100 Cal. 525, 35 Pac. 153.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 450; 13 Cent. Dig., cols. 1408-1415, §§ 140-143.

§ 94. —— Scope of Liability.

[a] The sureties of a county treasurer are liable for public money received by him as treasurer after the expiration of his term, so long as he remains in possession of the office, and until he delivers it over to his successor. Placer County v. Dickerson, 45 Cal. 12.

FOR AUTHORITIES FROM OTHER STATES:

County treasurers, sureties of, for what liable: 91 Am. St. Rep. 555, note. See, also, 11 Cyc. 449; 13 Cent. Dig., cols. 1415-1421, §§ 144-147.

§ 95. Actions on Official Bonds.

[a] It is error to dismiss an action brought by the district attorney in the name of the people, on the official bond of the county treasurer, to recover moneys of the state and county, fraudulently converted by him, on the ground that it was commenced without authority, where it appears that the act of the district attorney was ratified both by the supervisors and by the grand jury, which lawfully directed him to continue its prosecution.—People v. Madden, 133 Cal. 347, 65 Pac. 741.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 451-455; 13 Cent. Dig., cols. 1424-1441, §§ 152-159.

§ 96. —— Defenses.

[a] Where deposit is made by the clerk and receipted for by the treasurer as required by the act of 1864, and the latter regularly turns it over to his successor in office, by whom it is embezzled, any irregularity that there may have been in the manner of making the original deposit will not release the sureties on the official bond of the succeeding treasurer from liability.—Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833.

§ 97. —— Limitations.

[a] Code of Civil Procedure, section 337, limits the right of action on any contract

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obligation to four years; and County Government Act, section 87 (Stats. 1891, p. 318), requires the county treasurer to keep the county funds in his own possession until disbursed according to law. Held, that an action in 1896 on a county treasurer's official bond for money lost by him by deposit in a bank in 1891, which was then known to the county, was barred by limitations, though his term of office did not expire until 1893, since the cause of action arose when he lost control of the money, and not at the expiration of his term of office.—San Diego County v. Dauer, 131 Cal. 199, 63 Pac. 338.

§ 98. —— Parties Plaintiff.

[a] The board of supervisors of Sacramento county is the proper plaintiff in an action for a breach of the county treasurer's bond, which occurred in September, 1863.—Sacramento County Supervisors v. Bird, 31 Cal. 66.

§ 99. —— Pleading.

[a] An allegation in the complaint, in an action by a board of supervisors, on a county treasurer's bond, that the bond had been executed and delivered to the plaintiff, may be rejected as surplusage, when it is inconsistent with other allegations that it was executed and delivered to the state, as required by law, and the plaintiff corporation was not in existence when the bond was filed. Sacramento County Supervisors v. Bird, 31 Cal. 66.

[b] Commission retained by a county treasurer on moneys paid the state cannot be recovered in an action on his bond, where the only breach alleged is that he failed to keep the money of the county in the safe provided for that purpose, but unlawfully withdrew the same, and converted it to his own use.—Sacramento County Supervisors v. Bird, 31 Cal. 66.

[c] If the complaint on the official bond of a county treasurer avers that the money for which the treasurer is in default belongs to the county, the action is properly brought in the name of the county.—Mendocino County v. Morris, 32 Cal. 145.

[d] Averment in complaint on county treasurer's official bond that he received money belonging to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions.—Mendocino County v. Morris, 32 Cal. 145.

§ 100. —— Evidence.

[a] Receipts of a county treasurer, given to a tax collector for public money, after the expiration of his term, but before he has delivered possession of the office to his successor, are admissible as evidence to charge the sureties on his official bond.—Placer County v. Dickerson, 45 Cal. 12.

[b] In an action on a county treasurer's bond for conversion of funds, when the defense is that the treasurer was robbed and locked in the vault, in which he was found twelve hours after the alleged robbery, evidence of the effect of striking the sheet-iron sides of the vault was competent, since it was a fair inference that if his story was true, and knowing the effect of such a blow, he would naturally have tried to attract attention in that way.—Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 68.

[c] Evidence in action on bond held to create such suspicious circumstances as justified the jury in ignoring defendant's uncontradicted evidence.—Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681.

§ 101. —— Findings and Judgment.

[a] In an action against the principal and sureties on an official bond, the judgment should first fix the amount of the defalcation of, or recovery from, the former and then proceed with a separate judgment against each of the sureties for the full amount for which he has made himself liable in the bond and costs, and then close with a proviso to the effect that each shall be satisfied by the collection or payment of such defalcation or recovery and costs.—People v. Rooney, 29 Cal. 642.

[b] A finding that a payment by a county treasurer was made "upon what purported to be a county auditor's warrant," raises the presumption, in the absence of any finding to the contrary, that the warrant was genuine, and complied with the law in form and substance.—Los Angeles v. Lankershim, 100 Cal. 525, 35 Pac. 153.

§ 102. Criminal Responsibility for Failure to Reside at County Seat.

[a] Failure of county treasurer to reside at county seat of his county, as required by law, is not an "omission to perform any duty enjoined by law upon a public officer," within the meaning of a statute (Pen. Code, section 176) declaring such omission a misdemeanor. Such a statute should not be deemed to apply to conditions or qualifications upon which the incumbent's right to hold an office depends, but to nonperformance of duties pertaining to the office.—Harrold, Ex parte, 47 Cal. 129.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 456, 457; 13 Cent. Dig., cols. 1441, 1442, § 160.

III. PROPERTY, CONTRACTS AND TORTS.

A. Property, §§ 103-107.
B. Contracts and Expenditures, §§ 108-121.
C. Torts, §§ 122-125.

A. PROPERTY.

TITLE TO SWAMP LANDS, § 103.
POWER TO ACQUIRE, § 104.
—— MODE OF EXERCISING, § 105.
REGULATION AND USE, § 106.
SALE OR TRANSFER, § 107.

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§ 103. Title to Swamp Lands.

[a] State has never given any interest in its swamp lands to counties; they hold proceeds of sales of such lands in trust for state. Kings County v. Tulare, 119 Cal. 514-516, 51 Pac. 866.

§ 104. Power to Acquire.

[a] Authority by act of legislature to erect a courthouse and jail would necessarily embrace the power to purchase the land on which to erect them.—De Witt v. San Francisco, 2 Cal. 289.

[b] A court of sessions has no authority to purchase land for a courthouse, and a contract made by them with that end in view is void.—Phelan v. County of San Francisco, 6 Cal. 531.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 457; 13 Cent. Dig., cols. 1443-1448, §§ 161-164; cols. 1454, 1455, § 167.

§ 105. —— Mode of Exercising.

[a] Provision in County Government Act prescribing manner in which supervisors must proceed in purchasing land is mandatory. Winn v. Shaw, 87 Cal. 635, 25 Pac. 968.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 458-460; 13 Cent. Dig., cols. 1443-1448, §§ 161-164.

§ 106. Regulation and Use.

[a] Boards of supervisors possess the power, as incidental to that of buying, selling, and leasing of property, and the management, care, and preservation thereof, as conferred by statutes (Stats. 1855, sec. 9, p. 51), to take all legal measures necessary to that end, by suit or otherwise, and therein are vested with large discretionary powers.—Hornblower v. Duden, 35 Cal. 664.

[b] Code of Civil Procedure, section 144, which provides that if suitable rooms for holding the superior courts are not provided in any county by the supervisors thereof, together with the furniture, fuel, and lights sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff to provide such rooms, etc., does not authorize the judge of a department of a superior court to anticipate the action of the county court board in completing and furnishing a room of a county courthouse, designed for him, though the board are unreasonably delaying the work.—Los Angeles County v. Superior Court of Los Angeles, 93 Cal. 380, 28 Pac. 1062.

[c] Under statutes of 1883, page 299, authorizing supervisors to provide "county buildings and suitable rooms for county purposes," and to manage and control the same, the power of the supervisors to designate rooms in the courthouse for the use of county officers is not exhausted by one designation, but they may assign to the district attorney rooms occupied by the judges of the superior court, though such rooms were designated on the building plan as "Judges' Chambers." San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967.

[d] The setting apart by the board of supervisors of a few feet for shelf room for a law library, in a large room occupied by the principal county officers, and by the board of supervisors when in session, where the books cannot be consulted or used with reasonable convenience, is not providing such a room for the use of the law library as is contemplated by act of March 31, 1891, providing for the establishment of law libraries in counties.—Board of Law Library Trustees v. Orange County Supervisors, 99 Cal. 571, 34 Pac. 244.

§ 107. Sale or Transfer.

[a] County may assign and transfer warrant drawn in its favor by another county on its treasurer, so as to invest the holder with the right to demand payment thereon without selling it at public auction.—Beals v. Evans, 10 Cal. 459.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 464-466; 13 Cent. Dig., cols. 1456-1462, §§ 170-173.

B. CONTRACTS AND EXPENDITURES.

CONTRACTS—POWER TO MAKE, § 108.
—— FORMAL REQUISITE, § 109.
—— NECESSITY FOR PROPOSALS OR BIDS, § 110.
—— VALIDITY OF CONTRACT PAYABLE IN WARRANTS, § 111.
—— ILLEGAL CONTRACTS, § 112.
—— CONSTRUCTION AND OPERATION, § 113.
—— RATIFICATION OF UNAUTHORIZED CONTRACTS, § 114.
—— MODIFICATION OR RESCISSION, § 115.
—— ACTIONS, § 116.
COUNTY EXPENSES AND CHARGES AND STATUTORY LIABILITIES — ELECTION EXPENSES, § 117.
—— COSTS OF REPAIRING HIGHWAYS, § 118.
—— COSTS OF KEEPING JAILS AND PRISONERS, § 119.
—— FEES OF JURORS AND JUSTICES, § 120.
STATE AID FOR SUPPORT OF PAUPERS AND AGED PERSONS, § 121.

§ 108. Contracts—Power to Make.

[a] Under Political Code, sections 4478, 4479, a board of supervisors is authorized to erect a county building by contract.—Babcock v. Goodrich 47 Cal. 488.

[b] Prior to the enactment of the Political Code, section 4047, there was no limitation upon the general powers of the board of supervisors to contract either for printing or publication.—Maxwell v. Stanislaus County Supervisors, 56 Cal. 114.

[c] Though the tax collector is required by Political Code, section 3764, to make publication of the delinquent tax list, the supervisors must contract for the printing thereof; section 4047 providing that they must con-

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tract for all county printing.—Times Pub. Co. v. Alameda County, 64 Cal. 469, 2 Pac. 246.

[d] Act of March 14, 1883 (County Government Act), authorizes the county board of supervisors to issue bonds, and provides that the bonds shall be delivered to the county treasurer, by whom they shall be sold to the highest bidder. Section 25 further authorizes the board to do "all other acts and things . . . . which may be necessary to the full discharge of the duties of the legislative authority of the county government." Held, that the board did not have authority, under section 25, to employ an agent to procure bids to be made for such bonds.—Smith v. Los Angeles County, 99 Cal. 628, 34 Pac. 439.

[e] A county clerk had no authority, as the law stood in 1892, to bind the county by his contract to print the Great Register for the county; but the authority to provide printed copies of the Great Register was devolved, by section 34 of the County Government Act of 1891, upon the board of supervisors, who are the chief legislative and executive authority of the county.—Frandzen v. County of San Diego, 101 Cal. 317, 35 Pac. 897.

[f] The allowance by the board of supervisors to attorneys for assisting in the prosecution of criminal cases is void and creates no legal claim against the county. County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483.

[g] The appointment by the board of supervisors of a county of an agent to procure the redemption of lands sold to the state for taxes, and to collect the amount of such taxes due the county, with an agreement to pay him a commission on the amount collected, is ultra vires.—House v. Los Angeles County, 104 Cal. 73, 37 Pac. 796.

[h] The act of receiving or collecting license taxes is an official function to be performed only by a county officer invested for that purpose with a part of the sovereign power of the state; and the board of supervisors has no power to make a contract with a private individual to collect license taxes for an agreed compensation, and such compensation cannot be enforced as a valid claim against the county.—Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488.

[i] The supervisors of a county have authority under section 25 of the County Government Act to erect a jail, under a contract let to the lowest responsible bidder, provided plans and specifications therefor have been first adopted by the board prior to the sixty days' notice of the bidding upon which the bids are to be based; but they have no authority to let a contract upon plans and specifications to be drafted and submitted by the bidders, thereby preventing competition in bidding, and giving the board an opportunity for favoritism; and the carrying out of a contract so let may be enjoined at suit of a taxpayer.—Ertle v. Leary, 114 Cal. 238, 46 Pac. 1.

[j] The cells of a jail are a part of the building, within the meaning of the act. Ertle v. Leary, 114 Cal. 238, 46 Pac. 1.

[k] Unfavorable results of suits brought for a county by attorneys employed therefor by the county commissioners is not conclusive against right of the commissioners to employ them at the expense of the county, but the test is whether there was room for an honest difference of opinion as to what the result would be.—Lamberson v. Jefferds, 118 Cal. 363, 50 Pac. 403.

[l] Tax collector has no authority to make contract for publication of delinquent tax list.—Harris v. Cook, 119 Cal. 455, 51 Pac. 692.

[m] The boards of supervisors of adjoining counties have authority to contract with a railroad company for the payment of different sums of money from each if the railroad company to aid it in the construction of a new bridge across a river, constituting a boundary between the two counties, so as to make a separate roadway for teams and footmen, and another underneath, for the use of the railroad company, which new bridge is designed to replace an old dilapidated bridge, which had been long used both by the railroad company and the public, and which was less convenient and more dangerous to the public. The contract by the supervisors to pay the money so agreed to be paid to the railroad company, which constructs the bridge as agreed, is binding upon the county.—Croley v. California Pacific R. R. Co., 134 Cal. 557, 66 Pac. 860.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 467-476; 13 Cent. Dig., cols. 1463, 1464, § 174.

§ 109. —— Formal Requisites.

[a] Contract for the erection of county buildings is not void because it does not provide that eight hours shall be a day's work under it.—Babcock v. Goodrich, 47 Cal. 488.

[b] Contract for publication of delinquent tax list must be made by board of supervisors in manner prescribed by section 3766, Political Code. Contract made with tax collector and approved by supervisors is no claim against county.—Harris v. Cook, 119 Cal. 455, 51 Pac. 692.

[b] Contract for county buildings may include both labor and material.—Babcock v. Goodrich, 47 Cal. 488.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 476, 477; 13 Cent. Dig., cols. 1477, 1478, § 183.

§ 110. —— Necessity for Proposals or Bids.

[a] The plaintiff proved that he did work, and furnished materials for repairing a public bridge in Napa county, at the request of the board of supervisors of the county, and that the board promised to pay him for the same; but he neither proved nor attempted to prove a compliance with the statute of 1860

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in awarding the contract. Held, that he was properly nonsuited at the trial.—Murphy v. Napa County, 20 Cal. 497.

[b] Political Code, section 4047, requiring "all county printing" to be contracted for with the lowest bidder, after ten days' notice for bids, includes the printing of reports, statements, and advertisements of officers, and is not confined to the printing of forms, billheads, stationery, etc.—Maxwell v. Stanislaus County, 53 Cal. 389.

[c] Under Statutes of 1891, chapter 216, section 25, subdivision 23, providing that the board of supervisors shall fix the price of all county advertising, and each county officer shall procure such advertising at a price no greater than is so fixed, mandamus will not lie to compel a tax collector to publish a delinquent tax list in a certain newspaper, even though such newspaper has tendered the lowest bid for such publication.—Journal Pub. Co. v. Whitney, 97 Cal. 283, 32 Pac. 237.

[d] Construing subdivision 11 of section 2643 of the Political Code, as amended in 1893, with other sections of the Political Code in pari materia, the advertising for bids for sprinkling roads is in the discretion of the board of supervisors, and the exercise of their discretionary power cannot be controlled by mandamus.—Splivalo v. Bryan, 102 Cal. 403, 36 Pac. 780.

[e] Section 25 of the County Government Act of 1891, requiring all county buildings to be let by contract, after notice by publication for six days, has no application to a contract for making repairs or alterations in the courthouse, or for laying walks and making improvement upon the grounds surrounding the courthouse.—McGowan v. Ford, 107 Cal. 177, 40 Pac. 231.

[f] County cannot purchase supplies, sell public property or make contracts for constructive work otherwise than by advertising proposals of bidders.—Swasey v. Shasta County, 141 Cal. 395, 74 Pac. 1031.

[g] County cannot enter into contract for erection of fence around courthouse grounds without advertising for bids and letting contract to lowest bidder.—Swasey v. Shasta County, 141 Cal. 395, 74 Pac. 1031.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 479-483; 13 Cent. Dig., cols. 1486-1494, §§ 187-191.

§ 111. —— Validity of Contract Payable in Warrants.

[a] A contract made by a county with another party, in which the county agrees to pay for services rendered, in county warrants, is in effect a contract payable in money, and is not void.—Babcock v. Goodrich, 47 Cal. 488.

§ 112. —— Illegal Contracts.

[a] Under County Government Act, section 25, subdivision 17 (Stats. 1891, p. 304), authorizing the supervisors "to direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same," the supervisors have no power to employ an attorney to defeat, by means of lobbying, a bill pending in the legislature by the passage of which the county in question would be compelled to pay a large sum of money to another county.—Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 478; 13 Cent. Dig., cols. 1480-1482, § 185.

§ 113. —— Construction and Operation.

[a] A contract entered into by a board of supervisors for and on behalf of the county, and signed by the chairman of the board, is the contract of the county.—Babcock v. Goodrich, 47 Cal. 488.

[b] Civil Code, section 25, subdivision 9, giving the board of supervisors power to erect a county jail, provides that it shall not be erected until plans shall have been made therefor, and adopted by the board. An architect sued a county for services in making plans for a jail, which had been adopted by the board on condition that they should receive a bid from some reliable person. After receiving bids, they refused to act on them, and rejected plaintiff's plans, alleging that he procured their adoption by fraud. Held, that the condition on which the adoption of the plans was based had been performed, hence the plans had been adopted within the meaning of the act, and that plaintiff could recover.—Hall v. Los Angeles County, 74 Cal. 502, 16 Pac. 313, reversing judgment (1887) 13 Pac. 854.

[c] A contract whereby a county, which had become entitled to a certain sum of money out of the state treasury, agreed with one of the defendants (himself not a county officer) to allow him twenty-five per cent for services in preparing evidence, etc., was not void, though the defendant employed certain county officers to do a part of the work for him.—Contra Costa County v. Soto, 138 Cal. 56, 70 Pac. 1019.

[d] Where a county having a well bored was to furnish the casing, the presumption that it should be suitable and of proper strength is not overcome by Civil Code, section 1654, providing that an uncertainty in a contract between a public body and a private person shall be presumed to be caused by the latter, and most strongly construed against him.—McPherson v. San Joaquin County, 56 Pac. 802.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 477; 13 Cent. Dig., cols. 1478-1480, § 184.

§ 114. —— Ratification of Unauthorized Contracts.

[a] Contract for the purchase of land for a courthouse made by court of sessions is void,

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and could not be made valid by subsequent ratification of the board of supervisors. Phelan v. County of San Francisco, 6 Cal. 531.

[b] To charge supervisors on their ratification of a void purchase by the court of session, it should be shown that they acted with a full knowledge of the facts.—Phelan v. San Francisco, 6 Cal. 531.

[c] That the board of supervisors may cure previous informalities in letting contracts by subsequent ratification has no application where the board by failure to advertise for bids for county printing, as required by Political Code, section 3766, as amended in 1895, had no power to make the contract in the first instance.—Smeltzer v. Miller, 125 Cal. 41, 57 Pac. 668.

§ 115. —— Modification of Rescission.

[a] Whatever may be the power of the legislature, the board of supervisors cannot contract for services for a year, and then rescind the contract and refuse to pay, by abolishing the office or refusing to have the services performed.—McDaniel v. Yuba, 14 Cal. 444.

[b] The board of supervisors of the city and county of San Francisco cannot extend the time for performing a contract forfeited, because not completed within the time agreed upon.—Fanning v. Schammel, 68 Cal. 428, 9 Pac. 427; La Societe Francaise D'Epargne et de Prevoyance Mutuelle v. Fishel, 10 Pac. 395.

[c] The board of supervisors are justified in rescinding contract if they had been induced to execute it through the fraudulent representations of the architect, but cannot rescind it on the ground that the architect had slandered certain members of the board. Hall v. County of Los Angeles, 74 Cal. 502, 16 Pac. 313.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 485, 486; 13 Cent. Dig., cols. 1494-1498, §§ 192, 193.

§ 116. —— Actions.

[a] Whether county will gain or lose by executing void contract is immaterial in action to enjoin such execution.—Winn v. Shaw, 87 Cal. 637, 25 Pac. 968.

[b] County Government Act, section 8, providing that when any board of supervisors shall without authority of law pay out any money, the district attorney shall sue to recover the same, does not authorize a suit by the county to recover moneys paid under a void contract, which it is otherwise estopped to recover, where the other party to the contract has completed it in good faith, and the county has accepted the benefits thereof. Sacramento County v. Southern Pac. Co., 127 Cal. 217, 59 Pac. 568.

[c] A county agreed with a railroad company to pay to it thirty thousand dollars to construct a public roadway on its railroad bridge, and fifteen thousand dollars was paid when the work was commenced. The roadway was completed by the railroad in good faith, according to the terms of the contract, turned over to the county, and used by it. Held, in an action to recover the money paid on the ground that the contract was void because entered into without statutory authority, that the county, having permitted the railroad to construct the roadway in good faith, and accepted the benefits thereof, was estopped from recovering the money paid therefor.—Sacramento County v. Southern Pac. Co., 127 Cal. 217, 59 Pac. 568.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 489; 13 Cent. Dig., cols. 1504, 1505, § 198.

§ 117. County Expenses and Charges and Statutory Liabilities—Election Expenses.

[a] The publication of the list of nominations provided for in section 1194 of the Political Code is a part of the county advertising, and the cost of it is a county charge. Johnson v. County of Yuba, 103 Cal. 538, 37 Pac. 528.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 489-496; 13 Cent. Dig., cols. 1505-1523, §§ 199-208.

§ 118. —— Costs of Repairing Highways.

[a] County has no common-law obligation to repair highways.—Barnett v. Contra Costa County, 67 Cal. 77, 7 Pac. 177.

§ 119. —— Costs of Keeping Jails and Prisoners.

[a] Where persons are employed by a sheriff as a temporary guard for the protection of a county jail under section 29 of the act of April 29, 1851, the county is liable directly to such persons for their services, and not to the sheriff.—Neville v. Solano County, 29 Cal. 251.

[h] Penal Code, section 1611, which provides that the sheriff, for maintaining prisoners, shall be allowed a reasonable compensation, "to be determined by the board of supervisors," does not make the board's determination conclusive; and, if the sheriff is dissatisfied with their determination, he may sue the county for what he claims to be a reasonable amount.—Fulkerth v. Stanislaus County, 67 Cal. 334, 7 Pac. 754.

[c] Under Penal Code, section 1611, providing that the sheriff must receive all persons committed to jail by competent authority, it is immaterial, to the liability of the city to the county for board of prisoners, that the city recorder had no authority to commit prisoners convicted by him to the county jail, if he had jurisdiction to convict them.—Sonoma County v. City of Santa Rosa, 102 Cal. 426, 36 Pac. 810.

§ 120. —— Fees of Jurors and Justices.

[a] Statutes of 1864, page 365, providing that in the county of San Francisco the fees

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for jurors should be "for each cause two dollars, to be paid in civil cases by the successful party," was amended by Statutes of 1866, page 122, which declared that, if a cause occupied more than one day, jurors should receive two dollars for each day's attendance. Statutes of 1895, page 267, enacted to establish the fees of jurors throughout the state, declared that grand jurors or jurors in the superior court should receive two dollars for each day's attendance. Held, that the later act did not repeal the former, and hence jurors' fees in the county of San Francisco in civil cases were still payable by the successful party, and not from the public treasury.—Hilton v. Curry, 124 Cal. 84, 56 Pac. 784.

[b] The provision of statutes of 1895, page 267, that the board of supervisors may reject all bills for fees of justices and constables in criminal cases in which the district attorney has not approved the issue of the warrant of arrest, is in conflict with Constitution, article 11, section 5, providing that the legislature shall regulate the compensation of county and township officers in proportion to the duties they perform.—Westerfield v. Riverside County, 50 Pac. 929.

§ 121. State Aid for Support of Paupers and Aged Persons.

[a] County is entitled to state aid for support of indigent and aged persons under article 4, section 22, Constitution of 1879. Yolo County v. Dunn, 77 Cal. 135, 19 Pac. 262.

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ACT EXEMPTING COUNTY CONSTRUED, § 122.
ACTS OF OFFICERS, AGENTS OR EMPLOYEES, § 123.
BREAKING OF COUNTY ROAD BRIDGE, § 124.
INJURIES BY MOBS, § 125.

§ 122. Act Exempting County Construed.

[a] The design and only effect of the twenty-fourth section of the consolidation act is to exempt the city and county from the liability for injuries which would otherwise attach to it, by reason of the exclusive control of the streets and public highways, conferred upon it by other sections of the statute, and to transfer such responsibility to individual officers, agents, and employees of the corporation.—Eustace v. Jahns, 38 Cal. 3.

§ 123. Acts of Officers, Agents or Employees.

[a] Quasi corporation, such as county, is not liable for acts of officers or employees which it appoints in the exercise of a portion of the sovereign power of the state by the requirement of a public law, simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit.—Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151, 81 Pac. 151.

[b] A county is not liable for damage sustained by reason of the unskillful treatment of an indigent sick person, in the county hospital, by the resident physician, nor by reason of insufficient and unwholesome food and other necessaries there supplied to the patient.—Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151, 81 Pac. 151.

[c] By act of 1855 (Wood's Digest, p. 650), it is the duty of the board of supervisors of each county to divide the county into road districts, and appoint overseers therefor, removable at their pleasure, and the overseers are required to build and keep up the highways and bridges. Held, that the relation thus created between a county and its road overseers was not analogous to master and servant.—Crowell v. Sonoma County, 25 Cal. 313.

[d] A county is not liable for the neglect or refusal of a supervisor to perform a duty imposed on him by law. Code, section 4086, makes the supervisor personally liable.—Santa Cruz R. Co. v. Santa Clara County, 62 Cal. 180.

[e] County supervisors cannot authorize a road master to do an unlawful act; and their direction to do a lawful act, which results in injury, constitutes no defense to an action for damages, unless, at least, it affirmatively appears that the work could not be done equally well in such manner as would not produce injury.—Learned v. Tangeman, 65 Cal. 334, 4 Pac. 191.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 498-500; 13 Cent. Dig., cols. 1526-1530, § 212.

§ 124. Breaking of County Road Bridge.

[a] County is not liable in damages for injury resulting from breaking of bridge on county road.—Bank of Santa Cruz v. Bartlett, 78 Cal. 303, 20 Pac. 682.

§ 125. Injuries by Mobs.

[a] The act of the legislature compelling a county to pay for property destroyed by a mob created a new right, and provided a new remedy therefor, complete in itself.—Clear Lake W. W. Co. v. Lake County, 45 Cal. 90.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 500, 501; 13 Cent. Dig., cols. 1530-1532, § 213.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

POWER TO INCUR DEBTS, § 126.
LIMITATIONS ON INDEBTEDNESS, § 127.
SUBMISSION OF QUESTION TO POPULAR VOTE, § 128.
GENERAL ADMINISTRATION, APPROPRIATION, AND USE OF FUNDS, § 129.
CUSTODY OF FUNDS, § 130.
AID TO CORPORATIONS AND INVESTMENTS IN STOCK—RIGHT TO GRANT AID, IN GENERAL, § 131.
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—— SUBMISSION OF QUESTION TO POPULAR VOTE, § 133.
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—— PAYMENT, § 139.
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—— ACTIONS BY HOLDERS, § 141.
BILLS OF EXCHANGE, § 142.
BONDS—POWER TO ISSUE, § 143.
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—— STATUTE AUTHORIZING ISSUE AS PART OF CONTRACT, § 148.
—— RIGHTS OF PURCHASERS, § 149.
—— INTEREST, § 150.
—— PAYMENT, § 151.
TAXATION, § 152.
RIGHTS AND REMEDIES OF TAXPAYERS, § 153.

§ 126. Power to Incur debts.

[a] Board of supervisors are not empowered to create a debt or liability on the part of the county for any purpose except as provided by law.—Foster v. Coleman, 10 Cal. 278.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 502; 13 Cent. Dig., cols. 1533, 1534, § 214.

§ 127. Limitations on Indebtedness.

[a] Eighth article of constitution, prohibiting state from creating debts over three hundred thousand dollars, or loaning its credit, etc., only applies to the state as a corporation—as a political sovereign, represented by her law-making power; and does not prevent the state authorizing counties or municipal corporations to create debts, when the debt of the state itself is up to the constitutional limit.—Pattison v. Yuba County, 13 Cal. 175.

[b] Political Code, section 4070, which declares, in effect, that the board of supervisors must not contract debts and liabilities which, added to the salaries of officers, etc., will exceed the revenue of the county for the year, does not mean, by "revenue," the actual amount of money received into the treasury, but the estimate of the board of what the revenue will be; and it is this estimate at the time an account is presented for allowance, of what the revenue of the year will be, which must control their action in allowing or rejecting it.—Babcock v. Goodrich, 47 Cal. 488.

[c] Requirement of constitution, that "before or at the time of incurring indebtness provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal," does not require that at the time of the sale or issuance of bonds, or the incurrence of the bonded indebtedness, a sinking fund or interest tax be levied. It only requires that at or before such time provision shall be made for their collection. Howlan v. Board of Supervisors, 109 Cal. 152, 41 Pac. 864.

[d] Where a county contracts for the erection of a building, the payment to be made in installments each year as the work progressed, the debt or liability created is not the aggregate amount of such installments, but only that which arises from year to year on the separate installments; and, if the installment is within the income each year it is not illegal, under the provisions of County Government Act of 1891 (sections 5, 36), forbidding counties to incur an indebtedness or liability exceeding in any year the income and revenue provided for that year.—Smilie v. Fresno County, 112 Cal. 311, 44 Pac. 556.

[e] A claim under a contract between petitioner and the board of supervisors, by which petitioner was to bury the indigent dead for the fiscal year at a certain sum for each burial, is within Constitution, article 11, section 18, declaring that no county shall "incur any indebtedness . . . . in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year without the assent," etc., and therefore cannot be paid from the income of a succeeding year, it not being an obligation imposed by law, though statute of 1860, page 272, gives a supervisor authority to allow and order paid out of the general fund such sums as may become due for burying the indigent dead, and Penal Code, section 292, imposes the duty of burying the dead, first on relatives, next on the coroner, and next on those charged with the support of the poor, and section 293 provides that every person omitting to perform such duty shall be guilty of a misdemeanor, and liable in treble damages to the person performing the duty.—Pacific Undertakers v. Widber, 113 Cal. 201, 45 Pac. 273.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 503-508; 13 Cent. Dig., cols. 1534-1541, §§ 215-217.

§ 128. Submission of Question to Popular Vote.

[a] The election on the proposition of incurring the indebtedness, although held on the same day and at the same place as the general election, in pursuance of the privilege given by the act of 1891, page 295, is in legal effect a special election.—Howlan v. Board of Supervisors, 109 Cal. 152, 41 Pac. 864.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 507, 522-528; 13 Cent. Dig., cols. 1541-1543, § 218.

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§ 129. General Administration, Appropriation, and Use of Funds.

[a] Board of supervisors has no power to set apart portion of revenue of the county, as a fund for current expenses.—Laforge v. Magee, 6 Cal. 285.

[b] The treasurer of Sacramento county has no power to transfer to the redemption fund any part of the interest tax collected under act of April 25, 1863; but it is his duty, if two thousand dollars or upward remain, after payment of the interest due at any time, to advertise for proposals for the redemption of the bonds issued to the Central Pacific Railroad Company.—Crocker v. Wolson, 30 Cal. 663.

[c] Money in county treasury is presumptively money of county, and money illegally withdrawn by the treasurer will be held to belong to the county until the contrary is shown.—Sacramento v. Bird, 31 Cal. 66.

[d] No county indebtedness incurred in any one year can be paid out of income or revenue of any future year.—Schwartz v. Wilson, 75 Cal. 505, 17 Pac. 449.

[e] General fund cannot be expended for highway purposes except for portion of cost of constructing bridges.—Potter v. Fowzer, 78 Cal. 496, 497, 21 Pac. 118.

[f] County funds can only be used in manner prescribed by law.—Potter v. Fowzer, 78 Cal. 497, 21 Pac. 118.

[g] Section 18 of article 11 of the constitution, providing that "no county, city, etc., ... shall incur any indebtedness or liability .... exceeding in any year the income and revenue provided for it for such year," means that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.—Smith v. Broderick, 107 Cal. 644, 48 Am. St. Rep. 167, 40 Pac. 1033.

[h] Under section 31 of article 4 of the state constitution, the credit of a county cannot be pledged for the payment of the liabilities of municipal or other corporations, and section 3819 of the Political Code is to be so construed as not to conflict with the constitution, and as not designed to authorize the recovery from the county of illegal taxes collected for the use of a school district, for which the county could have no recourse against the district, if compelled to pay them.—Pacific Mutual Life Ins. Co. v. San Diego, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571.

[i] A county, as such, has no interest in the funds of a high school district, nor any control over the same in the county treasury; and no action will lie against the county, under section 3819 of the Political Code, to recover taxes paid into such funds under protest, upon the ground of alleged illegality of the high school tax.—Elberg v. San Luis Obispo, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572.

[j] Statutes of 1893, pages 415, 416, section 173, granting authority to county officers to appoint deputies at a fixed maximum salary, the payment of such salaries to be out of county funds, does not conflict with Constitution, article 11, section 13, providing that no person shall be granted power to control, appropriate, supervise, or in any way interfere with county funds.—Tulare County v. May, 118 Cal. 303, 50 Pac. 427; Tulare County v. Jefferds, 118 Cal. 303, 50 Pac. 427; Gilmer v. May, 118 Cal. 303, 50 Pac. 427.

[k] The authority given to the board of supervisors to expend the funds of the county in constructing county roads is limited to localities outside of incorporated cities, and no tax can be levied for county road purposes upon any property in such city; and as property within the limits of the city of Sacramento would necessarily have to be taxed for the payment of the bonds of the county issued for the construction of such road, it follows that such bonds, if issued, are illegal, and the levy of a special tax for their payment will be enjoined at the instance of a taxpayer of the municipality.—Devine v. Board of Supervisors of Sacramento Co., 121 Cal. 670, 54 Pac. 262.

[l] Where an attorney had been employed by a county to collect a hospital fund due from the state, he to receive a certain per cent of the fund as compensation, the county treasurer, on receipt of the fund, should credit the entire amount to the hospital fund and thereafter pay therefrom the amount due the attorney.—Power v. May, 123 Cal. 147, 55 Pac. 796.

[m] Statutes of 1855, page 67, prohibiting an appropriation of the hospital fund for any purpose other than the care and protection of the indigent sick, refers to the fund raised by taxation by the county, and does not apply to the hospital fund coming from the state, under Constitution, article 4, section 22, Revised Statutes of 1880, page 13, and Revised Statutes of 1883, page 380.—Power v. May, 123 Cal. 147, 55 Pac. 796.

[n] No moneys held in the county treasury by the treasurer are subject to the payment of demands, unless received therein upon the certificate of the auditor required by sections 4145 and 4217 of the Political Code.—Meyer v. Widber, 126 Cal. 252, 58 Pac. 532.

[o] The supervisors have no power to defeat the law by designating a special fund for the payment of phonographic reporters, which is insufficient to pay all legal demands upon the treasury therefor, while there is sufficiency of money in the general fund to meet them.—Stevens v. Truman, 127 Cal. 155, 59 Pac. 397.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 509, 510, 514, 515, 518-530; 13 Cent. Dig., cols. 1544-1590, §§ 219-240.

§ 130. Custody of Funds.

[a] The sums paid by counties for expenses of volunteer companies are to be allowed and credited to such counties by the state treasurer in his annual settlements with the county

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treasurers.—People ex rel. Cobb v. Supervisors of San Joaquin County, 28 Cal. 228.

[b] Legislature cannot direct that county funds be paid into city treasury.—San Luis Obispo County v. Graves, 84 Cal. 77, 23 Pac. 1032.

[c] County funds must be deposited with county treasurer, and cannot be placed with private depositary.—Yarnell v. Los Angeles, 87 Cal. 608, 25 Pac. 767.

[d] Political Code, section 4145, providing that the county treasurer shall receive no money into the treasury unless accompanied by a certificate of the auditor, has no application to money as damages for laying out a road deposited with the treasurer pursuant to section 2689.—Mariposa County v. Knowles, 146 Cal. 1, 79 Pac. 525.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 513, 514; 13 Cent. Dig., cols. 1551, 1552, § 223.

§ 131. Aid to Corporations, and Investments in Stock—Right to Grant Aid in General.

[a] Legislature has power to authorize county to take stock in a railroad.—Pattison v. Yuba County Supervisors, 13 Cal. 175.

[b] Proposed Central Pacific Railroad, leading from the city and county of Sacramento to the eastern portion of the state is so far a public improvement, and sufficiently for the apparent interest of the city and county, that a law authorizing the municipality to become a stockholder in the railroad corporation is not unconstitutional as imposing a tax upon a local community for an improvement in which it has no peculiar interest.—Robinson v. Bidwell, 22 Cal. 379.

§ 132. —— Limitations.

[a] Under the act of April 28, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river, at or near Knight's Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection.—Pattison v. Yuba County, 13 Cal. 175.

§ 133. —— Submission to Question to Popular Vote.

[a] The legislature has a right to authorize a local tax for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition or without it, or by or without a submission of the proposition to the people, and it is not essential that the improvement should be within or confined to the locality taxed; and a subscription for stock, to be paid for by taxation, is a valid contract to pay it.—Pattison v. Yuba County, 13 Cal. 175.

[b] Act of April 25, 1863, providing for a subscription by the city and county of Sacramento to the capital stock of the Central Pacific Railroad Company, upon a vote by the electors of the county in favor of the proposition, is, in its main features, constitutional, and authorizes the making of the subscription as therein directed.—Robinson v. Bidwell, 22 Cal. 379.

[c] An order submitting the question of aid to a railroad to the people may be made before the railroad is incorporated.—Coleman v. Marin County Supervisors, 50 Cal. 493.

§ 134. —— Construction and Operation.

[a] Under the act of 1860 (Stats. 1860, p. 133), relative to the issuance of the bonds of Butte county to the California Northern Railroad Company in certain contingencies, the basis upon which the supervisors are to proceed in estimating the work done by the company, so as to entitle it to bonds, is the actual expenditure by the company, and not the value of the work. This actual expenditure, connected with proof of the other facts required by the statute, prima facie constitutes the company's claim on the county for the bonds.—California Northern R. R. Co. v. Butte County, 18 Cal. 671.

[b] The county might refuse to issue the bonds if the expenditures were not really made, or if fraud had been committed in the contracts for such expenditures.—California Northern R. R. Co. v. Butte County, 18 Cal. 671.

[c] Supervisors may authorize railroad company to diverge proposed line after aid is voted.—Coleman v. Marin County Supervisors, 50 Cal. 493.

§ 135. Warrants and Certificates of Indebtedness—Power and Duty to Issue.

[a] Auditor cannot draw warrant under act of 1851 for claims other than those audited by himself.—Draper v. Noteware, 7 Cal. 276.

[b] Under Woods' Digest, 715, article 3446, providing that the county auditor may draw warrants for claims "examined, settled, allowed, and ordered paid by the board," he is not authorized to draw a warrant for a claim "allowed" but not ordered paid.—Connor v. Morris, 23 Cal. 447.

[c] Except in cases where the board of supervisors have exceeded their powers, the auditor cannot assume to set up his judgment in opposition to theirs, in respect to the issuance of a warrant on an account against the county. Nor can he refuse to issue a warrant, because the person in whose favor it is to be drawn, and whose account has been allowed, has committed a fraud on the county in relation to procuring the contract on which the warrant is to be issued.—Babcock v. Goodrich, 47 Cal. 488.

[d] Auditor may refuse to draw a warrant, but he cannot draw one in favor of some person other than one whom board has ordered paid.—Scheerer v. Edgar, 76 Cal. 572, 18 Pac. 681.

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[e] County Government Act (Stats. 1891, p. 311), section 41, requiring a claim against a county to be itemized, "giving names, dates and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and does not control the county auditor in drawing warrants for claims allowed.—Sehorn v. Williams, 110 Cal. 621, 43 Pac. 8.

[f] County Government Act (Stats. 1891, p. 322), section 113, requires a county auditor to draw warrants for claims "legally examined, allowed and ordered paid by the board of supervisors," when he has received, as required by section 20, subdivision 4, a properly certified list of the claims allowed. Section 45 requires warrants drawn by order of the county supervisors to specify the liabilities for which they were drawn, and when they accrued. Held, that it is the duty of a county auditor to draw his warrant for a claim on a certificate of supervisors giving the name of the claimant and amount of the claim, and stating that it has been duly allowed, though it does not state what the claim was for, nor when it accrued.—Sehorn v. Williams, 110 Cal. 621, 43 Pac. 8.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 532; 13 Cent. Dig., cols. 1591-1595, §§ 241-245.

§ 136. —— Requisites and Validity.

[a] If a contract with a county is unauthorized and void, a warrant drawn on the treasurer by order of the county board for work done thereunder is also void, and he cannot be compelled to pay it.—Perry v. Ames, 26 Cal. 372.

[b] Warrant issued in payment of claim for which county was not liable is void.—Bank of Santa Cruz v. Bartlett, 78 Cal. 303, 20 Pac. 682.

[c] Assuming that it is the duty of the auditor to designate in his warrant the particular fund against which it is drawn, it is his duty to draw his warrant in payment of such claim on the proper fund, notwithstanding the board of supervisors had erroneously ordered its payment from another fund.—White v. Hayden, 126 Cal. 621, 59 Pac. 118.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 531-537; 13 Cent. Dig., cols. 1595-1599, §§ 246-248.

§ 137. —— Operation and Effect.

[a] Warrants are not intended to constitute a new debt or evidence of a new debt against the county, but are the means prescribed by law for drawing money from the county treasury.—Dana v. San Francisco, 19 Cal. 486.

§ 138. —— Negotiability and Assignment.

[a] County warrants acquire no greater validity in hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred or in what faith they may have been taken. If illegal when issued, they are illegal for all time.—People v. Supervisors, 11 Cal. 170.

[b] Probably assignee of warrants would be protected as holder of a claim against the county. But this would result, not by virtue of the indorsement as passing to the assignee the legal title to the warrant, as an indorsee under the law-merchant, but because in equity the indorsement would be deemed to be an assignment of the debt for which the warrant was issued, and an authority to the assignee to receive the money.—Dana v. San Francisco, 19 Cal. 486.

[c] One who transfers a county warrant by indorsement is not liable to the transferee as an indorser of negotiable paper, nor, under the statute (Wood's Digest, p. 75), relating to bonds, due-bills, etc., as an assignor of a written instrument to pay money.—Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78.

[d] A county treasurer cannot be compelled to pay a warrant to any other person than the one in whose favor it is drawn, without an assignment of it by the payee.—People v. Gray, 23 Cal. 125.

[e] Warrants drawn by a county auditor upon the treasurer are not negotiable, although payable to "A., or bearer."—People v. Gray, 23 Cal. 125.

[f] County warrant has not incidents of negotiable paper and assignee stands in shoes of original holder.—Bank of Santa Cruz v. Bartlett, 78 Cal. 303, 20 Pac. 682.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 537, 538; 13 Cent. Dig., cols. 1599-1601, § 249.

§ 139. —— Payment.

Interest on warrants. See Interest, § 11.

[a] Under a statute respecting county treasurers, passed March 22, 1850, party who registers his warrants becomes a preferred creditor, and is to be paid as soon as there are sufficient funds in the treasury, and the prior registered warrants are paid.—Taylor v. Brooks, 5 Cal. 332.

[b] The act creating the office of county treasurer provides that warrants drawn on the treasury shall be paid in the order of their registry, and this order of payment cannot be changed gy the supervisors.—Laforge v. Magee, 6 Cal. 285.

[c] There is nothing in the act of 1855, creating bonds of supervisors in the counties of this state, which entitles a warrant, drawn on the fund for current expenses during that year, to a priority in payment over a warrant of the same class drawn the year before. As it does not seem to have been the intention of the act to cut off all previous indebtedness, an honest creditor will not be postponed or denied the benefit of the act under which he contracted, and which provided that warrants should be paid in the order of registry.—McCall v. Harris, 6 Cal. 281.

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[d] A warrant may be paid by installments, and payment of funds on hand may be enforced.—Beals v. Evans, 10 Cal. 459, 39 Cal. 593.

[e] The board of supervisors has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute.—McDonald v. Maddux, 11 Cal. 187.

[f] Act of 1854, to fund floating debt of city and county of Sacramento, forbidding the redemption of any warrants accruing prior to a certain date, except with the funds then on hand, or subsequently received and belonging to the revenue before that date, is obligatory upon county officers. The legislature is the paramount political power, and can control and direct them in this respect.—McDonald v. Maddux, 11 Cal. 187.

[g] Warrants drawn by the auditor of Sacramento county on the treasurer thereof, and duly registered and indorsed "not paid for want of funds," August 12, 1853, come within the preferred claims provided for in that clause of the thirty-sixth section of the consolidation act of 1858, 279, which says, in distributing the revenue, "and the balance to a general fund, which shall be applied to the payment of the outstanding auditor's warrants lawfully drawn on the treasury, and payable in the order of their registry."—McDonald v. Bird, 18 Cal. 195.

[h] Even if these warrants might have been funded under the act of 1858, it was a privilege, and not an obligation on the part of the holder, to fund; and his declining to fund did not take his warrants out of section 36 of the act of 1858.—McDonald v. Bird, 18 Cal. 195.

[i] Warrants drawn on the county treasurer, under act of 1860, funding the debt of Sonoma county, making no provision for their payment, must be paid under the provisions of act of 1850, concerning the office of county treasurer.—Cocke v. Hendley, 18 Cal. 369.

[j] Under the act of 1850, concerning the office of county treasurer, and that of 1857, concerning county warrants, a county treasurer is not required to pay all warrants which the county auditor may draw upon him, but only such as are founded on an order made by the board of supervisors for payment of a demand legally chargeable against the county and allowed by the board.—Keller v. Hyde, 20 Cal. 593.

[k] Where a road act provides what taxes may be imposed by a county for county purposes, and designates the purpose to which each fund shall be devoted, no provision being made for that class of indebtedness to which certain warrants belong, except the funding provisions contained in the act, where there are no funds in the treasury applicable to the purpose for which a warrant was issued when the holder demanded payment of the treasurer, his only remedy is to apply to the legislature to provide means of paying his debt.—Rose v. Estudillo, 39 Cal. 270.

[l] When illegal claims are allowed against a county and warrants drawn therefor, it is the duty of the treasurer to refuse to pay them.—Linden v. Case, 46 Cal. 171.

[m] Each year's income must pay each year's debts, and no debts of one year can be paid out of income of future years.—Shaw v. Statler, 74 Cal. 259, 260, 15 Pac. 833.

[n] Where a statute directs that damages due the parties entitled thereto for widening a street in the city and county of San Francisco shall be retained by the county treasurer, until the respective claims of the several parties shall have been adjusted, and the treasurer, knowing that there is a controversy as to who is entitled to the money, pays it over to one of them, he is responsible to the person entitled to it; and it is immaterial that the payment was made on presentation of a warrant, in form regular, but which the treasurer knew to have been improvidently issued.—Priet v. Hubert, 62 Cal. 9.

[o] Where the law requires all county school moneys to be apportioned, and the warrants drawn on the special funds, a finding that a payment of a school warrant was made from the general school fund is not equivalent to a finding that the warrant was not drawn on any special fund, so that the treasurer was liable for an illegal payment.—Los Angeles County v. Lankershim, 100 Cal. 525, 35 Pac. 556.

[p] Where the board of supervisors issue a warrant which they are authorized to issue, the treasurer can exercise no discretion in regard to paying it.—Von Schmidt v. Widbur, 105 Cal. 151, 38 Pac. 682.

[q] Where indebtedness was incurred within one fiscal year, it can only be paid out of the revenue provided for that fiscal year, and the board of supervisors have no jurisdiction or authority to carry the indebtedness over, and make it payable out of the revenue of the next fiscal year.—McGowan v. Ford, 107 Cal. 177, 40 Pac. 231.

[r] Where the demand upon the auditor was for a warrant for full payment of the salary of a stenographer employed by the city and county, part of which was applied on a judgment against him filed with the auditor, a mandate cannot be issued to compel the payment of the excess, which the auditor may pay upon demand for the correct amount.—Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 538-541; 13 Cent. Dig., cols. 1601-1608, §§ 250-254.

§ 140. —— Surrender or Funding.

[a] Holders of warrants on county treasury are not compelled to accept bonds for them, or, in other words, to fund them, where the state has passed an act to fund the indebtedness of a county; they are simply left unprovided for in any other way.—Hunsacker v. Borden, 5 Cal. 288, 63 Am. Dec. 130.

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[b] Neither the act of 1861 nor the act of 1868 is compulsory on the creditors, and does not require them to surrender their evidences of indebtedness, nor forbid the county to pay its debts, if the creditors should refuse to accept the bonds.—Soher v. Supervisors Calaveras county, 39 Cal. 134.

[c] The legislature cannot require the creditors of a county to surrender their evidences of indebtedness, and accept new ones different in terms from the old, but it may refuse to provide funds to pay any portion of the old indebtedness, unless the creditors will accept new evidences in place of the old, and for a less sum.—People v. Morse, 43 Cal. 534.

[d] Act of April, 1880, providing for funding of county debt, although it adds five new sections to the Political Code, is an independent act.—University of California v. Bernard, 57 Cal. 612.

§ 141. —— Actions by Holders.

[a] The holder of county warrant cannot maintain an action upon it as a negotiable instrument.—Dana v. San Francisco, 19 Cal. 486.

[b] Mandamus is proper remedy to compel a county treasurer to satisfy warrants surrendered for redemption, as provided by law. Day v. Callow, 39 Cal. 593.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 544-549; 13 Cent. Dig., cols. 1611-1616, §§ 256-259.

§ 142. Bills of Exchange.

[a] The county auditor has no power to issue a bill of exchange nor to give to his warrant the form and qualities of such an instrument.—Dana v. San Francisco County, 19 Cal. 486.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 549; 13 Cent. Dig., cols. 1616-1618, § 260.

§ 143. Bonds—Power to Issue.

[a] A statute authorizing a county to fund its outstanding warrants which did not draw interest, and to make the bonds given in exchange therefor bear interest, is valid.—Chapman v. Morris, 28 Cal. 393.

[b] Act of March 18, 1874, requiring two certain county boards to issue bonds to provide funds for a road, leaves no discretion in the boards as to whether or not they will issue the bonds.—People v. San Luis Obispo County Supervisors, 50 Cal. 561.

[c] Laws of 1870 authorize counties to aid in the construction of railroads by the issue of county bonds, payable within twenty years, and provide that the board of supervisors shall submit to the qualified electors of the county "the question whether such railroad aid shall be granted." An affirmative vote in pursuance of such statute authorized the board to issue such aid bonds upon such terms as might appear to them most advantageous to the county, the bonds to be delivered to the railroad company at a specified rate for every mile of completed track. The termini were specified in the submission, but the road was built over a portion only of the distance between them. Held, that an issue of the bonds by the board in proportion to the amount of completed track was within their powers and valid.—Nevada Bank v. Steinmitz, 64 Cal. 301, 30 Pac. 970.

[d] The levying of a tax for county road purposes on property in a city in which work and improvements on the street are done by virtue of laws relating to street work and improvements therein, being prohibited by Statutes of 1883, page 20, so that the road fund is one to which only part of the county contributes, and which is to be expended for the benefit of such part only, the county's bonds cannot be issued for construction of a road.—Devine v. Board of Supervisors of Sacramento Co., 121 Cal. 670, 54 Pac. 262.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 550-560; 13 Cent. Dig., cols. 1618-1632, §§ 261-268.

§ 144. —— Power of Legislature to Require Issuance.

[a] Legislature may require a county to issue bonds for improvement of roads.—People v. Board of Supervisors, 50 Cal. 561.

§ 145. —— Submitting Question to Popular Vote.

[a] The clause in the act of April 20, 1858, authorizing the issuance of bonds requiring the action of the board of examiners to be submitted to a vote of the people on a contingency does not make the act any the less a law. The act took effect as a law immediately, and was not dependent on the action of any other body.—Blanding v. Burr, 13 Cal. 343.

[b] Order submitting bond issue to vote must specify amount of bonds required for each of several objects.—People v. Baker, 83 Cal. 152, 23 Pac. 112, 364.

[c] Proclamation that election would be held submitting question of issue of bonds to "vote of people" means to "qualified voters."—People v. Counts, 89 Cal. 22, 26 Pac. 612.

[d] Proclamation for bond election may be made by order of supervisors; ordinance is not necessary.—People v. Counts, 89 Cal. 22, 26 Pac. 612.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 556-558; 13 Cent. Dig., cols. 1632-1640, §§ 269-273.

§ 146. —— Limitations on Issue and Effect of Overissue.

[a] Overissued bonds are void.—Sutro v. Pettit, 74 Cal. 337, 5 Am. St. Rep. 442, 16 Pac. 7; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 93.

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[b] Municipal bonds can only be issued by virtue of express legislative authority.—Sutro v. Pettit, 74 Cal. 336, 5 Am. St. Rep. 442, 16 Pac. 7.

§ 147. —— Formal Requisites.

[a] The act of March 14, 1883, known as the County Government Act, required that bonds issued by a county should refer to the act, and to that extent repealed section 4048 of the Political Code, which required reference to be made to that section in county bonds.—County of Merced v. Regents of the University, 66 Cal. 25, 4 Pac. 780.

[b] Specification of purpose to construct two wagon roads with bonds to be issued is not expression of more than one object.—People v. Counts, 89 Cal. 19, 20, 26 Pac. 612.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 563-569; 13 Cent. Dig., cols. 1641-1654, §§ 275-284.

§ 148. —— Statute Authorizing Issue as Part of Contract.

[a] Statute authorizing bond issue is part of contract between county and bondholders. Davis v. Yuba County, 75 Cal. 456, 13 Pac. 874, 17 Pac. 533.

§ 149. —— Rights of Purchasers.

[a] When a funding act provides that a certain tax shall be levied to pay the bonds, a person who takes the bonds in place of his claim is entitled, as part of his contract, to have the tax so levied; hence any subsequent holder is entitled to such levy.—English v. Sacramento County, 19 Cal. 172.

[b] Where the statute authorizing the issue of county bonds prescribes their form, one is not obliged to receive them from the county unless they are in the form prescribed, even though, possibly, they may be valid.—Merced County v. California University, 66 Cal. 25, 4 Pac. 780.

[c] Purchasers of municipal bonds are bound to know power of municipal corporation and of its officers by whom the bonds were issued; and as the statute requires all county bonds to be recorded, and the fact of the overissue can be readily ascertained from the numbers of the bonds, any mistake of a purchaser of overissued bonds, as to the validity of the bonds, is a mistake of law from which he cannot be released.—Sutro v. Rhodes, 92 Cal. 117, 29 Pac. 98.

§ 150. —— Interest.

[a] Interest does not accrue on county or municipal bonds, except as authorized by statute.—Soher v. Calaveras County, 39 Cal. 134.

[b] Coupons on county bonds, after they become payable, bear interest from time they are presented for payment.—Davis v. Yuba County, 75 Cal. 453, 13 Pac. 874, 17 Pac. 533.

[c] It is only where county is made generally liable for annual interest on bonds, and means are provided for meeting it, that it is liable for interest upon interest not paid at maturity.—Davis v. Sacramento, 82 Cal. 563, 22 Pac. 1118.

§ 151. —— Payment.

[a] Twenty year bonds payable out of certain fund cannot, without consent of holder, be paid prior to maturity from different fund.—Davis v. Yuba County, 75 Cal. 453, 458, 13 Pac. 874, 17 Pac. 533.

[b] Purchaser of county bonds having twenty years to run, issued under statute providing that they might be paid before that time on happening of certain event, has right to hold them and collect interest for twenty years or until such event takes place, and cannot be compelled to accept payment before that time.—Davis v. Yuba County, 7 Cal. 453-458, 17 Pac. 533.

[c] The delay of the tax collector in making his settlement with the auditor cannot confer the right upon a bondholder to compel payment by the treasurer of bonds and coupons prior to the settlement. He should first compel such settlement before making his demand upon the treasurer.—Meyer v. Widber, 126 Cal. 252, 58 Pac. 532.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 570-575; 13 Cent. Dig., cols. 1675-1685, §§ 293-299.

§ 152. Taxation.

Power to levy and assess taxes. See Taxation, § 39.

[a] Limitation of tax for county purposes only applies to general fund, and not to special funds.—People v. Gerke, 37 Cal. 228.

[b] County has no power of taxation except as authorized by law.—Rose v. Estudillo, 39 Cal. 275.

[c] Under authority given by Political Code to boards of supervisors to levy such taxes annually as may be necessary to defray the "current expenses" of a county, not exceeding a certain fixed amount, a board has authority to levy a tax to pay the expenses of building a county jail.—Babcock v. Goodrich, 47 Cal. 488.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 467, 575-584; 13 Cent. Dig., cols. 1686-1710, §§ 300-308.

§ 153. Rights and Remedies of Taxpayers.

[a] When a taxpayer might object to a contract made by the board of supervisors for building a jail, stated.—People ex. rel. Smith v. Myers, 15 Cal. 33.

[b] A court of equity, on the complaint of a taxpayer, will enjoin the payment of and cancel county warrants illegally drawn on

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the treasurer by order of the board of supervisors.—Andrews v. Pratt, 44 Cal. 309.

[c] The County Government Act (section 8) making it the duty of a county attorney, whenever any money shall have actually been paid under an order of the supervisors, made without lawful authority, to institute suit for the said money in the name of the county, affords an adequate remedy at law where an order illegally allowing a claim against the county has been paid, but the interest which a mere citizen or taxpayer has in the matter does not entitle him to bring suit in his own name, untill after the matter has been laid before the attorney, and the latter has refused to act.—Burr v. Sacramento County Supervisors, 96 Cal. 210, 31 Pac. 38.

[d] A taxpayer may maintain a suit to enjoin the county auditor perpetually from drawing his warrant upon the county treasurer in favor of a publisher of the delinquent tax list who had no contract with the board of supervisors for such publication. Smeltzer v. Miller, 113 Cal. 163, 45 Pac. 264.

[e] A taxpayer may maintain a suit to enjoin the county auditor from drawing his warrant upon the county treasurer in favor of a publisher of the delinquent tax list, who had no valid contract with the board of supervisors for such publication, though the claim therefor has been allowed by the board of supervisors. Smeltzer v. Miller, 113 Cal. 163, 45 Pac. 264, affirmed, and held to be the law of the case.—Smeltzer v. Miller, 125 Cal. 41, 57 Pac. 668.

[f] A taxpayer cannot maintain an action to enjoin the board of supervisors from allowing an alleged illegal claim against the county for printing; nor can he in that action enjoin the auditor and treasurer from acting officially upon such claim.—McBride v. Newlin, 129 Cal. 36, 61 Pac. 577.

[g] Injunction will lie, at suit of a taxpayer, to restrain a county from incurring expense for equipping a ferry partly without the county, it having no authority to establish or operate such a one.—Johnston v. Sacramento County, 137 Cal. 204, 69 Pac. 962.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 583, 584; 13 Cent. Dig., cols. 1706-1710, § 308.

V. CLAIMS AGAINST COUNTY.

NECESSITY FOR PRESENTATION — CLAIMS FOR SALARY, § 154.
—— WARRANTS, § 155.
STATEMENT OR ITEMIZATION, § 156.
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Presentation of fraudulent claim to county as swindling. See False Pretenses, § 10.

§ 154. Necessity for Presentation—Claim for Salary.

[a] Under act of March 4, 1878, providing that gas inspectors "shall be entitled to a salary to be paid and allowed" by the board of supervisors, a claim for such salary need not be presented to the auditor.—Ames v. City and County of San Francisco, 76 Cal. 325, 18 Pac. 397.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 587; 13 Cent. Dig., cols. 1711-1715, §§ 309-311.

§ 155. Warrants.

[a] An act of the legislature creating a board of commissioners for the purpose of determining the legality of all claims or demands outstanding against a county, and for the funding of such as they shall consider legal and just, which further provides that no such demand or claim shall be a legal claim against the county unless it is presented to and allowed by such commissioners, is void in this last respect, and a warrant, issued by the auditor of a county, which has been duly presented by the holder to the treasurer for payment, and indorsed by him, "Not paid for want of funds," prior to the passage of the act, the holder having elected not to present it to the said commissioners, is nevertheless a valid claim against the county; and it is the duty of the treasurer to pay it from the first moneys in the treasury applicable to such payment.—Rose v. Estudillo, 39 Cal. 270.

§ 156. Statement or Itemization.

[a] A county board of supervisors is not bound nor has it the right, to allow a claim against the county for officers' fees or disbursements, unless all the items of the claim are given.—Christie v. Sonoma County Supervisors, 60 Cal. 164.

[b] A claim against a county for a specific sum due on a contract cannot be repudiated because not itemized as required by County Government Act, section 41 (Stats. 1891, p. 311), where no notice to itemize it was given to claimant pursuant to said section, and the supervisors allowed it.—Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 589-591; 13 Cent. Dig., cols. 1718-1722, § 313.

§ 157. Verification.

[a] Verification of claim must be by oath annexed to account.—McCormick v. Tuolume County, 37 Cal. 257.

[b] Verification to claim against county held sufficient.—Rhoda v. Alameda, 69 Cal. 524, 11 Pac. 57.

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FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 590; 13 Cent. Dig., col. 1722, § 314.

§ 158. Time to Present.

[a] Under act of March 5, 1864 (Stats. 1863-64, p. 152), county officers can have no jurisdiction to audit or allow charges not presented within the year, and an order of allowance cannot give an outlawed charge any validity.—Carroll v. Siebenthaler, 37 Cal. 193.

[b] Statutes of 1893, page 363, section 41, does not bar a claim by a surveyor for his daily compensation due under Statutes of 1893, page 497, for a period more than a year before the statement was filed, where it also demanded pay for a period within the year.—Nelson v. Merced County, 122 Cal. 644, 55 Pac. 421.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent Dig., cols. 1723, 1724, § 315.

§ 159. Audit, Allowance or Disallowance and Effect Thereof.

[a] Supervisors of San Francisco cannot audit and claim upon the sinking fund. People v. Bond, 10 Cal. 563.

[b] A mandamus commanding proper officers to audit a claim does not compel them to allow it.—People v. Supervisors of City and County of San Francisco, 11 Cal. 42.

[c] Boards of supervisors are quasi judicial bodies so far as concerns examination and settlement of accounts and claims against a county; and the allowance and settlement by such boards are an adjudication of the claims, and conclusive. (Baldwin, J.)—El Dorado County v. Elstner, 18 Cal. 144; Colusa County v. De Jarnett, 55 Cal. 373.

[d] An order of the county supervisors, viz., "Account allowed J. J. Cloud, surveying Little Lake and Big River Road, $344.20," will not authorize the auditor to draw a warrant for the payment of the claim, and the treasurer cannot be compelled to pay such a warrant.—Connor v. Morris, 23 Cal. 447.

[e] It is the duty of the boards of supervisors of the respective counties in this state to audit and allow the bills of organized volunteer companies for rent of armory, etc., and to direct a warrant to be issued therefor, payable out of the county funds in the hands of the county treasurer.—People ex rel. Cobb v. Supervisors of San Joaquin County, 28 Cal. 288.

[f] If the board of supervisors allow a claim against a county more than one year after it falls due, its action is void and the auditor should refuse to draw his warrant for the same.—Carroll v. Siebenthaler, 37 Cal. 193.

[g] A board of supervisors of a county in allowing or disallowing a claim exercise judicial functions.—Tilden v. Board of Supervisors of Sacramento, 41 Cal. 68.

[h] The board has no power to audit and allow accounts not legally chargeable to the county.—Linden v. Case, 46 Cal. 171.

[i] If claims not legally chargeable are allowed by a county board, neither the allowance nor the warrants drawn therefor create any legal liabilities, and it is the duty of auditor to refuse to draw warrants therefor. Linden v. Case, 46 Cal. 171.

[j] If claim against county is barred by statute of limitations, and the legislature passes an act requiring the board of supervisors to act upon and reject or allow it, notwithstanding the bar of the statute, the act does not have the effect of legalizing the claim if it is illegal.—Domingos v. Board of Supervisors, 51 Cal. 608.

[k] A resolution authorizing the payment of an unliquidated claim against a county must state the precise amount allowed. Spring Valley Waterworks v. Ashbury, 52 Cal. 126.

[l] Under San Francisco charter (Stats. 1856, p. 163), providing that "every ordinance providing for the expenditure of public moneys in sums exceeding five hundred dollars shall be published before final action upon the same," the board of supervisors of the city and county of San Francisco may at one vote allow several claims against the city and county without passing an ordinance, even if the aggregate of the demands exceeds five hundred dollars, provided each claim is for less than five hundred dollars.—Sweeny v. Maynard, 52 Cal. 468.

[m] Board of supervisors is not required to allow or settle claims which courts are authorized to certify to and order paid. McAllister v. Hamlin, 83 Cal. 366, 367, 23 Pac. 357.

[n] Code of Civil Procedure, section 144, provides that if suitable rooms, etc., for holding the superior courts be not provided by the county supervisors, the courts, or the judge or judges thereof, may direct the sheriff to provide the same, and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof. Held, that since the statute provides that the expenses incurred shall be audited by the judge, it is not necessary than they be audited by the county supervisors.—Widber, Ex parte, 91 Cal. 367, 27 Pac. 733.

[o] Under Statutes of 1891, page 301, section 25, subdivision 12, which gives the board of supervisors jurisdiction "to examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor," the board has jurisdiction to "examine, settle, and allow" a constable's claim for fees.—McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113.

[p] Where the board of supervisors hears and determines the facts involved in a claim,

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and orders the allowance thereof, it becomes res judicata, and, in the absence of fraud, cannot be attacked by the officer who is ordered to pay the claim.—McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113.

[q] Statutes of 1891, page 322, section 113, provides that the auditor must draw warrants on the county treasurer in favor of all persons entitled thereto, in payment of all claims against the county which have been allowed, and ordered paid, by the supervisors. Held that, after a constable's claim for fees had been examined and allowed by the county board, the auditor could not refuse to draw warrants for the payment thereof on the ground that the services for which the fees were charged were never rendered.—McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113.

[r] Act of May 17, 1861, empowers the board of supervisors to allow a sum not exceeding five thousand dollars in any one fiscal year as counsel fees. Act of February 25, 1878, provides that the board shall not pay out in any one month more than one-twelfth of any claim allowed by law for the fiscal year, and further provides that if, at the beginning of a month, any money remains which might have been expended in past months, it may be carried forward and expended in any succeeding months. Held, that the board may properly allow at one time a counsel fee of two thousand dollars.—Hunt v. Broderick, 104 Cal. 313, 37 Pac. 1040.

[s] One demanding payment of claim against county must show some statute authorizing it or some contract express or implied which itself finds authority of law; benefit to county is immaterial.—Irwin v. Yuba County, 119 Cal. 690, 52 Pac. 35.

[t] There being no requirement that the board of county supervisors should designate the particular fund out of which a claim allowed and certified by it should be paid, such a designation by it will not affect any duty of the county auditor, under County Government Act, section 121, and Political Code, section 4223, to so designate.—White v. Hayden, 126 Cal. 621, 59 Pac. 118.

[u] The board of supervisors, in passing upon a claim against the county, acts in a quasi judicial capacity; and it must be presumed that the board will do its duty, and will reject the claim if it is illegal.—McBride v. Newlin, 129 Cal. 36, 61 Pac. 577.

For Authorities from Other States:

Claims against counties, effect of allowance or rejection of: 55 Am. St. Rep. 203, note. See, also, 11 Cyc. 588, 591-595; 13 Cent. Dig., cols. 1724-1733, §§ 316-321.

§ 160. Reconsideration and Second Audit.

[a] An account audited against the county of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment. Knox v. Woods, 8 Cal. 545.

[b] A contract with a county for building a bridge provided that the price was payable on presentation of a certificate of the superintendent of construction of the bridge in warrants drawn on the first road district fund of the county. A claim under such contract presented to the county board of supervisors, without reference to the fund out of which it was to be paid, and without the superintendent's certificate, was rejected. Afterward claimant again presented a claim under the contract, asking that it be paid in warrants drawn on the road district fund in question, and the superintendent's certificate and a copy of the contract were attached, The certificate appeared to have been issued after the first claim was presented. Held, that the two claims were materially different, and a writ of mandate would lie to compel the county board of supervisors to act on the second claim.—Smith v. San Bernardino County Supervisors, 99 Cal. 262, 33 Pac. 1094.

§ 161. Effect of Allowance or Disallowance.

[a] The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account, after presentation to and rejection by the board of supervisors.—Price v. Sacramento County, 6 Cal. 254.

[b] After board of supervisors have reversed auditor's refusal to allow claim, duty of auditor to enter it is ministerial.—Falk v. Strother, 84 Cal. 547, 24 Pac. 110.

[c] Under sections 43 and 44 of the County Government Act, where the supervisors have allowed a portion of a claim presented, and rejected the remainder, the claimant, if dissatisfied with the rejection of the claim in part, is required to indicate to the supervisors his unwillingness to accept the amount allowed, and to give them an opportunity to again consider his claim for final action at the next regular succeeding session of the board, and a suit brought by the claimant before such final action is had by the supervisors upon the claim, is premature and cannot be sustained.—Arbios v County of San Bernardino, 110 Cal. 42 Pac. 1080.

[d] The allowance by county supervisors of the claim for services of attorneys employed by the supervisors to transact business for the county is conclusive on the auditor of the rendition and value of the services.—Lamberson v. Jefferds, 118 Cal. 363, 50 Pac. 403.

[e] Where the county supervisors allow a claim in excess of their jurisdiction, the auditor should refuse to draw a warrant therefor.—Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731.

[f] Where a coroner's bill, consisting of items properly chargeable to the county, was duly audited and allowed by the board of supervisors, and paid by the county, the county could not recover the money back in a collateral proceeding on the ground that the coroner did not in fact perform the services for which the bill was rendered.—Alameda County v. Evers, 136 Cal. 132, 68 Pac. 475.

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FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 595-599; 13 Cent. Dig., cols. 1733-1749, §§ 322-330.

§ 162. Review of Decision.

[a] Before mandamus can be properly awarded board of supervisors must refuse to act upon claim, after it has obtained jurisdiction of it.—Tilden v. Board of Supervisors of Sacramento, 41 Cal. 68.

[b] Consolidation Act, section 92, providing for an appeal to the board of supervisors from the rejection of a claim by the county auditor, does not apply to claims already passed on by the board, or which must be presented in the first instance for its sanction.—Hunt v. Broderick, 104 Cal. 313, 37 Pac. 1040.

[c] If the board of supervisors exceeds its jurisdiction in the allowance of claims which are illegal and void upon their face, there is a remedy against such allowance; and there may be cases in which equity will set aside an allowance procured by fraud. But where the board acts within its jurisdiction, and without any fraud in the procuring of an allowance, its decision upon questions of fact in making the allowance is without remedy in the courts.—Alameda County v. Evers, 136 Cal. 132, 68 Pac. 475.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 606; 13 Cent. Dig., cols. 1755-1758, § 335.

§§ 163, 164. Priorities.

[a] Act authorizing county recorder of Yuba county to be paid out of county treasury, for certain specified services, contains no words which raise the presumption that he was to be allowed a preference over other creditors.—People ex rel. Benham v. Williams, 8 Cal. 97.

§ 165. Payment.

[a] Section 77 of County Government Act, giving claims priority according to time of presentation, refers only to claims presented during a given year.—Shaw v. Statler, 74 Cal. 260, 15 Pac. 833.

[b] Employment by the day in the service of a county under the same contract, at a stipulated compensation, is a proper subject of an account to be embraced in a single cause of action, the statute nowhere fixing a time for the payment of per diem compensation of officers.—Nelson v. Merced County, 122 Cal. 644, 55 Pac. 421.

[c] Under the provisions of the County Government Act of March 24, 1893, a claim of a supervisor for services rendered as such and as ex-officio road commissioner should be paid from the salary fund.—White v. Hayden, 126 Cal. 621, 59 Pac. 118.

FOR AUTHORITIES FROM OTHER STATES:

11 Cyc. 605, 606; 13 Cent. Dig., cols. 1755-1758, §§ 335, 336.

§ 166. —— In Depreciated Warrants.

[a] And the supervisors cannot pay a debt in county warrants at the depreciated cash value, as the county is liable for the full value, and the supervisors have no right to make the county pay the difference by way of gift.—Foster v. Coleman, 10 Cal. 278.

§ 167. —— Recovery of Payments Made.

[a] Action against supervisors to recover amount of illegal claims alleged to have been paid by them should be brought in name of county as real party in interest, and district attorney is proper person to prosecute it.—Hedges v. Dam, 72 Cal. 520, 14 Pac. 133.

[b] Section 8 of the County Government Act, providing for the recovery of money paid by order of the supervisors "without authority of law," only applies to payments which the board has no general power to make, and does not affect the principle of equitable estoppel as applied to payments made within the scope of the general powers of the board, and by virtue of which it has acquired a benefit, or an interest of which it retains the enjoyment.—County of Sacramento v. Southern Pacific Co., 127 Cal. 21, 59 Pac. 568, 825.

[c] Under section 8 of the County Government Act of 1893, a claim allowed by the supervisors, which is paid by the county, cannot be recovered back, unless it was allowed and paid "without authority of law." County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574.

[d] The board of supervisors of a county, in passing upon a claim against the county, act as a quasi judicial body, and their allowance and settlement of the claim is an adjudication which is conclusive. Hence, no action can be brought by the county to recover money paid on such claim.—Placer County v. Campbell, 11 Pac. 602.

VI. ACTIONS.

CAPACITY TO SUE OR TO BE SUED, § 168.
—— STATUTORY PROVISIONS, § 169.
—— SUPERVISORS, § 170.
—— PEOPLE OF COUNTY, § 171.
RIGHT OF COUNTY TO SUE ANOTHER COUNTY, § 172.
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—— AVERMENTS AS TO PRESENTATION OF CLAIM, § 181.
—— ANSWER, § 182.
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EXECUTION—PAYMENT, § 185.
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§ 168. Capacity to Sue or be Sued.

[a] A county government is a portion of the state government, and the county debt

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created by the authority of law, is a part of the public state debt, and in the same manner as there is no remedy against the state, there may be none against the county. Hunsaker v. Borden, 5 Cal. 288, 63 Am. Dec. 130.

[b] Counties are quasi corporations, and can sue and be sued.—Price v. County of Sacramento, 6 Cal. 254.

[c] At common law an action does not lie against a county; and in the absence of some constitutional or statutory provision counties are to be treated as political divisions of the state, created for convenience, and not liable for damages caused by the neglect of its officers or agents.—Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240.

FOR AUTHORITIES FROM OTHER STATES:

Liability of counties, mode of its enforcement, and the power of the legislature to modify or impair: 68 Am. Dec. 291, note. See, also, 11 Cyc. 607-614; 13 Cent. Dig., cols. 1760-1799, §§ 338-367.

§ 169. —— Statutory Provisions.

[a] Under act of April, 1854, counties have right of prosecuting and defending actions in the same manner as individuals.—Placer County v. Austin, 8 Cal. 303.

[b] Statute allowing a county to be sued does not give a vested right to a remedy for enforcement of the judgment.—Sharp v. Contra Costa Co., 34 Cal. 285.

[c] An action will not lie, under section 1050 of the Code of Civil Procedure, against a county for the purpose of determining an adverse claim which it is alleged the defendant makes against the plaintiff for a sum of money, under an ordinance imposing a license tax upon persons engaged in certain business, which ordinance the plaintiff claims is void.—Whittaker v. County of Tuolumne, 96 Cal. 100, 30 Pac. 1016.

§ 170. —— Supervisors.

[a] Supervisors cannot be sued in their official character, in ordinary common-law actions, for claims against the public, county or village they represent, without express statutory provision.—Hastings v. San Francisco, 18 Cal. 49.

§ 171. —— People of County.

[a] The people of a county are not a corporation, nor can they sue or be sued.—People ex rel. Smith v. Myers, 15 Cal. 33.

§ 172. Right of County to Sue Another County.

[a] Under section 4 of the County Government Act one county may maintain an action against another as for money had and received, in a proper case, after the presentation of its claim to the board of supervisors of the latter.—County of Colusa v. County of Glenn, 117 Cal. 434, 49 Pac. 457.

§ 173. Rights of Action—By County.

[a] County may intervene to enforce lien of tax on property in custody of law, and creditors having no lien cannot object thereto.—Yuba County v. Adams, 7 Cal. 35, 37.

[b] Action may be brought in name of county to recover money belonging to general fund of the county.—Solano County v. Neville, 27 Cal. 465.

[c] Failure to take out license does not make defendant liable to county in action for debt.—Monterey County v. Abbott, 77 Cal. 543, 18 Pac. 113, 20 Pac. 73.

[d] A complaint in an action by a county to recover possession of rooms in the courthouse which alleges facts showing the plaintiff's right of possession of the courthouse, and of the rooms therein described, and that the defendants wrongfully withhold the possession of said rooms from the plaintiff, states a cause of action.—County of San Joaquin v. Budd, 96 Cal. 47, 30 Pac. 967.

[e] County may sue for nuisance to it in its proprietary capacity as owner of land injured.—Yuba County v. Kate etc. M. Co., 141 Cal. 363, 74 Pac. 1049.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 466, 467; 13 Cent. Dig., cols. 1762-1766, §§ 339, 340.

§ 174. —— Against County.

[a] The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account, after presentation to, and rejection by, the board of supervisors.—Price v. County of Sacramento, 6 Cal. 254.

§ 175. Form of Action.

[a] Action of assumpsit is proper remedy on account against county, which has been rejected by supervisors.—Price v. Sacramento, 6 Cal. 254.

§ 176. Conditions Precedent.

[a] A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the act of 1861, fails to state a cause of action, unless it avers that the plaintiff had attempted to come to an agreement with the board of supervisors as to the amount of damages sustained, and could not agree with the board as to such amount.—Lincoln v. Colusa County, 28 Cal. 662.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1766-1772, §§ 341-343.

§ 177. —— Presentation of Claim.

[a] Statute providing that no person shall sue county for any demand, unless the claim has first been presented to the board of supervisors, and been by them rejected, applies as well to actions arising out of tort as upon

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contract.—McCann v. Sierra County, 7 Cal. 121.

[b] Claim for damages caused by a mob need not be presented to supervisors before suit.—Clear Lake W. W. v. Lake County, 45 Cal. 90; Bank of California v. Shaber, 55 Cal. 322.

[c] Where a claim against a county was rejected by the supervisors on its first presentation, it was not necessary to present it again before suing thereon.—Millard v. Kern County, 147 Cal. 682, 82 Pac. 329.

[d] Statutes of 1893, page 346, sections 43, 44, requiring a second presentation of claims allowed in part to the board of supervisors before bringing suit for the balance, do not apply to claims wholly rejected.—San Diego County v. Riverside County, 55 Pac. 7.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 1767-1771, § 342.

§ 178. Venue.

[a] Section 16, article 12, of Constitution, prescribing place of trial in actions against corporations, does not relate to suits against counties.—Buck v. Eureka, 97 Cal. 135, 31 Pac. 845.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 610, 611; 13 Cent. Dig., cols. 1772-1774, § 345.

§ 179. Parties.

[a] County is corporation, and is proper party plaintiff to object to contract made by the board of supervisors for building a jail.—People ex rel. Smith v. Myers, 15 Cal. 33.

[b] The act of 1851 creating the board of supervisors of San Francisco county, and authorizing the board "to sue and defend on behalf of the county," did not authorize the board to bring suits on behalf of the county in its own name; nor did it render the board liable to be sued directly for a claim against the county.—Hastings v. San Francisco, 18 Cal. 49.

[c] Where an action is prosecuted in behalf of a county by a taxpayer, instead of the district attorney, facts must be alleged in the complaint showing a refusal or neglect on the part of the district attorney to institute the action.—Hedges v. Dam, 72 Cal. 520, 14 Pac. 133.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 608, 609; 13 Cent. Dig., cols. 1775-1782, §§ 347-351.

§ 180. Pleading—Complaint in General.

[a] A complaint which alleges that the plaintiff, as a justice of the peace, performed services at the request of the district attorney of the county, in cases wherein the people of the state were plaintiffs, to the amount of three thousand two hundred dollars, and that the defendant thereby became, and is, liable to pay said sum, does not state facts sufficient to constitute a cause of action against said county, because it does not allege the means whereby the county became liable, nor that the services were for, or procured by, the county.—Miner v. Solano County, 26 Cal. 115.

[b] Complaint against auditor need not aver that there is any money in the treasury.—Babcock v. Goodrich, 47 Cal. 488.

[c] When complaint of county is not verified, answer need not be verified.—Monterey v. Cummings, 83 Cal. 515, 23 Pac. 700.

[d] In an action against a county for publishing an election notice, plaintiff need not allege that there is money in the treasury to meet the demand, or that the allowance of the demand would not exceed the limit of liability which the county is authorized to contract for the fiscal year.—Johnson v. Yuba County, 103 Cal. 538, 37 Pac. 528.

[e] A complaint by a county against a county treasurer, to recover money alleged to have been paid out by him on a warrant issued for a claim on which the county was not liable, is not demurrable because it does not set out the contents of the warrant, where from the facts alleged its illegality must have been apparent on its face, if drawn in compliance with the statute (County Government Act, sec. 114), which provides that "all warrants must distinctly specify the liability for which they are drawn and when it accrued."—Ventura County v. Clay, 114 Cal. 242, 46 Pac. 9.

[f] In an action by one county against another for money alleged to be due, the ambiguity of the complaint caused by a mistake in figures, causing a discrepancy of allegation as to the number of miles taxed in the new county, which may be corrected by other figures given in the complaint, cannot be reached upon general demurrer.—County of San Diego v. County of Riverside, 125 Cal. 495, 58 Pac. 81.

[g] As Constitution, article 6, section 6, speaks of the counties of Yuba and Sutter, and Civil Code, section 1189, requires the venue and certificate of acknowledgment of a complaint to be expressed as "county of ——," a demurrer to a complaint, commenced in the name of the county of Sutter, on the ground that the name of the county is "Sutter," and not the "County of Sutter," should be overruled.—Sutter County v. McGriff, 130 Cal. 124, 62 Pac. 412.

[h] In an action against a county on a well contract, the petition alleged that the county entered into the contract, acted on it, and made payments under it; and the contract recited that the county made it through its duly authorized agent. Held, on demurrer, that the petition was not bad as not setting out the authority under which the agent acted.—McPherson v. San Joaquin County, 56 Pac. 802.

§ 181. —— Averments as to Presentation of Claim.

[a] In an action on a claim against the county, the plaintiff must aver all the mat-

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ters required by the statute in relation to his presentation of the claim to the board of supervisors, and their rejection of it, and a mere allegation that it was duly presented and rejected is not sufficient.—Rhoda v. Alameda County, 52 Cal. 350.

[b] In an action on a claim against a county, a complaint, alleging presentation of the claim to the board of supervisors, and that the affidavit accompanying the claim, which was for a certain number of dollars, "is true and correct, and that the same is due and owing from said county to deponent," substantially complies with the provisions of the statute which requires an allegation of presentation of the claim to the board of supervisors, together with an affidavit "that the amount claimed is justly due," as a condition precedent to the right to maintain an action therefor.—Rhoda v. Alameda County, 69 Cal. 523, 11 Pac. 57.

§ 182. —— Answer.

[a] The complaint of A. against the county of N. alleged that work was done under a contract with the board of supervisors. The defendant's answer admitted a contract with A. and one W., and averred this to be the only contract made by them in relation to this work. Held, that the complaint must be understood as averring a contract in accordance with the statute, and that the answer was sufficient to put the plaintiff upon proof of his contract.—Murphy v. Napa County, 20 Cal. 497.

§ 183. Evidence.

[a] Deposit of auditor's certificate in treasury raises presumption that payment accompanies it.—Butte County v. Morgan, 76 Cal. 5, 18 Pac. 115.

[b] In an action by a constable against a county for fees, where the agreed statement of facts shows that part of the claim was rejected by the board of supervisors, but does not show the ground of rejection, such action will be presumed to have been correct unless the agreed statement shows it to have been erroneous.—Green v. Fresno County, 95 Cal. 329, 30 Pac. 544.

[c] In an action against a county, by a road overseer, for services and money expended in repair of county roads, testimony of the road commissioner that he had directed plaintiff not to run in debt in excess of the funds appropriated for such work, and that he did not know anything about plaintiff's doing the work until the bills therefor came in, is sufficient to show that the work was authorized by the commissioner.—Ludy v. Colusa County, 45 Pac. 166.

[d] In an action to compel a county treasurer to pay a warrant, plaintiff alleged that under a contract with the county he had collected certain money due it, for which his compensation was to be fifty per cent; that he presented his claim to the supervisors, who allowed it; that the auditor drew a warrant; and that the treasurer refused to pay it. The answer denied any agreement with plaintiff except a certain written contract, substantially as alleged by plaintiff. The answer averred that such contract was ultra vires and void, denied that plaintiff rendered any services under the contract, and alleged that the county from which the money was collected had instituted an action to recover it back, and that the same was still pending. The contract with plaintiff did not, on its face, appear to be ultra vires or void: Held, that the pleadings made a prima facie case in favor of plaintiff, and the burden of proof was on defendant to show facts, if any existed, to defeat the case thus made.—Kelley v. Sersanous (Cal.), 46 Pac. 299.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cent. Dig., cols. 1792-1794, §§ 360-362.

§ 184. Judgment.

[a] Judgment against county has the force and effect of an audited claim.—People v. San Francisco, 21 Cal. 668.

[b] The assignee of a claim against a county for nine hundred and fifty-two dollars and seventy-seven cents, presented it to the board of supervisors for allowance, and it was allowed for the amount of six hundred and forty dollars and seventy-seven cents only. He then sued and recovered judgment upon a portion of his original claim. Held, that such judgment was a bar to further proceedings to enforce the claim, as allowed by the board, under Laws of 1883, page 313, section 44, allowing suit by a claimant dissatisfied with the amount allowed him, as such suit must be for the whole amount.—Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 612; 13 Cent. Dig., cols. 1795, 1796, § 364.

§ 185. Execution—Payment.

[a] When money judgment is rendered against a county no execution can issue on it.—Emeric v. Gilman, 10 Cal. 404, 70 Am. Dec. 742; Alden v. County of Alameda, 43 Cal. 270.

[b] When a money judgment is recovered against a county the only remedy is to present it to the board of supervisors for allowance as an audited claim within the time prescribed by law (Stats. 1855, p. 51); and if the board refuse to perform its duty, by allowing it as such, it may be compelled to do so by mandamus.—Alden v. County of Alameda, 43 Cal. 270.

[c] The act of 1858 (Stats. 1858, p. 233), conferring power upon the board of supervisors to "order paid any final judgment against said city and county, out of the surplus fund," does not authorize the payment of such judgment out of the revenue collected for any subsequent year.—Smith v. Broderick, 107 Cal. 644, 48 Am. St. Rep. 167, 40 Pac. 1033.

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FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 613; 13 Cent. Dig., cols. 1796, 1797, § 365.

§ 186. Appeal and Error.

[a] Objection that account presented to supervisors was not "authenticated," as required by statute (Acts 1857, p. 167), cannot be taken in supreme court for first time. Randall v. Yuba County, 14 Cal. 219.

[b] County need not give bond on appeal. San Francisco etc. Co. v. State, 141 Cal. 357, 74 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cent. Dig., cols. 1798, 1799, § 366.

COUNTING VOTES.

See Elections, IX.

COUNTRY.

See California; references under Foreign Country; International Law; United States; War.

COUNTS.

Separate counts in criminal pleading. See Indictment and Information, §§ 77, 78.

Joinder of counts in criminal pleading. See Indictment and Information, §§ 110, 111.

In civil pleadings. See Pleading, § 33.

Reference from one count to another in civil pleading. See Pleading, § 34.

COUNTY ATTORNEYS.

See District and Prosecuting Attorneys.

COUNTY AUDITORS.

See Counties, §§ 72, 82, 84.

COUNTY BOARDS.

See Counties, §§ 19-53.

Right to enjoin acts and proceedings by. See Injunction, § 59.

COUNTY BONDS.

See Counties, §§ 143-152.

COUNTY CLERKS.

See Clerks of Court; Counties, §§ 71, 81.

COUNTY COURTS.

See Courts, § 142.

COUNTY OFFICERS.

See Counties, II, C.

COUNTY ORDINANCES.

See Counties, §§ 43-52.

COUNTY ROADS.

See Highways.

COUNTY SEAT.

Location and removal. See Counties, §§ 17, 18.

COUNTY SUPERVISORS.

See Counties, II, B.

COUNTY WARRANTS.

See Counties, §§ 135-141.

Interest on. See Interest, § 11.

COUPLED WITH INTEREST.

Right to enjoin power coupled with interest. See Injunction, § 55.

Power coupled with an interest. See Powers, § 8.

Revocation of agency coupled with an interest. See Principal and Agent, § 14.

Effect of death of principal on agency coupled with interest. See Principal and Agent, § 18.

COUPONS.

Interest bearing coupons.. See Bonds, § 20.

COURSE AND DISTANCE.

Description of boundary by. See Boundaries, §§ 16-22.

COURSE OF BUSINESS.

Transfers by debtor out of ordinary course of business as fraud on creditors. See Fraudulent Conveyances, § 19.

COURSE OF NATURE.

Judicial notice of. See Evidence, § 2.

COURSE OF TRIAL.

Of criminal trials. See Criminal Law, § 312.

Of civil actions before courts of justices of the peace. See Justices of the Peace, § 86.

Of civil trials before courts of record. See Trial, III.

COURT A QUO.

Jurisdiction of court a quo as affecting jurisdiction of appellate court. See Justices of the Peace, § 103.

COURT COMMISSIONERS.

Include officers authorized to assist state courts in the performance of part of their functions with subordinate judicial powers; appointment, qualification, tenure, and removal of such officers; their jurisdiction and powers and proceedings before them in general; and their rights, duties, and liabilities.

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Appointment and functions of supreme court commissioners. See Courts, § 51.
Power to continue, modify or vacate preliminary injunction. See Injunction, § 105.
United States commissioners. See United States Commissioners.

§ 1. Ministerial Powers and Functions.

[a] The power conferred on court commissioners by Code of Civil Procedure, section 259, "to take acknowledgments and proofs of deeds, mortgages," etc., was not affected by the subsequent enactment of the amendment to Civil Code, section 1181, that "the proof or acknowledgment of any instrument may be made" before certain named officers, omitting court commissioners.—Malone v. Bosch, 104 Cal. 680, 38 Pac. 516.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 623; 13 Cent. Dig., cols. 1803-1806, §§ 2, 6.

§ 2. Civil Jurisdiction and Authority.

[a] Under Laws of 1863, page 338, section 40 (Code Civ. Proc., sec. 259), a court commissioner has no jurisdiction to hear a motion or make an order in a matter not referred to him by the court.—(1865) Stone v. Bunker Hill Copper etc. Co., 28 Cal. 497; (1880) Quiggle v. Trumbo, 56 Cal. 626.

[b] A court commissioner, as such, has no power to try any issue of fact raised by the pleadings.—Jackson v. Puget Sound Lumber Co., 123 Cal. 97, 55 Pac. 788.

[c] The powers of court commissioners as prescribed by Code of Civil Procedure, section 259, cannot be enlarged by consent.—Jackson v. Puget Sound Lumber Co., 52 Pac. 838.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 623-625; 13 Cent. Dig., cols. 1803-1809, §§ 2, 7, 8.

COURT INTERPRETER.

Appointment of in criminal cases. See Courts, § 54; Criminal Law, § 328.

COURT OF APPEALS.

District court of appeals. See Courts, § 114.

COURT OFFICERS.

See Courts, §§ 51-55.
Judicial notice of. See Evidence, § 35.

COURT OF SESSIONS.

See Courts, § 149.

COURTROOM.

Right of judge to suitable room in courthouse. See Judges, § 15.

Duty of city to provide suitable quarters for justices of the peace. See Justices of the Peace, § 14.
Place of holding courts of justices of the peace. See Justices of the Peace, § 50.

COURTROOM CLERKS.

Salary of. See Courts, § 52.

COURT RULES.

See Courts, § 63 et seq.

COURTS.

Include the judicial department of government; nature and scope of judicial power in general; establishment, organization, and conduct of business of courts; ministerial officers attached to them; jurisdiction and procedure peculiar to particular courts and concurrent and conflicting jurisdiction and comity between courts.

I. NATURE, EXTENT AND EXERCISE OF JURISDICTION IN GENERAL, §§ 1-41.
II. ESTABLISHMENT, ORGANIZATION AND PROCEDURE IN GENERAL, §§ 42-104.
A. Creation, Constitution and Officers, §§ 42-55.
B. Terms, Vacations, and Place and Time of Holding Court, §§ 56-66.
C. Rules of Court and Conduct of Business, §§ 67-104.
III. SUPREME COURT AND DISTRICT COURT OF APPEALS, §§ 105-114.
IV. SUPERIOR COURT, §§ 115-131.
V. PROBATE COURT, §§ 132-139.
VI. SPECIAL, INFERIOR AND OBSOLETE, §§ 140-149.
VII. FEDERAL COURTS, §§ 150-160.
VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY, §§ 161-192.

Objections to jurisdiction as ground for abatement of suit. See Abatement and Revival, § 1.
Courts empowered to naturalize aliens. See Aliens, §§ 38-41.
Power to appoint amicus curiae. See Amicus Curiae, § 1.
Control of courts over rights of members of unincorporated associations. See Associations, § 6.
Right of expelled member of beneficial association to resort to courts. See Beneficial Associations, § 13.
Encroachment on powers of courts by executive department of state. See Constitutional Law, § 95.
Decisions of courts impairing obligation of contract. See Constitutional Law, § 152.
Delegation of legislative power to courts. See Constitutional Law, § 76.
Encroachment by legislature on powers of courts. See Constitutional Law, §§ 53-68.
Judicial powers and functions in general. See Constitutional Law, §§ 83-91.

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Establishment of supreme court commission as encroachment on judiciary. See Constitutional Law, § 63.
Refusal of courts to enforce illegal contracts. See Contracts, § 97.
Control of courts over county boards. See Counties, § 23.
Ministerial powers and functions of court commissioners. See Court Commissioners, § 1.
Civil jurisdiction of court commissioners. See Court Commissioners, § 2.
Criminal jurisdiction. See Criminal Law, IV.
Deposits in court. See Deposits in Court.
Estoppel in judicial proceedings. See Estoppel, §§ 1-7.
Judicial notice of rules of court. See Evidence, § 37.
Judicial notice of existence and organization of courts. See Evidence, §§ 32-36.
Judicial notice of proceedings and records of courts. See Evidence, § 38.
Court records as evidence. See Evidence, §§ 284-288, 304.
Nonjudicial days. See Holidays, § 1.
Duty of court to impose death sentence on one convicted of murder in first degree. See Homicide, § 222.
Jurisdiction of state courts over prosecution of Indians. See Indians, § 2.
Description of court in indictment. See Indictment and Information, § 19.
Term at which indictment must be filed. See Indictment and Information, § 10.
Reservation of day in court to infant wishing to attack judgment on attaining majority. See Infants, § 54.
Necessity for revenue stamp on judicial process. See Internal Revenue, § 3.
Duty of judge to decide case in ninety days. See Judges, § 18.
Appointment, qualifications, powers and liabilities of judges. See Judges.
Conclusiveness of judgments of courts of record. See Judgment, XIII, XIV.
Removal of causes from courts of justices of the peace to courts of record. See Justices of the Peace, §§ 58-60.
Mayor's court as justice court. See Justices of the Peace, § 3.
Proceedings of courts subject to control by writ of prohibition. See Prohibition, §§ 6-11.
Want, excess or abuse of jurisdiction constituting ground for issuance of writ of prohibition. See Prohibition, §§ 17-25.
Mandamus to compel holding of court. See Mandamus, § 24.
Control over cities. See Municipal Corporations, § 22.
Court to which application for new trial must be made. See New Trial, § 67.
Supervision of receivers. See Receivers, § 12.
Supervision of religious societies. See Religious Societies, § 6.
Removal of causes from state to federal courts. See Removal of Causes.
Validity of special laws affecting courts and court officers. See Statutes, § 32.
Retroactive operation of laws relating to procedure. See Statutes, § 104.
Authority and duty in construing statutes. See Statutes, § 66.
Validity of judicial proceedings on Sunday. See Sunday, § 3.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

JURISDICTION DEFINED, § 1.
"WITHIN JURISDICTION," DEFINED, § 2.
JURISDICTION OF SUBJECT MATTER—NECESSITY FOR ACTUAL CONTROVERSY, FICTITIOUS OR MOOT QUESTIONS, § 3.
—— ABATED NUISANCE, § 4.
—— PROCEEDINGS TO CONFIRM IRRIGATION BONDS, § 5.
—— PLACE OF ACCRUAL OF CAUSE OF ACTION, § 6.
—— PROPERTY LOCATED OUTSIDE TERRITORIAL LIMITS OF JURISDICTION, § 7.
—— SITUATED IN ANOTHER STATE, § 8.
—— ACTION TO RESCIND CONTRACT MADE HERE FOR PURCHASE OF LAND IN MEXICO, § 9.
JURISDICTION OF THE PERSON—ACTIONS BETWEEN RESIDENT ALIENS, § 10.
—— ACTIONS QUASI IN REM, § 11.
MODE OF ACQUIRING JURISDICTION, IN GENERAL, § 12.
—— CONSTRUCTIVE SERVICE OF PROCESS BY PUBLICATION, § 13.
—— SEIZURE OF SUBJECT MATTER, § 14.
—— EFFECT OF IRREGULARITY IN ACQUIRING JURISDICTION, § 15.
CONSENT AS CONFERRING JURISDICTION, § 16.
—— PARTICULAR COURTS, § 17.
—— JURISDICTION OF SUBJECT MATTER, § 18.
—— JURISDICTION OF THE PERSON, § 19.
—— NONRESIDENTS, § 20.
SCOPE AND EXTENT OF JURISDICTION, § 21.
——— INCLUDES MEANS OF ENFORCING, § 22.
—— TERRITORIAL EXTENT, § 23.
EXERCISE OF JURISDICTION OUTSIDE OF TERRITORIAL LIMITS, § 24.
ENTIRETY OF JURISDICTION, § 25.
POWER OF COURT WITH REGARD TO MATTERS DISPOSED OF BY PREDECESSOR, § 26.
POWER OF LEGISLATURE TO CONFER, ENLARGE OR ABRIDGE JURISDICTION, § 27.
—— POWER TO TAKE JURISDICTION FROM ONE COURT AND GIVE IT TO ANOTHER, § 28.
—— POWER TO CONFER EXTRATERRITORIAL JURISDICTION, § 29.
—— POWER OF CONGRESS OVER STATE COURTS, § 30.
DISCRETION OF COURT AS TO EXERCISE OF JURISDICTION, § 31.
—— SENDING SUITOR TO COURT OF CONCURRENT JURISDICTION, § 32.
LOSS OR DIVESTITURE OF JURISDICTION—LOSS OF JURISDICTION, IN GENERAL, § 33.
—— CHANGE OF POSITION OF JUDGE, § 34.
MODE OF EXERCISING JURISDICTION, § 35.
NECESSITY THAT RECORD SHOW JURISDICTION, § 36.
PRESUMPTION AS TO JURISDICTION, § 37.
OBJECTIONS TO JURISDICTION, § 38.
WAIVER OF OBJECTION, § 39.
DETERMINATION OF QUESTIONS OF JURISDICTION, § 40.
ACTS IN EXCESS OF JURISDICTION, § 41.

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Objections to jurisdiction as ground for abatement of action. See Abatement and Removal, § 1.
Acquiring personal jurisdiction over absent or concealed defendant. See Absentees, § 3.
Admiralty jurisdiction. See Admiralty, § 1.
Jurisdiction of adoption proceedings. See Adoption, § 10.
Appellate jurisdiction in civil cases. See Appeal and Error, §§ 22-29.
Right to raise jurisdictional questions for first time on appeal. See Appeal and Error, § 252.
Transfer of jurisdiction by appeal. See Appeal and Error, § 509.
Dismissal of appeal for want of jurisdiction. See Appeal and Error, §§ 983, 997.
Necessity that record on appeal show jurisdiction. See Appeal and Error, § 578.
Jurisdiction of appellate court after remand. See Appeal and Error, § 1487 et seq.
Appearance as conferring jurisdiction. See Appearance, §§ 24-30.
Jurisdiction to issue writ of assistance. See Assistance, Writ of, § 6.
Jurisdiction to review expulsion of members of voluntary associations. See Associations, § 9.
Jurisdiction to admit attorneys. See Attorney and Client, § 8.
Jurisdiction to admit to bail. See Bail, § 13.
Jurisdiction of boundary suits. See Boundaries, § 39.
Jurisdiction to issue writs of certiorari or review. See Certiorari, § 30.
Power to determine constitutional questions. See Constitutional Law, § 37.
Constitutional powers of courts and relation of courts to executive and legislative department of state. See Constitutional Law, §§ 83-91.
Power to grant continuance. See Continuance, § 2.
Jurisdiction of state court over insolvent foreign corporation. See Corporations, § 493.
Jurisdiction of proceedings to dissolve corporations. See Corporations, § 468.
Jurisdiction of actions by or against corporations. See Corporations, § 416.
Jurisdiction to tax costs. See Costs, § 49.
Jurisdiction of court commissioners. See Court Commissioners, § 2.
Criminal jurisdiction of courts of all classes. See Criminal Law, IV.
Jurisdiction after remand of criminal case. See Criminal Law, §§ 810, 811.
Appellate jurisdiction in criminal cases. See Criminal Law, §§ 608-610.
Power to sentence convict. See Criminal Law, § 578.
Jurisdiction of divorce cases. See Divorce, IV, A.
Jurisdiction of election contest. See Elections, §§ 99-101.
Jurisdiction of condemnation proceedings. See Eminent Domain, § 93.
Equity jurisdiction. See Equity I, A.
Jurisdiction of actions by or against executors and administrators. See Executors and Administrators, § 470.
Jurisdiction of forcible entry suits. See Forcible Entry and Detainer, §§ 55-57.
Jurisdiction of action for fraud. See Fraud, § 34.
Jurisdiction of actions to set aside fraudulent conveyances. See Fraudulent Conveyances, § 12.
Jurisdiction to appoint guardians. See Guardian and Ward, § 9.
Jurisdiction of actions by or against guardians. See Guardian and Ward, § 81.
Want or excess of jurisdiction as ground for relief by writ of habeas corpus. See Habeas Corpus, §§ 10, 11.
Jurisdiction to set apart probate homestead. See Homestead, § 148.
Jurisdiction over infants. See Infants, § 6.
Jurisdiction of injunction suit. See Injunction, § 74.
Jurisdiction of insanity inquisition. See Insane Persons, § 5.
Power of court to appoint assignee in insolvency. See Insolvency, § 39.
Jurisdiction in insolvency proceedings. See Insolvency, § 6.
Jurisdiction of application to open or vacate judgment. See Judgment, § 263.
Jurisdiction of motion to set aside default. See Judgment, § 109.
Civil jurisdiction of courts of justices of the peace. See Justices of the Peace, §§ 21-48.
Jurisdiction of appeals from courts of justices of the peace. See Justices of the Peace, § 103.
Jurisdiction of actions between partners. See Partnership, § 47.
Jurisdiction of action to recover statutory penalty. See Penalties, § 6.
Jurisdiction to issue writ of prohibition. See Prohibition, § 29.
Determination of claims under Spanish or Mexican land grants by civil courts. See Public Lands, §§ 198, 199.
Jurisdiction of mandamus proceedings. See Mandamus, § 63.
Jurisdiction of proceedings to annul marriage. See Marriage, § 25.
Jurisdiction of action to enforce mechanics' lien. See Mechanics' Liens, § 75.
Jurisdiction of mortgage foreclosure suit. See Mortgages, § 201.
Power to control acts of cities. See Municipal Corporations, § 22.
Jurisdiction of notaries. See Notaries, § 1.
Jurisdiction of action to abate or enjoin nuisances. See Nuisance, § 12.
Jurisdiction of action to quiet title. See Quieting Title, § 20.
Jurisdiction of quo warranto proceedings. See Quo Warranto, § 8.
Jurisdiction of actions for specific performance. See Specific Performance, § 38.
Jurisdiction to grant writs of supersedeas. See Supersedeas, § 3.
Jurisdiction of action to enforce vendor's lien. See Vendor and Purchaser, § 117.
Jurisdiction after change of venue. See Venue, § 48.
Power to change venue in civil cases. See Venue, § 15.
Jurisdiction of probate of will and proceedings relating thereto. See Wills, § 106.
Jurisdiction of action to construe will. See Wills, § 308.

§ 1. Jurisdiction Defined.

[a] "Jurisdiction is the power to hear and determine"; but after the determination of a matter over which the court has this cognizance it cannot be contended that a law, fixing the mode by which effect is to be given to a lawful judgment, is not a mere subject

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of municipal regulation, which has nothing to do with a question of jurisdiction.—Hickman v. O'Neal, 10 Cal. 292.

[b] General definition of jurisdiction is power to hear and determine, and, as applied to a particular claim or controversy, is power to hear and determine that controversy.—Central Pac. R. R. Co. v. Placer Co., 43 Cal. 365.

[c] Jurisdiction is the power to hear and determine, or to hear without determining, or to determine without hearing.—Bennett, Ex parte, 44 Cal. 84.

[d] Jurisdiction is the power to hear and determine, and does not depend upon the rightfulness of the decision.—Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565.

[e] Jurisdiction defined.—Crew v. Pratt, 119 Cal. 148, 149, 51 Pac. 38.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 659-661, § 682; 13 Cent. Dig., cols. 1826-1830, §§ 1-9; cols. 1918-1933, §§ 91-106.

§ 2. "Within the Jurisdiction" Defined.

[a] Within the jurisdiction of the court means within the state.—Stevens v. Irwin, 12 Cal. 306.

§ 3. Jurisdiction of Subject Matter—Necessity for Actual Controversy, Fictitious or Moot Questions.

[a] The supreme court, on an application for a writ of mandate, will not review the action of the district court upon a question not presented in good faith in due course of litigation, but only in order to gratify the curiosity of counsel, or of a party who procured it to be raised against himself by others having no real interest in the contest. People v. Pratt, 30 Cal. 223.

[b] Parties cannot, by agreeing upon a statement of facts, invoke the aid of a court for the decision of what, to them, or either of them, is merely a moot question of law; and courts should not render judgments which cannot be enforced by any process known to the law.—Johnson v. Malloy, 74 Cal. 430, 16 Pac. 228.

§ 4. —— —— Abated Nuisance.

[a] If nuisance was abated before commencement suit, county court had no jurisdiction for any purpose.—Grigsby v. Clearlake, 40 Cal. 396.

§ 5. —— —— Proceedings to Confirm Irrigation Bonds.

[a] Statutes of 1889, page 212, authorizing the directors of an irrigation district to petition the superior court to confirm their proceedings in the issuance of bonds of the district, is not, because it authorizes the court to determine the right of the parties interested in the bonds before any controversy as to such right, in conflict with Constitution, article 6, section 5, fixing the jurisdiction of the superior court.—Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769.

§ 6. —— Place of Accrual of Cause of Action.

[a] Our courts have jurisdiction over a contract for the carriage of goods over the Isthmus to New York made here, no matter where the breach of it took place.—Ord v. The Uncle Sam, 13 Cal. 369.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 11 Cyc. 662; 13 Cent. Dig., cols. 1834-1838, §§ 13-15; cols. 1846, 1847, § 28.

§ 7. —— Property Located Outside Territorial Limits of Jurisdiction.

[a] Superior court of San Francisco had no jurisdiction affecting real estate outside of city limits.—Watts v. White, 13 Cal. 321.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 11 Cyc. 669, 670; 13 Cent. Dig., cols. 1861-1877, §§ 46-68.

§ 8. —— Lands Situated in Another State.

[a] Where a court of equity has acquired jurisdiction of the parties, it may declare void a deed to lands located in another state, and compel a reconveyance.—McGee v. Sweeney, 84 Cal. 100, 23 Pac. 1117.

§ 9. —— Action to Rescind Contract Made Here for Purchase of Land in Mexico.

[a] In action to rescind contract for sale of mining property in Mexico for fraud, offer to restore title to vendors does not deprive court of jurisdiction on ground that action involves title to land in foreign country.—Loaiza v. Superior Court, 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376.

[b] Courts of this state have jurisdiction of action to rescind contract made here for purchase of land in Mexico, and to cancel notes and mortgage given therefor, and order so much of the money and property as remains in this jurisdiction to be delivered up.—Loaiza v. Superior Court, 85 Cal. 22-27, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376.

FOR AUTHORITIES FROM OTHER STATES:

Jurisdiction of equity over land and property in a foreign jurisdiction: 67 Am. Dec. 95, note.

Jurisdiction to enforce contracts made beyond the limits of the state: 55 Am. St. Rep. 774, note.

Jurisdiction as dependent on sovereignty of states: 58 Am. Dec. 692, note.

Jurisdiction of transitory causes of action: 59 Am. St. Rep. 869, note.

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Jurisdiction to enforce contracts made beyond the limits of the state: 55 Am. St. Rep. 774, note.

Jurisdiction to enforce causes of action created by the statutes of another state: 14 Am. St. Rep. 350, note.

§ 10. Jurisdiction of the Person—Actions Between Resident Aliens.

[a] State courts have jurisdiction of suit between resident aliens for tort committed in a foreign country.—Roberts v. Dunsmuir, 75 Cal. 204, 16 Pac. 782.

FOR AUTHORITIES FROM OTHER STATES:

Jurisdiction over foreigners and their property: 76 Am. Dec. 665, note.

Jurisdiction of courts over absent citizens: 53 Am. St. Rep. 179, note.

Jurisdiction to quiet title against nonresidents: 1 Am. St. Rep. 264, note.

Jurisdiction of courts over citizens of another state or country: 6 Am. St. Rep. 179, note.

Jurisdiction over foreigners and their property: 76 Am. Dec. 665, note.

Jurisdiction over unknown owners: 87 Am. St. Rep. 358, note. See, also, 11 Cyc. 666-668; 13 Cent. Dig., cols. 1848-1860, §§ 32-45.

§ 11. —— Actions Quasi in Rem.

[a] Actions quasi in rem require jurisdiction of person.—Fresno Nat. Bank v. Superior Court, 83 Cal. 500, 24 Pac. 157.

§ 12. Mode of Acquiring Jurisdiction in General.

[a] In order to give a court jurisdiction of the subject matter, so as to enable it to issue orders of process, there must be a suit instituted in the court.—Ex parte Cohen, 6 Cal. 318.

[b] There are two modes of acquiring jurisdiction of the person: (1) by personal service of the summons and copy of complaint; and (2) by constructive service, or by what is commonly designated publication of summons.—Hahn v. Kelley, 34 Cal. 391, 94 Am. Dec. 742.

[c] A court cannot, by rendering a decision in a cause, acquire jurisdiction of the subject matter denied it by the constitution.—Rogers v. Cady, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.

[d] Court acquires jurisdiction upon service of its process and does not lose it by failing to make proof of such service a matter of record.—Hibernia v. Matthai, 116 Cal. 426, 48 Pac. 370.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 670-673; 13 Cent. Dig., cols. 1877-1890, §§ 69-74; cols. 1947-1949, §§ 129-133.

§ 13. —— Constructive Service of Process by Publication.

[a] Superior court of city of San Francisco could acquire jurisdiction of the person of a defendant by publication of a summons.—McCauley v. Fulton, 44 Cal. 355.

[b] In proceedings in rem publication is equal to personal service of summons on nonresident.—Loaiza v. Superior Court, 85 Cal. 35, 20 Am. St. Rep. 197, 24 Pac. 707.

[c] Service by publication on nonresident is ineffectual in suit to determine personal rights.—Loaiza v. Superior Court, 85 Cal. 34, 20 Am. St. Rep. 197, 24 Pac. 707.

[d] Court acquires jurisdiction over property of resident of foreign country by publication without personal service or appearance of defendant here.—Loaiza v. Superior Court, 85 Cal. 28-33, 20 Am. St. Rep. 197, 24 Pac. 707.

[e] By the appointment of a receiver to take charge of property specifically described in the complaint in connection with the service of summons by publication the court acquires jurisdiction to render a judgment in rem affecting such property, notwithstanding the absence of the owner from the state, and the impropriety of rendering a personal judgment against him.—Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37.

[f] The jurisdiction of courts of general jurisdiction as to persons extends in a general sense to persons within their territorial limits who can be reached by their process, but as to proceedings in rem, where the property or subject of the action is within the territorial limits of the state, such courts may, by statutory provisions, procure jurisdiction of the person of a nonresident by constructive service of process.—McHatton v. Rhodes, 143 Cal. 275, 76 Pac. 1036.

§ 14. —— Seizure of Subject Matter.

[a] Rule that requires seizure of thing to give jurisdiction in actions in rem is altered by our statute. Service on a person standing in particular relation to the thing confers jurisdiction on the court from which the process issues.—Averill v. Steamer Hartford, 2 Cal. 308.

[b] Unauthorized writ of attachment does not confer jurisdiction over property of nonresident served by publication.—Mudge v. Steinhart, 78 Cal. 39, 12 Am. St. Rep. 17, 20 Pac. 147.

FOR AUTHORITIES FROM OTHER STATES:

Jurisdiction dependent on the attachment of property: 76 Am. St. Rep. 800, note.

§ 15. —— Effect of Irregularity in Acquiring Jurisdiction.

[a] There is a very decided distinction between want of jurisdiction and irregularity in procuring jurisdiction.—Whitwell v. Barbier, 7 Cal. 54.

[b] Irregularity in procuring jurisdiction is a want of jurisdiction in an inferior court,

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or when jurisdiction is special and statutory. Whitwell v. Barbier, 7 Cal. 64.

FOR AUTHORITIES FROM OTHER STATES:

Decoying party within the state to be sued or served: 16 Am. Dec. 723, note.

§ 16. Consent as Conferring Jurisdiction.

[a] A court cannot properly, even upon consent of parties, pass upon questions not raised by the written allegations of the pleadings.—Biddle Boggs v. Merced Min. Co., 14 Cal. 279.

[b] Parties cannot by stipulation confer jurisdiction on the district court to try a case in a certain county, after the court had adjourned therein, and its term had commenced in another county in the same district.—Bates v. Gage, 40 Cal. 183.

[c] Neither the silence nor consent of the parties justifies a court in retaining jurisdiction of an action on a contract void as against public policy.—Ball v. Putnam, 123 Cal. 134, 55 Pac. 773.

[d] The lack of jurisdiction under the constitution cannot be waived by the action of one or both parties; nor can they vest a court with a jurisdiction which it does not possess under the constitution.—King v. Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 673-676; 13 Cent. Dig., cols. 1891-1903, §§ 75-81.

§ 17. —— Particular Courts.

[a] The jurisdiction of an alcalde cannot be extended or enlarged by consent of parties.—Ladd v. Stevenson, 1 Cal. 18.

[b] Consent of parties cannot give a justice jurisdiction beyond two hundred dollars.—Feillett v. Engler, 8 Cal. 76.

[c] The municipal court of appeals of San Francisco could not acquire jurisdiction of a case except by transfer from the county court, and, in the absence of such transfer, the voluntary appearance could not confer jurisdiction.—Descalso v. Municipal Court of San Francisco, 60 Cal. 296.

§ 18. —— Jurisdiction of Subject Matter.

[a] Jurisdiction of subject matter cannot be given or enlarged by consent of parties.—Ladd v. Stevenson, 1 Cal. 21.

[b] Where the jurisdiction of the court, as to the subject matter, has been limited by the constitution or by statute, the consent of parties cannot confer jurisdiction.—Gray v. Hawes, 8 Cal. 562.

[c] Jurisdiction of the subject matter of an action cannot be conferred by consent of the parties.—Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 673-676; 13 Cent. Dig., cols. 1897-1901, §§ 76, 77.

§ 19. —— Jurisdiction of the Person.

[a] When limit of court's jurisdiction regards certain persons, they may, if competent, waive their privilege, and this will give the court jurisdiction.—Gray v. Hawes, 8 Cal. 562.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 676; 13 Cent. Dig., cols. 1901-1903, §§ 79, 80.

§ 20. —— Nonresidents.

[a] By becoming suitors here nonresidents voluntarily submit to jurisdiction of court and may be compelled to comply with conditions attached to relief awarded.—Loaiza v. Superior Court, 85 Cal. 23, 20 Am. St. Rep. 197, 24 Pac. 707.

§ 21. Scope and Extent of Jurisdiction.

[a] State court has jurisdiction of action of trespass against a United States marshal.—Hirsch v. Rand, 39 Cal. 315.

[b] Where power is specially conferred upon court of general jurisdiction to determine particular question, this includes power to take evidence to aid in such determination.—People v. Chew Lan Ong, 141 Cal. 552, 553, 99 Am. St. Rep. 88, 75 Pac. 186.

[c] Court has power of its own motion to declare void that which clearly appears to be void on face of records.—Winrod v. Wolters, 141 Cal. 403, 74 Pac. 1037.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 677; 13 Cent. Dig., cols. 1903-1917, §§ 82-90.

§ 22. —— Includes Means of Enforcing.

[a] The power which the judiciary possesses to declare a law unconstitutional comprehends the necessary authority of carrying its judgment into effect.—Nougues v. Douglass, 7 Cal. 65.

[b] Court can make all necessary orders respecting process issued or to be issued on its judgments.—Clark v. Sawyer, 48 Cal. 133.

[c] Section 187, Code of Civil Procedure, is inapplicable to case over which court is given no jurisdiction, such as consideration of purely legislative questions.—Tulare County v. Kings County, 117 Cal. 203, 49 Pac. 8.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 677-680; 13 Cent. Dig., cols. 1906-1916, §§ 84-87.

§ 23. —— Territorial Extent.

[a] The superior court may issue a writ of mandamus to run out of the county, or to be executed out of the county in which the court is held, and there is nothing in section

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5 of article 6 of the constitution restricting the jurisdiction of the court in this particular to the county in which it is held.—Kings County v. Johnson, 104 Cal. 198, 39 Pac. 870.

§ 24. Exercise of Jurisdiction Outside of Territorial Limits.

[a] A judgment on demurrer rendered in the district court of the fifteenth judicial district of Contra Costa county, in open court, is valid, notwithstanding the order sustaining the demurrer was made in San Francisco, and entered on the minutes during vacation.—Agard v. Valencia, 39 Cal. 292.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 684-690; 13 Cent. Dig., cols. 1937-1939, §§ 112-118.

§ 25. Entirety of Jurisdiction.

[a] Where court has general jurisdiction of subject it has power to make a full disposition of the matter, and conclude the litigation respecting it; or, in other words, the power to pass upon the question involved carries with it, as a general rule, the power to make the decision effectual for the purpose for which it was made.—Kennedy v. Hamer, 19 Cal. 374.

[b] Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court.—Hibernia Sav. etc. Soc. v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714.

§ 26. Power of Court with Regard to Matters Disposed of by Predecessor.

[a] The present supreme court will not set aside an order of the late supreme court, adjudging that no appeal had been taken in a case.—Reed v. Allison, 54 Cal. 489.

§ 27. Power of Legislature to Confer, Enlarge or Abridge Jurisdiction.

See, also, post, §§ 44, 119, 152.

[a] Where the jurisdiction of a court is defined by the constitution, no statute can deprive it of its powers.—Hicks v. Bell, 3 Cal. 219.

[b] The district courts of this state have the same control over the persons of minors, as well as their estates, that the courts of chancery in England possess. This jurisdiction is conferred by the constitution, and cannot be devested by any legislative enactment.—Wilson v. Roach, 4 Cal. 362.

[c] The cognizance of all cases, where the sum involved exceeds two hundred dollars, is by the constitution distributed between the supreme, district, county, and probate courts, and the court of sessions; and nothing is left by the constitution for the legislature to do in granting or defining jurisdiction.—Zander v. Coe, 5 Cal. 230.

[d] So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court is unconstitutional and void, as the effect of the act would be to indirectly confer appellate jurisdiction upon the district court.—Deck v. Gherke, 6 Cal. 666.

[e] The legislature has not the power to impair or take away the appellate jurisdiction of this court, but it has the power to prescribe the mode in which appeals may be taken.—Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

[f] Constitutional power of courts cannot be taken away or impaired by legislature.—Adams v. Woods, 8 Cal. 315.

[g] Legislature could not, under constitution, confer power to issue writs of certiorari on supreme court.—Miliken v. Huber, 21 Cal. 166, 169.

[h] Act of March 31, 1870, establishing the municipal criminal court of San Francisco without providing for an appeal therefrom to the county court, is not repugnant to Constitution, article 6, section 8, giving county courts appellate jurisdiction over inferior courts, because, if the constitutional provision is self-executing, an appeal lies without any statute authorizing it, and, if not self-executing, it merely confers on the county court power to exercise a jurisdiction when the legislature shall provide means for doing so, but is in no sense a guaranty of the right of such appeal.—People v. Nyland, 41 Cal. 129.

[i] Legislature may confer jurisdiction of "special cases" upon the district courts and the county courts.—Spencer Creek Water Co. v. Vallejo, 48 Cal. 70.

[j] Jurisdiction could not be conferred on county judge as distinguished from county court.—Spencer Creek Water Co. v. Vallejo, 48 Cal. 70.

[k] Jurisdiction of supreme court is derived from constitution and can be neither enlarged nor abridged by legislature.—Jessup, In re, 81 Cal. 463, 22 Pac. 742.

[l] Legislature has power to regulate, but not power to take away or defeat exercise of jurisdiction.—Jessup, In re, 81 Cal. 470, 22 Pac. 742.

[m] Jurisdiction conferred by constitution cannot be taken away or abridged by legislature.—People v. Bingham, 82 Cal. 242, 22 Pac. 1039.

[n] Manner of obtaining jurisdiction and procedure for its exercise are matters of state legislation.—Perkins v. Wakeham, 86 Cal. 582, 21 Am. St. Rep. 67, 25 Pac. 51.

§ 28. Power to Take Jurisdiction from One Court and Give It to Another.

[a] The cognizance of all cases where the sum involved exceeds two hundred dollars is distributed to the supreme, district, probate, and county courts, and the court of sessions, by the constitution itself, and nothing is left for the legislature to do, in granting or defining jurisdiction; and it cannot deprive those courts of their jurisdiction in such cases, and

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confer it upon justices of the peace.—Zander v. Coe, 5 Cal. 230.

§ 29. —— Power to Confer Extraterritorial Jurisdiction.

[a] Act extending process of municipal court beyond territorial limits held constitutional.—Hickman v. O'Neal, 10 Cal. 292.

§ 30. —— Power of Congress Over State Courts.

[a] Congress has no power to confer jurisdiction on state courts.—Knowles, Ex parte, 5 Cal. 302.

§ 31. Discretion of Court as to Exercise of Jurisdiction.

[a] The superior court has no power or discretion to refuse to try an action to recover the mesne profits of land until the conclusion of an action in the federal court, brought by the United States, to cancel the patent under which plaintiff claimed title.—Dunphy v. Belden, 57 Cal. 427.

[b] Court cannot by holding without reason that it has no jurisdiction, devest itself of jurisdiction.—Temple v. Superior Court, 70 Cal. 212, 11 Pac. 699.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 683; 13 Cent. Dig., cols. 1934-1937, §§ 107-111.

§ 32. —— Sending Suitor to Court of Concurrent Jurisdiction.

[a] Upon an application to the supreme court for a writ of mandate to compel the board of supervisors of a county to count the votes of certain precincts cast at an election for the removal of a county seat, held, that the facts that the district court of the county would not hold a term for two months, that delay in making improvements at the county seat would be an injury, that it was the practice of the supreme court to give people's cases the precedence, that nearly all the people of the county were disqualified as jurors, and that the attorney general resided at the capital of the state, and could not well attend court at the county, were not sufficient reasons why the application for the writ should not be made to the district court of the county, instead of to the supreme court.—People v. Kern County Supervisors, 47 Cal. 205.

§ 33. Loss or Divestiture of Jurisdiction—Loss of Jurisdiction in General.

[a] An action cannot be continued by the court to decide conflicting claims of the defendants, after the plaintiffs have withdrawn.—Ryan v. Tomlinson, 31 Cal. 11.

[b] Court does not lose jurisdiction by creation of new county including property in suit.—Tolman v. Smith, 85 Cal. 281, 24 Pac. 743.

[c] Constitution, article 6, section 5, provides that an action for the enforcement of a lien on real estate may be commenced in the county in which the real estate, or any part thereof, is situated; and by Code of Civil Procedure, section 726, there can be but one action for the recovery of a debt secured by mortgage. Plaintiff, having a lien on two parcels of land, one situated in F. county and in another county, sued F. county to enforce the lien on the land therein, and judgment was erroneously rendered for a sale of that land, but on a motion for a new trial the judgment was set aside. Held, that the court did not lose jurisdiction to render a judgment directing a sale of the land in both counties to satisfy all liens thereon by reason of the erroneous judgment, which had been vacated after the ascertainment of error.—Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 690, 691; 13 Cent. Dig., cols. 1939-1947, §§ 119-128.

§ 34. —— Change of Position of Judge.

[a] A judge who begins to hear a case, and is appointed judge of a new court which supersedes the old, may continue the hearing without a resubmission of the case.—Seale v. Ford, 29 Cal. 104.

§ 35. Mode of Exercising Jurisdiction.

[a] Where a court has jurisdiction both of the parties and the subject matter, the manner of exercising that jurisdiction cannot make void the action of the court.—Cloud v. Eldorado County, 12 Cal. 128, 73 Am. Dec. 526.

[b] Under the present constitution, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts are the acts of the "court."—Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

§ 36. Necessity that Record Show Jurisdiction.

[a] Every fact giving jurisdiction of the person to an inferior court must affirmatively appear.—Whitwell v. Barbier, 7 Cal. 54.

[b] Want of jurisdiction appearing anywhere in the record is fatal.—Watts v. White, 13 Cal. 321.

[c] When the jurisdiction of an inferior court or tribunal depends upon facts to be ascertained by such tribunal, its record must affirmatively show the existence and determination of such facts.—Bedell v. Scott, 126 Cal. 675, 59 Pac. 210.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 683, 695-697, 855; 13 Cent. Dig., cols. 1949-1960, §§ 134-139.

§ 37. Presumption as to Jurisdiction.

[a] The presumption in favor of the judgment of a court of general jurisdiction is

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overthrown when the record of the entire case discloses a want of jurisdiction.—Gray v. Hawes, 8 Cal. 562.

[b] District courts are courts of general jurisdiction, and regularity of their proceedings is presumed. It rests with a party seeking to impeach them to show affirmatively the irregularity of acts or omissions which affect the validity of their judgments, especially after the jurisdiction of the person is once shown. People v. Robinson, 17 Cal. 363.

[c] Under our statute (Acts 1858, p. 95), the same presumptions as to jurisdiction attach to the proceedings of probate courts, within the jurisdiction conferred on them by law, as in the case of district courts.—Irwin v. Scriber, 18 Cal. 499.

[d] If it does not appear affirmatively upon the face of a record of a court of general jurisdiction that the court had jurisdiction of the defendant, that fact will be presumed, unless the record shows affirmatively that no jurisdiction was acquired.—Carpentier v. City of Oakland, 30 Cal. 439.

[e] Jurisdiction will generally be presumed in the case of superior courts.—Forbes v. Hyde, 31 Cal. 342.

[f] If a judgment is rendered against a defendant by a court of general jurisdiction, it will be presumed that the court acquired jurisdiction of the person, unless the contrary appears affirmatively in the record.—Sharp v. Daughney, 33 Cal. 505.

[g] In the absence of anything in the record to the contrary, jurisdiction will be presumed as to courts of general jurisdiction.—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Mahoney v. Middleton, 41 Cal. 41.

[h] Jurisdiction of person will not be presumed in case of publication against a nonresident.—Belcher v. Chambers, 53 Cal. 635.

[i] Although the exercise of jurisdiction is presumed rightful, yet if it appears from the records of the court in any matter that it had not acquired jurisdiction, either of the subject matter or of the parties, this presumption is destroyed. It cannot exercise jurisdiction until it has acquired it in the mode prescribed by statute.—Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

[j] Jurisdiction does not exist by virtue of mere decision of court that it has jurisdiction, but presumption of jurisdiction exists, because court is authorized to determine question of jurisdiction in same mode as any other question of fact upon which its judgment is to rest, and its decision thereon is presumed to have been made upon evidence sufficient to sustain it; and this presumption does not depend upon the existence of any record of the decision, but the necessity for the presumption arises only when the record is silent.—Estate of Eichhoff, 101 Cal. 600, 36 Pac. 11.

[k] The presumption which the law implies in support of the judgments of courts of general jurisdiction only arises where the record is silent, and cannot apply where it is not silent.—Latta v. Tutton, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844.

[l] As a general rule, with a few exceptions, jurisdiction of the person of the defendant in a court of record is to be conclusively presumed, if the contrary does not appear from the record.—Bennett v. Wilson, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 880.

[m] In the absence of a showing to the contrary, everything is presumed in favor of jurisdiction of the court.—Grannis v. Superior Court of City and County of San Francisco, 143 Cal. 630, 77 Pac. 647.

§ 38. Objections to Jurisdiction.

Objections to jurisdiction as ground for abatement of action. See Abatement and Revival, § 1.
Mode of making, and who may make, objection to jurisdiction. See Abatement and Revival, §§ 5, 6.

[a] In an action in a state court against a foreign consul, the want of jurisdiction may be taken advantage of at any stage of the proceedings.—Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512.

§ 39. Waiver of Objections.

[a] Where the defendants in an action in a justice's court, which is personal in its nature, move for a dismissal on the ground that the court has no jurisdiction to try the cause, their subsequent withdrawal of the motion and consent to a trial on the merits is a waiver of the objection to the want of jurisdiction.—Luco v. Superior Court of Tuolumne County, 71 Cal. 555, 12 Pac. 677.

FOR AUTHORITIES FROM OTHER STATES:

See 15 L. R. A. 273, note. See, also, 11 Cyc. 697-699; 13 Cent. Dig., cols. 1972-1984, §§ 147-151.

§ 40. Determination of Questions of Jurisdiction.

[a] First point decided by any court is that court has jurisdiction, although it may not be in terms.—Clary v. Hoagland, 6 Cal. 685.

[b] The superior court of the city of San Francisco had a clerk and seal; hence a judgment thereof which recites that the defendant was regularly served with process is conclusive of the question of jurisdiction, as it is a court of superior jurisdiction.—McCauley v. Fulton, 44 Cal. 355.

[c] An inferior court possessing powers conferred by statute may determine conclusively its own jurisdiction, by adjudicating the existence of facts upon the existence of which its jurisdiction depends.—Grove Street, In re, 61 Cal. 438.

[d] Order of supervisors or other inferior boards determining existence of facts upon existence of which its jurisdiction depends is conclusive.—Humboldt County v. Dinsmore, 75 Cal. 607, 17 Pac. 710.

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[c] Facts necessary to show that a court or board of special or limited power has acted within its jurisdiction may be proven by other competent evidence, in the absence of a statute requiring such facts to appear in the minutes, or other records of its proceedings.—Estate of Williams, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

[f] An inferior board may determine conclusively its own jurisdiction or power, when depending, not upon allegations in a petition, but upon the existence or nonexistence of matters in pais, to be established by evidence, by adjudicating the existence of the facts, upon the existence of which its jurisdiction or power depends.—People ex rel. v. Los Angeles, 133 Cal. 338, 65 Pac. 749.

[g] Sufficiency of complaint is not conclusive test of jurisdiction.—Brush v. Smith, 141 Cal. 470, 75 Pac. 55.

FOR AUTHORITIES FROM OTHER STATES:

Extrinsic evidence of jurisdiction to sustain judgments: 20 Am. St. Rep. 521, note. See, also, 11 Cyc. 700, 701; 13 Cent. Dig., cols. 1984-1989, §§ 152-156.

§ 41. Acts in Excess of Jurisdiction.

[a] Acts of court in excess of jurisdiction are nugatory and of no binding effect even on those who have invoked its authority.—Smith v. Westerfield, 88 Cal. 379, 26 Pac. 206.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 702; 13 Cent. Dig., cols. 1989-1992, §§ 157-161.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

A. Creation, Constitution and Officers, §§ 42-55.

B. Terms, Vacations, and Place and Time of Holding Court, §§ 56-66.

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A. CREATION, CONSTITUTION AND OFFICERS.

WHAT ARE COURTS OF RECORD, § 42.
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DE FACTO COURTS, § 55.

Judicial notice of organization and proceedings of courts. See Evidence, §§ 32-36.

Creation and abolition of justices' court. See Justices of the Peace, § 4.

§ 42. What are Courts of Record.

[a] A court which is entitled to have a seal is a court "having a seal," though it actually has none, such phrase denoting a court of record.—Ingoldsby v. Juan, 12 Cal. 564.

[b] A court of record is "a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law." This definition implies a written record, but not a seal. That a court has a seal, or even that a permanent record of its proceedings is kept, does not of itself stamp its character as a court of record.—Thistleton, Ex parte, 52 Cal. 220.

§ 43. Creation.

[a] Court as a legal entity is distinct from its officers, and may be established and preserved without reference to incumbency.—Stratman, Ex parte, 39 Cal. 522.

[b] Provisions of charter making mayor component part of council and ex-officio city judge are valid.—Guerrero, In re, 69 Cal. 100, 10 Pac. 261.

[c] A police court established in Los Angeles, under Statutes of 1885, page 213, providing for police courts in cities of between thirty thousand and one hundred thousand inhabitants, is not abolished by a census showing a population of over one hundred thousand, taken under Statutes of 1897, page 28, providing for a state census of any city, where Statutes of 1883, page 24, fixes the United States census as the basis of enumeration for the purpose of classifying municipal corporations.—People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[d] Act of March 7, 1876, section 6, provides that the mayor and common council of the city of M. should elect all subordinate officers of a city, including police judge. Section 11 recites that the assessor shall be ex officio clerk of the police court, and section 13 declares that the police judge shall exercise certain powers. Held, that a police court was clearly established by the act.—Mauch, Ex parte, 134 Cal. 500, 66 Pac. 734.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 652-659, 702, 718; 13 Cent. Dig., col. 1993, § 162; cols. 2020-2023, §§ 181-183.

§ 44. Constitutional and Statutory Provisions and Power of Legislature.

[a] Act creating superior court of San Francisco constitutional.—People v. Gillespie, 1 Cal. 342.

[b] The jurisdiction of the district court is confirmed and defined by the constitution,

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and no statute can deprive it of its powers. Hicks v. Bell, 3 Cal. 219.

[c] Under the provision of the constitution giving the legislature the power "to establish such municipal and other inferior courts as may be deemed necessary," the courts thus created could only be of inferior, limited, and special jurisdiction.—Meyer v. Kalkmann, 6 Cal. 582.

[d] The express permission in Constitution, article 6, section 1, to establish municipal courts, is within the exception in article 3 respecting the division of powers in the government. The term "municipal courts" has a legal meaning, and includes mayors' and recorders' courts.—Uridias v. Morrill, 22 Cal. 473.

[e] The act creating the late superior court of San Francisco was constitutional, under the provision of the constitution authorizing the legislature to "establish such municipal and other inferior courts as may be deemed necessary."—Vassault v. Austin, 36 Cal. 691.

[f] The effect of the amendment of 1862 was to limit the power conferred on the legislature by article 6 of the constitution to the establishment of municipal and inferior courts within the limits of an incorporated city.—Stratmann, Ex parte, 39 Cal. 517.

[g] Nothing in the constitution can be so construed as to deprive the legislature of the right to create an additional police judge's court in San Francisco, as was done by act of March 7, 1881.—Jordan, Ex parte, 62 Cal. 464.

[h] Act of March 5, 1889, increasing number of police judges in San Francisco, did not abolish existing courts or create new one. Lloyd, Ex parte, 78 Cal. 423, 20 Pac. 872.

[i] Statutes of 1885, page 213, conferring judicial power on police judge in cities having a population of from thirty thousand to one hundred thousand, governs police courts in the city of Oakland, though a charter adopted by that city in 1899 contained provisions for the organization of a police court. Ah You, In re, 82 Cal. 339, 22 Pac. 929.

[j] Courts can only be established by laws passed and approved by governor. Resolution is not sufficient.—People v. Toal, 85 Cal. 337, 24 Pac. 603.

[k] Provision in city charter adopted by legislature by mere resolution of approval, and not by law, establishing inferior courts, is void.—People v. Toal, 85 Cal. 337, 24 Pac. 603; Reilly, Ex parte, 85 Cal. 632, 24 Pac. 807.

[l] The fact that an act, passed after the adoption of the new constitution for the purpose of adapting the phraseology of the several codes to the nomenclature of the courts, omitted such change in any particular section of the code, did not prevent the superior court from exercising any jurisdiction conferred on it by the constitution.—Wickersham v. Brittan, 93 Cal. 34, 29 Pac. 51, 15 L. R. A. 106.

[m] By the constitution of 1879, district courts theretofore existing were superseded by the superior courts. Constitution, article 22, section, 11, declares that "all laws relative to the present judicial system shall be applicable to the judicial system created by this constitution." Held, that the superior courts were vested with the jurisdiction of the district courts to inquire into any election held "by any corporate body," pursuant to the provisions of Civil Code, sections 312, 315.—Wickersham v. Brittan, 93 Cal. 34, 29 Pac. 51, 15 L. R. A. 106.

[n] Jurisdiction conferred upon superior courts by constitution cannot be taken away by statute.—Burns v. Superior Court, 140 Cal. 7, 73 Pac. 597.

[o] If legislative action on a subject omits any branch or feature or power existing inherently in a court, it does not follow that such power has ceased, nor that it is taken away.—Burns v. Superior Court, 140 Cal. 4, 73 Pac. 597.

[p] An inferior court can be established only by the passage of an act of the legislature, and its approval by the governor, or its passage over his veto, in the same manner as any other law is enacted, under constitution, article 4, sections 15, 16.—People v. Toal, 23 Pac. 203.

[q] Statutes of 1887, pages 88-90 (Const., Amend. art. 16, amending art. 11, sec. 8) provides that any city of more than ten thousand and not more than one hundred thousand inhabitants may frame a charter for its own government "consistent with and subject to the constitution and laws of the state," and, if ratified by a majority of the qualified voters of the city, it shall be submitted to the legislature for its approval or rejection as a whole, and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and the organic law thereof, and "shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter." Held, that this does not dispense with the requirements of Constitution, article 6, section 13, that the legislature shall fix by law the jurisdiction of any inferior court established pursuant to section 1 of this article, and that the provisions of a charter establishing a police or inferior court in such city which depend alone for their validity on a joint resolution of approval of the charter by a majority of the members of the legislature, but in no way submitted to or passed on by the governor, are unconstitutional, and the acts of such court are void.—People v. Toal, 23 Pac. 203.

[r] Although inferior courts in incorporated cities can only be established by the constitution (article 6, section 1), and their jurisdiction, powers, and duties must be fixed by the legislature (Const., art. 6, sec. 13), still a valid provision for filling vacancies may be made by charter.—People v. Sands, 35 Pac. 330.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 704-707, 718; 13 Cent. Dig., cols. 1994-2005, §§ 164-170.

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§ 45. Judicial Districts.

[a] Act of April 4, 1864, increasing the number of judicial districts to fifteen, is not in violation of Constitution, article 6, section 5, which provides that "the state shall be divided by the legislature into fourteen judicial districts, subject to such alteration from time to time, by a two-thirds vote of all the members elected to both houses, as the public good may require."—People v. Sassovich, 29 Cal. 480.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 708, 709; 13 Cent. Dig., cols. 2012-2019, §§ 178-180.

§ 46. Departments.

[a] The judges of superior court in particular county, for the convenient dispatch of business, or for any other reason they may deem necessary, may assign and transfer cases for trial to any one or more of the several departments of such court, without notice to the parties.—Bell v. Peck, 104 Cal. 35, 37 Pac. 766.

[b] After a cause has been assigned to one department of the superior court, a transfer to another department, though irregular, will not render proceedings in the latter for contempt of an order made by the former, while the cause was under its control, void for want of jurisdiction, and subject, therefore, to review by certiorari, since the jurisdiction of causes is by the constitution, article 6, section 6, vested in the court, and not in departments.—White v. Superior Court of City and County of San Francisco, 110 Cal. 60, 42 Pac. 480.

[c] The rule that the judgment of the court first acquiring jurisdiction will prevail over that of another court subsequently acquiring jurisdiction does not apply to judgments rendered by different departments of the superior court of the city and county of San Francisco, as all departments of such court, combined, form but one court.—Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 717; 13 Cent. Dig., cols. 2009-2011, §§ 174-176.

§ 47. Abolition, Consolidation and Reorganization.

[a] The amendment to the sixth article of the constitution, adopted in 1862, providing that the judicial powers of the state shall be vested in the supreme court, in the district court, in county courts, in probate courts, and in justice of the peace and in such recorders and other inferior courts as the legislature may establish, did not abolish the police court and office of police judge of the city and county of San Francisco as they were then established by law.—People v. Provines, 34 Cal. 520.

[b] Under Constitution, article 22, section 3, the superior court succeeded to the powers theretofore possessed by the district and county courts, which were abolished, and acquired jurisdiction of proceedings then pending in the abolished courts.—People v. Colby, 54 Cal. 184; Toland, Ex parte, 54 Cal. 344.

[c] Under the provisions of the constitution of 1879, the superior courts succeeded to, and took jurisdiction of, actions pending in the district courts, and, as no change was made as to the character of actions regarding nuisances, the superior courts properly take jurisdiction of those actions.—Learned v. Castle, 67 Cal. 41, 7 Pac. 34.

[d] Constitution of 1879 abolished all courts except justices' and police courts. Guerrero, In re, 69 Cal. 99, 10 Pac. 261.

[e] City courts, created by their charters, were not abolished by constitution of 1879.—Guerrero, In re, 69 Cal. 99, 100, 10 Pac. 261.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 709; 13 Cent. Dig., cols. 2020-2023, §§ 181-183.

§ 48. Transfer of Jurisdiction.

[a] The probate court has no jurisdiction over estates of persons who died before the adoption of the constitution, and the acts establishing this court, and giving it jurisdiction.—Downer v. Smith, 24 Cal. 114.

[b] Legislature cannot confer on one court the functions and powers which the constitution has conferred on another.—Zander v. Coe, 5 Cal. 230.

[c] The superior court of the city and county of San Francisco is the successor of the late fifteenth district court, and in an action in the latter court to recover the possession of real estate situate in the county of Sonoma, held that, upon the abolition of that court, the superior court acquired jurisdiction of the case.—Gurnee v. Superior Court of City and County of San Francisco, 58 Cal. 88.

[d] The municipal court of appeals in San Francisco acquired jurisdiction of causes pending in the county court by the operation of the statute creating the court of appeals. An order transferring them was unnecessary. Davis v. Superior Court of City and County of San Francisco, 63 Cal. 581; Millard v. Yee Teen, 63 Cal. 584.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 714-716; 13 Cent. Dig., cols. 2023-2039, §§ 184-192.

§ 49. —— Time of Taking Effect.

[a] Under constitutional amendment, article 6, section 19, transferring the jurisdiction of certain courts, and providing that no officer shall be superseded, nor shall the organization of the civil courts be changed, until the election and qualification of the officers provided for in the amendment, the courts abolished by the amendment retained their jurisdiction until such election and qualification.—Gillis v. Barnett, 38 Cal. 393.

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§ 50. —— Jurisdiction and Powers of Court to Which Transfer is Made.

[a] District court has no authority to allow counsel fees in cause transferred from the court of first instance into that court by the statute of February 28, 1850. Thus, in such a case, where counsel fees were allowed to the defendant to the amount of six hundred dollars, the judgment was reversed. Selby v. The Alice Tarlton, 1 Cal. 103.

[b] Where cases have been transferred by statute from the superior court to the district court, the district court has jurisdiction to arrest, on motion, all processes issued by the clerk on judgments which for any reason are void.—Chipman v. Bowman, 14 Cal. 157.

[c] District court possessed full power over judgments of court of first instance, records of which were transferred to them.—Clark v. Sawyer, 48 Cal. 133.

§ 51. Supreme Court Commissioners—Appointment and Functions.

Power of legislature to create supreme court commission. See Constitutional Law, § 63.

[a] Act authorizing appointment of supreme court commissioners is constitutional.—People v. Hayne, 83 Cal. 116, 117, 17 Am. St. Rep. 211, 23 Pac. 1.

[b] Power of supreme court commissioner is not judicial.—People v. Hayne, 83 Cal. 118, 17 Am. St. Rep. 211, 23 Pac. 1.

§ 52. Courtroom and Register Clerk—Salary.

[a] The salary of a courtroom and register clerk of the superior court of the city and county of San Francisco is fixed at one hundred and seventy-five dollars per month, by the acts of February 13, 1880, and of April 2, 1880.—Burke v. Edgar, 67 Cal. 182, 7 Pac. 488.

§ 53. Stenographers—Appointment and Compensation.

Court reporters. See Reports, § 1.

[a] An indictment will be set aside where a stenographer was present with the grand jury pursuant to act of March 26, 1872, allowing a shorthand reporter of the county court of San Joaquin county to attend the grand jury and take down the witness' testimony, since such act was repealed by act of March 30, 1874, repealing all general and special laws as to official shorthand reporters.—People v. Lon Me, 49 Cal. 353.

[b] Penal Code, section 869, as amended March 3, 1881, provides that a magistrate may require the testimony and proceedings in examinations of persons accused of crime to be taken down in shorthand, and for that purpose may appoint a shorthand reporter. Section 2 provides that the reporter's fees shall be paid out of the county or city treasury on the certificate of the magistrate, but there is no provision fixing the reporter's fees or authorizing the magistrate to fix them. Held, on an application for mandamus to compel the county treasurer to pay the stenographer his fees for such services, that, in the absence of any law prescribing the fees which he was entitled to charge for his services, the certificate of the magistrate that he had rendered services did not constitute a demand upon the county treasury which the treasurer was bound to pay.—Fox v. Lindley, 57 Cal. 650.

[c] The superior courts in the city and county of San Francisco have power to fix and order paid the compensation of phonographic reporters in criminal cases, and it is the duty of the treasurer of the city and county to pay the same upon the order of the court.—Reis, Ex parte, 64 Cal. 233, 30 Pac. 806.

[d] Penal Code, section 867, subdivision 6, providing that the compensation of a reporter for taking the testimony of witnesses before an examining magistrate "shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county . . . . in which the examination is had, on the certificate and order of the said magistrate," refers to Code of Civil Procedure, section 274, which declares that the official reporter shall receive as compensation for his services "a sum, to be fixed by the court, not to exceed $10 per day," and is not affected by the unconstitutional amendment (Code Civ. Proc., sec. 70) making the compensation of stenographers in the superior courts to depend on a salary to be fixed by the judge.—McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357.

[e] County is bound to draw warrant for amount properly allowed to court reporter by committing magistrate without allowance of claim by supervisors.—McAllister v. Hamlin, 83 Cal. 367, 23 Pac. 357.

[f] Section 869 of the Penal Code, authorizing the magistrate at a preliminary examination to appoint a shorthand reporter, only requires that he be competent to do the work; and that section is not to be construed as requiring the same qualifications prescribed for official reporters of the superior courts in chapter 3, title 4, of the Code of Civil Procedure.—People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

[g] Penal Code, section 871, makes it the duty of a magistrate after preliminary examination to indorse his order of discharge upon depositions taken and certified in the manner prescribed by section 869. Section 883 requires depositions so taken to be filed with the county clerk, whether defendant is discharged or held to answer. On examination of one charged with larceny, the justice appointed plaintiff to report in shorthand the proceedings at the preliminary investigation whereat accused was discharged. Held, that the reporter was not entitled to fees for transcribing the shorthand notes in such case.—Mattingly v. Nichols, 133 Cal. 332, 65 Pac. 748.

[h] Under constitution, article 11, section 8½, authorizing municipal charters to pro-

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vide for the constitution and jurisdiction of police courts, and for the appointment and compensation of the attachés of the judges, the framers of the charter of the city and county of San Francisco were authorized to provide for the appointment and compensation of stenographic reporters, though in conducting preliminary examinations the judges acquire jurisdiction under the general law, and that provision of the charter limiting the appointments to two, and prescribing that they shall attend on the court and take notes of all preliminary examinations, and shall be paid specified annual salaries, superseded Penal Code, section 869, as far as it empowers a police judge in San Francisco to appoint a reporter for a preliminary examination of a felony charge, and to fix his compensation, section 8 of the Constitution declaring that authorized charter provisions shall supersede all laws inconsistent therewith.—Elder v. McDougald, 145 Cal. 740, 79 Pac. 429.

[i] The superior courts in San Francisco have power to fix and order paid the compensation of phonographic reporters in criminal cases, and the duty is imposed upon the county treasurer to pay the same on order of the court.—People v. Becker, 4 Pac. 942.

[j] Act of March 21, 1885, relative to compensation of official shorthand reporters, was not unconstitutional as in violation of the county government bill, requiring a uniformity in county governments, etc., nor as imposing a new set of officials on the people, in violation of Constitution, article 11, section 6.—Smith v. Strother, 7 Pac. 801.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 11 Cyc. 720-722; 13 Cent. Dig., cols. 2042-2047, §§ 198-200.

§ 54. Interpreters.

[a] A person who is a witness on a criminal charge is not, on that account, incompetent to act as interpreter at the examination of other witnesses in the case before the grand jury.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

[b] Under Code of Civil Procedure, section 1884, providing that an interpreter must be sworn when a witness does not understand the English language, the court is necessarily vested with a discretion which is not abused in refusing an interpreter to a foreigner charged with murder who appeared to sufficiently understand the language.—People v. Young, 108 Cal. 8, 41 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 720; 13 Cent. Dig., cols. 2040-2042, §§ 194-197.

§ 55. De Facto Courts.

[a] The judgments of the courts which exercised civil jurisdiction in California between the acquisition of the territory by the United States, and the adoption of the state code of laws of 1850, cannot be tested by strict rules of either the civil or the common law. They must, from the necessity of the case, be sustained as the proceedings of de facto courts, in many cases where their regularity cannot fully be made to appear by the records now existing.—Ryder v. Cohn, 37 Cal. 69.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 724-726; 13 Cent. Dig., cols. 2050-2052, §§ 204, 205.

B. TERMS, VACATIONS AND PLACE AND TIME OF HOLDING COURT.

ABOLITION OF TERMS OF COURTS, § 56.
CONSTITUTIONAL AND STATUTORY PROVISIONS, IN GENERAL, § 57.
DURATION OF TERM, § 58.
ADJOURNMENT OF TERMS, § 59.
—— EFFECT, § 60.
—— TIME FOR RECONVENTION OF ADJOURNED TERM, § 61.
PROCEEDINGS IN VACATION, § 62.
SESSION DEFINED, § 63.
TIME FOR SESSIONS, § 64.
ADJOURNMENT OF SESSIONS, § 65.
RECESSES DEFINED, § 66.

§ 56. Abolition of Terms of Court.

[a] Our constitution and codes have abolished terms of court.—Wiggin v. Superior Court, 68 Cal. 401, 9 Pac. 646.

[b] Terms of court and final adjournments were abolished by constitution of 1879.—Gannon, In re, 69 Cal. 544, 545, 11 Pac. 240.

§ 57. Constitutional and Statutory Provisions in General.

[a] At the regular term of the district court, held at the time appointed by statute, the court fixed the time of holding an adjourned term, by virtue of a statute, different from the one appointing the regular term. In the interval a statute was passed appointing other regular terms and repealing the previous law for their appointment. Held, that the law authorizing the court to fix the time of holding adjourned terms was impliedly repealed, and that the adjourned term held in pursuance of the adjournment above stated was not legally holden.—Domingues v. Domingues, 4 Cal. 186.

[b] Where a special term of the county court was held on the first day of May, upon notice to that effect given on the 24th of April, preceding, the proceedings of the court were irregular, if not void, the statute (Wood's Digest, 381) requiring a notice of not less than ten nor more than twenty days. People ex rel. Orman v. Riley, 16 Cal. 186.

[c] The special act of 1864, providing for holding a term of court in Nevada county in August, was not repealed by the amendment of 1868 to section 15 of the judiciary act of 1863.—People v. Tyler, 36 Cal. 522.

[d] Effect of repealing clause on prior statute fixing terms was to declare that the terms should not thereafter begin on the days mentioned by virtue of any authority derived

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from the statute repealed.—People v. Doyell, 48 Cal. 85.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2053-2055, § 207.

§ 58. Duration of Term.

[a] The fictions of law that a term of court is but one day, and that a day is indivisible, do not prevent the court from inquiring as to the day or the hour if it becomes important.—People v. Beatty, 14 Cal. 566.

[b] Term of county court begun before Code of Civil Procedure went into operation might be continued until all business was finished. People v. Doyell, 48 Cal. 85.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 732-737; 13 Cent. Dig., cols. 2075-2078, § 230; col. 2091, § 246.

§ 59. Adjournment of Terms.

[a] Sheriff has no power to adjourn court for term for nonappearance of judge until end of full week.—Thomas v. Fogerty, 19 Cal. 644.

[b] A term of the court does not expire because the judges did not appear before noon, and neither the sheriff nor clerk adjourned the court to the next day, when the judges met later in the same day, and adjourned then.—People v. Sanchez, 24 Cal. 17.

[c] Permission for adjournment by sheriff from day to day has no application to adjourned portion of term.—People v. Ah Ying, 42 Cal. 18.

[d] Under act of March 1, 1864, a district judge may adjourn a general term of his court in one county over an intervening term in another county. The term so adjourned is a continuation of a regular term.—People v. Ah Ying, 42 Cal. 18.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 733-735; 13 Cent. Dig., cols. 2078-2089, §§ 231-242.

§ 60. —— Effect.

[a] The court does not lose its control over proceedings to condemn land, by reason of its adjournments, at any time, but they are continued as unfinished business, until the deed is made, and the money paid over, under order of court.—Stanford v. Worn, 27 Cal. 171.

[b] Final adjournment of term discharges jury. If there be no final adjournment, trial in progress may be completed notwithstanding close of term.—Johnson v. Pacific Cement Co., 50 Cal. 648.

§ 61. —— Time for Reconvention of Adjourned Term.

[a] Where the general February term of the sixth district court for Sacramento county, California, must have commenced on February 1st, and concluded prior to March 15th, and the general March term of the same court for Yolo county must have commenced on March 15th, and concluded prior to April 5th, held, that under the statute of 1864 (Stats. 1863-64, p. 118), relative to adjourned terms, such court could hold a legal session in Sacramento county after March 15th, and up to April 5th.—Talbert v. Hopper, 42 Cal. 397.

§ 62. Proceedings in Vacation.

[a] A judgment rendered by a district court after the time appointed by law for its adjournment is invalid, and will be reversed on appeal.—Smith v. Chichester, 1 Cal. 409.

[b] Where parties stipulate to try a case before judge in vacation, and that the judgment shall be entered as if tried at the regular term, and judgment is so rendered, such judgment is a nullity.—Wicks v. Ludwig, 9 Cal. 173.

FOR AUTHORITIES FROM OTHER STATES:

11 Cyc. 736, 737; 13 Cent. Dig., cols. 2103-2105, §§ 265-269.

§ 63. Session Defined.

[a] "Session" of court, defined.—Gannon, In re, 69 Cal. 545, 11 Pac. 240.

§ 64. Time for Sessions.

[a] The time and place of holding courts should not be left in doubt.—Ross v. Austill, 2 Cal. 183.

[b] Under the statute authorizing the county court to order a special term not less than two nor more than twenty days from date of notice, to hear and determine contested election cases, an order was made appointing a special term at a given date; but before the time appointed, and after the notice, the judge at chambers adjourned the case until a subsequent day, but did not adjourn the term, or meet on the day appointed. Held, that a judgment rendered at the time to which the judge at chambers adjourned the case was null and void, as there was in no legal sense a court.—Norwood v. Kenfield, 34 Cal. 329.

[c] Court may sit and exercise jurisdiction in trial of causes or transaction of any legal business at any time.—Gannon, In re, 69 Cal. 545, 11 Pac. 240.

[d] Superior courts are always open, intervals in which no business is transacted being regarded as "recesses," and time during which court is in fact engaged as a court as "sessions."—Falltrick v. Sullivan, 119 Cal. 616, 51 Pac. 947.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 729; 13 Cent. Dig., cols. 2092, 2093, §§ 247-249.

§ 65. Adjournment of Sessions.

[a] Where in the absence of the judge the sheriff adjourned the court without au-

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thority, the adjournment was held to be a nullity, and a judgment entered by the court two days afterward was held to be valid.—Thomas v. Fogarty, 19 Cal. 644.

[b] Section 874 of the Code of Civil Procedure is remedial in its nature, and is to be liberally construed, with a view to effect its object, and give the parties an opportunity for a hearing upon the merits of their controversy. It is general in its terms, and controls other sections of the code in relation to the subject matter of its provisions.—Hall v. Kerrigan, 135 Cal. 4, 66 Pac. 868.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 729; 13 Cent. Dig., cols. 2093-2096, §§ 250-254.

§ 66. Recesses Defined.

[a] "Recesses" of court, defined.—Gannon In re, 69 Cal. 545, 11 Pac. 240.

C. RULES OF COURT AND CONDUCT OF BUSINESS.

POWER OF LEGISLATURE TO REGULATE PROCEDURE, § 67.
POWER OF COURT TO ADOPT RULES, § 68.
—— REGULATIONS IN CONTRAVENTION OF STATUTE OR OF ESTABLISHED LEGAL RIGHTS, § 69.
POWER OF COURT TO MODIFY, SUSPEND, OR DISREGARD RULES, § 70.
CONSTRUCTION AND OPERATION, § 71.
SETTING ASIDE, § 72.
STIPULATIONS WAIVING, § 73.
CONDUCT OF PROCEEDINGS—DUTY OF COURT TO PROTECT LITIGANTS, § 74.

Fees of clerk for opening and adjourning court. See Clerks of Court, § 6.

§ 67. Power of Legislature to Regulate Procedure.

[a] The provision of the constitution conferring jurisdiction in equity cases on the district court does not take away from the legislature the power to abolish the writ of ne exeat, since it is the legislative province to establish the procedure by which the courts shall exercise their jurisdiction.—Harker, Ex parte, 49 Cal. 465.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 740; 13 Cent. Dig., cols. 2109-2113, §§ 274-281.

§ 68. Power of Court to Adopt Rules.

[a] Power of supreme court to adopt rules includes power to ratify a mode adopted by court below.—Pieper v. Centinela, 56 Cal. 173.

FOR AUTHORITIES FROM OTHER STATES:

Rules of courts, authority of courts to enact: 41 Am. St. Rep. 639, note.

§ 69. —— Regulations in Contravention of Statute or of Established Legal Rights.

[a] Where a statute gives a positive rule of practice, courts cannot exercise any discretion in the matter.—Stevens v. Ross, 1 Cal. 94.

[b] A rule of court is void so far as it operates to deprive a party of a statutory right.—People v. McClellan, 31 Cal. 101.

§ 70. Power of Court to Modify, Suspend, or Disregard Rules.

[a] Rules of supreme court are always under its control, and their application may be enlarged in special cases.—Haight v. Gay, 8 Cal. 300.

[b] Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend or modify its own rules, or to except a case from their operation, whenever justice requires it. People v. Williams, 32 Cal. 280; Pickett v. Wallace, 54 Cal. 147; Symons v. Bunnell, 20 Pac. 859.

[c] A rule of court which requires each counsel to submit such instructions as he intends to ask to the opposite counsel before his final argument, upon penalty of having the same refused, may, in many cases, work injustice, if strictly adhered to, and where it is apparent that such will be the effect of enforcing it, it will not be enforced.—People v. Williams, 32 Cal. 280.

[d] Rules of court made in the exercise of a power conferred by statute are obligatory on the court equally with suitors. Thus if a rule provides that the time for asking a rehearing shall not be extended by the court, an extension asked in any particular case must be denied.—Hanson v. McCue, 43 Cal. 178.

[e] A court may, whenever the purposes of justice require it, suspend its rule requiring ex parte orders to be served, or except a particular case from its operation.—Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 743, 744; 13 Cent. Dig., cols. 2122-2124, § 295.

§ 71. Construction and Operation.

[a] A rule of a district court requiring a party, on motion for a new trial, or for judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery cause.—Purcell v. McCune, 14 Cal. 230.

[b] Rules are to be enforced to advance the ends of justice, not to prevent their attainment.—People v. Lee, 14 Cal. 512.

[c] Rules of supreme court construed. Hutton v. Reed, 25 Cal. 478.

[d] If a rule of court provides that when a cause has been at issue for two years upon a question of either law or fact, and the plaintiff has not brought it on for a hearing, that the defendant shall be entitled to an order of dismissal without notice, the continuance of the time for the argument of a demurrer

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by consent takes away for two years thereafter the right of the defendant to move for a dismissal.—Poole v. Caulfield, 45 Cal. 107.

[e] Rules of procedure, whether statutory or made by the court, are intended to facilitate courts in doing justice between the parties, and when not jurisdictional, are intended for the convenience of courts and litigants, and should be liberally construed.—Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 742; 13 Cent. Dig., cols. 2121, 2122, § 294; cols. 2124-2126, §§ 296-299.

§ 72. Setting Aside.

[a] A rule of the trial court may, in the discretion of the court, be set aside.—Chielovich v. Krauss, 9 Pac. 945.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 743, 744; 13 Cent. Dig., cols. 2126, 2127, §§ 302-304.

§ 73. Stipulations Waiving.

[a] Parties have no unqualified right to stipulate for abrogation of rules prescribed by this court.—Reynolds v. Lawrence, 15 Cal. 359.

§ 74. Conduct of Proceedings—Duty of Court to Protect Litigants.

[a] It is duty of courts to protect rights of litigants even against incapacity of their attorneys.—Cook, In re, 77 Cal. 232, 17 Pac. 923, 19 Pac. 431.

[b] A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction.—Flaggs v. Puterbaugh, 98 Cal. 134, 32 Pac. 863.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2120, 2121, § 293.

D. RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

RULE OF DECISION, § 75.
PREVIOUS DECISION AS AUTHORITY AND DOCTRINE OF STARE DECISIS, § 76.
—— DECISIONS CONTRARY TO LAW, § 77.
—— LONG PRACTICE AS EVIDENCE OF CORRECTNESS, § 78.
—— DICTUM, § 79.
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—— DECISIONS IN DEPARTMENT AND IN BANK, § 81.
—— POWER TO OVERRULE AND CONSIDERATIONS GOVERNING ITS EXERCISE, § 82.
—— WHAT CONSTITUTES OVERRULING OPINION, § 83.
—— DECISIONS OF HIGHER COURT, § 84.
—— EFFECT OF OVERRULING DECISION ON EXISTING CONTRACTS, § 85.
—— DECISIONS OF COURTS OF OTHER STATES, § 86.
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—— DECISIONS OF COURTS OF OTHER COUNTRIES, § 88.
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NUMBER OF JUDGES NECESSARY TO ADJUDICATION—COURT OF SESSIONS, § 90.
—— DISTRICT COURT OF APPEALS, § 91.
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OPINIONS—PREPARATION AND FILING, § 94.
—— NECESSITY FOR WRITTEN OPINION, § 95.
—— RIGHT OF SUPREME COURT TO ADOPT TRIAL COURT OR COMMISSIONER'S OPINION, § 96.
—— CONSTRUCTION, § 97.
—— OPERATION AND EFFECT, § 98.
RECORDS, § 99.
—— NECESSITY, § 100.
—— WHAT CONSTITUTES FILING OF PAPER, § 101.
—— NUNC PRO TUNC ENTRY, § 102.
—— AMENDMENT AND CORRECTION, § 103.
—— CONCLUSIVENESS, § 104.

§ 75. Rule of Decision.

[a] Where authorities differ court ought to adopt that opinion which is most in unison with former condition of things in California, and which will best conduce to uphold and carry into execution intention of parties. (Per Bennett, J.)—Panaud v. Jones, 1 Cal. 488.

[b] This court is authorized by statute to render such judgment as substantial justice shall require; but by this is intended substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual.—Stevens v. Ross, 1 Cal. 94.

[c] In a case arising for the first time in this state the common-law rule of that case will not be disregarded, and a new rule created, merely because the English judges have frequently regretted the adoption of the rule.—Johnson v. Fall, 6 Cal. 359, 65 Am. Dec. 518.

[d] In matters of practice involving no principle, it is safer to acquiesce in a rule which has been established for several years in the inferior courts of this state, the abrogation of which might introduce confusion and operate hardly on litigants.—Ellissen v. Halleck, 6 Cal. 386.

[e] Courts are not to decide cases alone, but to settle principles first and decide cases according to those principles as applied to the facts.—Jessup, In re, 81 Cal. 423, 22 Pac. 742.

[f] In deciding cases court is not authorized to consider apparent justice or hardship of particular cases.—Jessup, In re, 81 Cal. 423, 22 Pac. 742.

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§ 76. Previous Decision as Authority and Doctrine of Stare Decisis.

Effect of rehearing on authority of former opinion. See Appeal and Error, § 1044.

Opinions of attorney general as authority. See Attorney General, § 16.

[a] There is no principle which compels the observance of the doctrine of stare decisis when a rule, well settled and universally acquiesced in, has been violated.—Cohas v. Raisin, 3 Cal. 443.

[b] In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of stare decisis.—Seale v. Mitchell, 5 Cal. 401.

[c] The question as to whether the act of the legislature, organizing the superior court of the city of San Francisco, was, in its general provisions, constitutional, is put to rest upon the doctrine of stare decisis.—Hickman v. O'Neal, 10 Cal. 292.

[d] The conservative doctrine of stare decisis was never designed to protect manifest innovations upon the well-settled principles of law.—Aud v. Magruder, 10 Cal. 282.

[e] The twenty-fifth section of act of Congress, 1879, commonly called the "Judiciary Act," providing for writs of error from the supreme court of the United States to state courts, is constitutional; the long course of adjudication by courts of the highest authority, state and national, commencing almost from the foundation of the government, and the acquiescence of nearly all the state governments in all their departments have given to this doctrine a recognition so strong and authentic that it can no longer be denied.—Ferris v. Coover, 11 Cal. 175.

[f] Opinion of a judge is only authority to extent of special concurrence.—Cowell v. Buckelew, 14 Cal. 640.

[g] Decision is not authority when the judges do not concur in the grounds of judgment.—Stuart v. Allen, 16 Cal. 501, 76 Am. Dec. 551.

[h] Construction of a statute repeatedly recognized becomes part of the law.—Clary v. Rolland, 24 Cal. 153.

[i] Where an appeal is submitted without argument, the decision is not satisfactory authority.—Franklin v. Merida, 35 Cal. 570, 95 Am. Dec. 129.

[j] Stare decisis, doctrine of, how far binding, discussed.—Houghton v. Austin, 47 Cal. 646, 667.

[k] The supreme court of California, as at present organized, follows, as authoritative, the construction placed upon any provision of constitution of 1849, by the highest judicial tribunal created by and under that constitution.—Davis v. Superior Court of City and County of San Francisco, 63 Cal. 581.

[l] Construction of provisions of former constitution given by the highest tribunal created by that constitution will be followed. Moulton v. Parks, 64 Cal. 166, 179, 30 Pac. 613.

[m] When a case is new in instance, but not new in principle, failure to discover an exact precedent is of little consequence.—People v. Richards, 67 Cal. 418, 7 Pac. 828.

[n] On questions of mere construction, case cannot be regarded as authority unless in all respects similar to one under discussion. Stevens, In re, 83 Cal. 330, 17 Am. St. Rep. 252, 23 Pac. 379.

[o] A decision of the supreme court which has been in force for over twelve years, and has been accepted and acted upon as correct ever since, and which is not shown to violate any principle of law, or work injustice, will not be reversed, even if its correctness is doubted.—Estate of Dorris, 93 Cal. 611, 29 Pac. 244.

[p] The power of a judge who has tried a cause to settle a bill of exceptions therein, after the expiration of his term of office, conferred by section 653 of the Code of Civil Procedure, has been continuously recognized and declared by this court for too long a period of time to be now questioned as unconstitutional, and its validity is affirmed upon the rule of stare decisis.—Miller & Lux v. Enterprise Canal etc. Co., 124 Cal. 208, 75 Pac. 770.

[q] A prior decision, in an action for refusal to carry a bona fide passenger, that though the face of the ticket says nothing as to stop-over privileges, yet Civil Code, section 490, enters into the contract, and gives the holder of the ticket stop-over privileges, is not stare decisis in actions by members of the combination to recover the penalties allowed by the section.—Southern Pac. Co. v. Robinson, 132 Cal. 408, 64 Pac. 572.

[r] The power conferred on a judge by Code of Civil Procedure, section 653, providing that a judge may settle and sign a bill of exceptions after he ceases to be such a judge, has been continuously recognized and declared by the court, and the principle of stare decisis is applicable, though the question as to the constitutionality of the statute may not have been decided.—Miller & Lux v. Enterprise Canal etc. Co., 142 Cal. 208, 75 Pac. 770.

§ 77. —— Decisions Contrary to Law.

[a] Decisions contravening the plain letter of the statute are not binding as authority.—Ingraham v. Gildermester, 2 Cal. 161.

[b] Though, on questions of practice, previous decisions are entitled to very great weight, still a single decision, made without notice of a statute, and in fact setting aside the statute, cannot be invoked as authority on the principle of stare decisis.—Duff v. Fisher, 15 Cal. 375.

FOR AUTHORITIES FROM OTHER STATES:

Stare decisis, rule of, when applicable: 27 Am. Dec. 628, note.

Limitations upon the doctrine of stare decisis: 73 Am. St. Rep. 98, note. See, also, 11 Cyc. 745-758; 13 Cent. Dig., cols. 2130-2171, §§ 311-340.

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[c] Decisions in direct conflict with statute must be overruled.—Golden Gate etc. Co. v. Hendy M. Works, 82 Cal. 185, 23 Pac. 45.

§ 78. —— Long Practice as Evidence of Correctness.

[a] Practice of supreme court continued for many years, without observation impugning its correctness, is strong evidence that it is in accordance with law.—Sharon v. Sharon, 68 Cal. 340, 9 Pac. 187.

[b] Constant and uniform procedure continued for a long time is strongly persuasive that practice is correct.—Giant Powder Co. v. San Diego Flume Co., 78 Cal. 198, 20 Pac. 419.

§ 79. —— Dictum.

[a] A mere obiter dictum is not authority. Haight v. Joyce, 2 Cal. 64, 56 Am. Dec. 311.

[b] No point of a decision is dictum because other points are sufficient grounds for the judgment.—Clary v. Rolland, 24 Cal. 150, 57 Cal. 550.

[c] Where a decision passes on any question not necessary for the determination of the appeal, it will not interpose any obstacle to a reinvestigation of such question on its merits, in any case that may be thereafter before the court in which the point is directly presented.—Trinity County v. McCammon, 25 Cal. 117.

[d] The discussion and determination, in an opinion of the supreme court, of other points not tending to the decision of the point upon which the appeal was disposed of, must be regarded as dicta, and not as the law of the case.—Mulford v. Estudillo, 32 Cal. 131.

[e] A point decided is not obiter when the judgment turns upon it.—Urton v. Wilson, 65 Cal. 13, 2 Pac. 411.

[f] Decision upon a point which arose and was decided is not dictum, though not necessary to disposition of appeal.—Gwinn v. Hamilton, 75 Cal. 266, 17 Pac. 212.

[g] Expression of opinion on question not before court for decision is not entitled to same consideration as it would if question were involved in case.—Magee v. North Pacific etc. R. R., 78 Cal. 433, 12 Am. St. Rep. 69, 21 Pac. 114.

[h] Dictum on point elaborately considered is entitled to great weight where opinion is concurred in by whole court in bank.—Adams v. Seaman, 82 Cal. 639, 23 Pac. 53.

[i] Decision is not even authority except upon point actually passed upon by court and directly involved in the case.—Norris v. Moody, 84 Cal. 149, 24 Pac. 37.

[j] Determination of point not necessary to decision of case is not conclusive.—United Land Assn. v. Knight, 85 Cal. 463, 24 Pac. 818.

[k] The expression of opinion in the decision of a cause which is not necessary to a determination of the case is to be regarded as a mere dictum, and, when it announces a doctrine which is inconsistent with the plain meaning and effect of a statute, it cannot affect a subsequent decision in accordance with the statute.—Cardenas v. Miller, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472.

For Authorities from Other States:

See 64 C. C. A. 361, note. See, also, 11 Cyc. 755; 13 Cent. Dig., cols. 2160-2163, § 335.

§ 80. —— Rules of Property.

[a] Considerations of public policy and justice, as well as regard for individual rights acquired under the law, as announced by highest judicial tribunal, imperatively demand a strict adherence to the doctrines of the case of Cohas v. Raisin, 3 Cal. 443.—Welch v. Sullivan, 8 Cal. 165.

[b] The rule that a deed executed before the act concerning conveyances (April 16, 1859) must be first recorded, in order to prevail against a subsequent deed taken in good faith, and for a valuable consideration, has stood too long to be set aside by the court.—Clark v. Troy, 20 Cal. 219.

[c] Where a decision was made many years before in reference to the title of certain property, and valuable rights have arisen under that decision, it is the duty of the court, on the principle of stare decisis, not to reverse the former decision.—Hihn v. Courtis, 31 Cal. 398.

[d] Where important rights of property had grown up under a decision of the supreme court, and many years have elapsed since the same was rendered, and its correctness has been tacitly admitted in other cases, the question will not be reopened.—Vassault v. Austin, 36 Cal. 691.

[e] When a rule by which the title to real property is to be determined has become established by positive law, or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of less importance than that it should itself be constant and invariable.—Smith v. McDonald, 42 Cal. 484.

[f] Even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the constitution, it is better that inconvenience should be submitted to, rather than such decision should stand, and a valuable provision in the fundamental law be obliterated.—San Francisco v. Spring Valley Water Works, 48 Cal. 493.

[g] Decisions settling rights of property should not be disturbed.—Kohl v. Lilienthal, 81 Cal. 389, 22 Pac. 689.

[h] Decision of long standing establishing property rights should be followed, though its soundness be questionable.—Monterey County v. Cushing, 83 Cal. 511; McDanial v. Cummings, 83 Cal. 519, 23 Pac. 700.

[i] The decisions of the supreme court upholding the validity of trust deeds to secure loans establish a conclusion which has become a rule of property, and will not be disturbed.

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Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813.

[j] The decision of the supreme court that bonds of a corporation, issued in violation of Civil Code, section 309, are not void, is a declaration of a rule of property, and will not be overruled.—Smith v. Ferries etc. Ry. Co., 51 Pac. 710.

FOR AUTHORITIES FROM OTHER STATES:

11 Cyc. 755; 13 Cent. Dig., cols. 2163-2169, §§ 336-339.

§ 81. —— Decisions in Department and in Bank.

[a] Court in department is bound by decision of majority of court in bank.—Arnold v. San Jose, 81 Cal. 620, 22 Pac. 877.

§ 82. —— Power to Overrule and Considerations Governing Its Exercise.

[a] A former decision of the supreme court will be overruled when it is apparent that a plain rule of law has been violated thereby.—McFarland v. Pico, 8 Cal. 626.

[b] No well-considered decision of this court ought to be overruled unless it clearly violates some established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. It is an additional reason for standing by a decision that it was based upon the construction of a statute and affects titles to real estate.—Pioche v. Paul, 22 Cal. 105.

[c] Decisions of the supreme court cannot be overruled by an inferior court.—People v. McGuire, 45 Cal. 56.

[d] If, upon a fuller consideration, the court is satisfied that a former judgment upon a constitutional question is wrong, it is not precluded from asserting the correct rule if vested interests of great moment are not disturbed thereby.—People v. Lynch, 51 Cal. 15, 39, 21 Am. Rep. 677.

[e] Decision of long standing without challenge will be followed though it may seem illogical.—Stevens, In re, 83 Cal. 328, 329, 17 Am. St. Rep. 252, 23 Pac. 379.

[f] Rule which would upset innumerable judgments which have stood for years will not be declared unless required by inexorable mandate of law.—Oakland v. Oakland W. F. Co., 118 Cal. 253, 254, 50 Pac. 268.

[g] A decision construing a clause of the constitution will not be overruled in an action between parties who have acted on the same.—Angus v. Plum, 121 Cal. 608, 54 Pac. 97.

[h] Laws are not made by judicial decisions, and, in so far as they declare the law, they can only declare what it was and is, and cannot enact what it shall be. The court simply determines the existing rights of the parties in the controversy before it, and must always look to the past for its law. Judicial decisions are only persuasive authority for future cases, and may be overruled for cogent reasons; and existing controversies growing out of the past transactions should ordinarily be governed by the later decision.—Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460.

§ 83. —— What Constitutes Overruling Opinion.

[a] Long-continued practice in supreme court should not be considered overruled by expressions in an opinion which can be reconciled with it.—Sharon v. Sharon, 68 Cal. 340, 9 Pac. 187.

§ 84. —— Decisions of Higher Court.

[a] An inferior court cannot disregard the decisions of a court of last resort, but it must give them full effect, whatever its views may be as to their correctness.—People v. McGuire, 45 Cal. 56.

§ 85. —— Effect of Overruling Decision on Existing Contracts.

[a] Persons entering into a contract, relying on a decision of the supreme court, are bound in the performance thereof by the law as declared by a subsequent decision of the same court overruling the former decision as erroneous.—Allen v. Allen, 27 Pac. 30.

FOR AUTHORITIES FROM OTHER STATES:

11 Cyc. 758; 13 Cent. Dig., cols. 2171, 2172, §§ 341-343.

§ 86. —— Decisions of Courts of Other States.

[a] As a general rule constitutions should be construed from their terms, rather than by authorities from other states, but if in other states like constitutional provisions have received a definite construction, the authority is entitled to the same weight as in other cases.—People v. Burbank, 12 Cal. 378.

[b] Supreme court will not overrule a settled rule of this state on account of its conflict with authorities of other states.—Spencer v. Houghton, 68 Cal. 91, 8 Pac. 679.

[c] Decisions of other state courts of last resort, while strongly persuasive, are not binding as authority on courts of this state.—People v. Hayne, 83 Cal. 119, 17 Am. St. Rep. 211, 23 Pac. 1.

[d] Rule of law announced in a decision of our state supreme court takes precedence over numerous authorities contra from other states.—San Francisco etc. Co. v. Dumbarton etc. Co., 119 Cal. 275, 51 Pac. 325.

[e] People v. Benson, 6 Cal. 221, affirmed, as having evidenced the law of this state for many years, and as being supported by respectable authority, though the weight of authority may be to the contrary.—People v. Shea, 125 Cal. 151, 57 Pac. 885.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 749, 750; 13 Cent. Dig., cols. 2141-2144, §§ 322, 323.

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§ 87. —— Decisions of United States Courts as Authority in State Courts.

[a] The government of the United States is one of delegated powers; the right to decide ultimately upon the extent of powers granted has not been delegated to the United States, nor prohibited to the states, and is reserved to the states by the provisions of the tenth amendment to the constitution; and therefore the decision of the supreme court of the United States on such questions is not binding in the state courts. (Per Terry, C. J.)—Ferris v. Coover, 11 Cal. 176.

[b] The construction given by the supreme court of the United States to its decree confirming a Mexican grant of land in California, is of binding authority in the state courts.—Schmitt v. Giovanari, 43 Cal. 617.

[c] When the question involved in an appeal is one which falls within the jurisdiction of the United States courts, the supreme court of this state will adopt that view thereof which is in harmony with the adjudications of the United States courts.—Belcher v. Chambers, 53 Cal. 635.

[d] The finding of any fact involved in a contest before the land department of the United States is conclusive upon the courts of this state, in an action to hold the successful party as a trustee for the other, or to deprive him of the benefit of his success in the department, except, perhaps, in cases of fraud. Haven v. Haws, 63 Cal. 452.

[e] In cases involving federal questions, state courts are bound to follow decisions of federal court and disregard those of state court.—Tubbs v. Wilhoit, 73 Cal. 67, 14 Pac. 361.

[f] In cases where writ of error lies to federal supreme court, its decisions take precedence over decisions of state supreme court. San Benito County v. S. P. R. R. Co., 77 Cal. 520, 19 Pac. 827.

[g] Decisions of federal supreme court in relation to public lands prevail over those of state court.—Gale v. Best, 78 Cal. 240, 12 Am. St. Rep. 44, 20 Pac. 550.

[h] Decision of federal supreme court on question of right to public land is conclusive. Wright v. Roseberry, 81 Cal. 88, 22 Pac. 336.

[i] State court follows opinion of federal supreme court on questions reviewable by it. United Land Assn. v. Knight, 85 Cal. 477, 24 Pac. 818.

[j] The former decisions of this court, to the extent to which they hold that the interest of a settler on the public lands under the pre-emption or homestead laws attaches as against the appropriator of water rights on his tract only as of the time of his final proof or of obtaining a patent, must be controlled by the decision of the federal supreme court to the contrary.—McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060.

[k] Courts of this state are not bound by decision of federal supreme court on burden of proof in criminal cases.—People v. Allender, 117 Cal. 82, 48 Pac. 1014.

[l] Decision of federal supreme court upon federal question is binding upon state courts. Foley v. Foley, 120 Cal. 42, 65 Am. St. Rep. 147, 52 Pac. 122.

[m] A state court of last resort is not bound by the judgment of the United States supreme court construing a state statute, but is entitled to construe the same according to its own judgment.—People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86.

[n] A decision of the United States supreme court in a matter of federal jurisdiction must be regarded as of binding authority on a state court of last resort.—United Land Assn. v. Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064.

[o] The decision of the United States supreme court as to what constitutes a fugitive from justice, within constitution of the United States, is binding on a state court.—Letcher, Ex parte, 145 Cal. 563, 79 Pac. 65.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 751; 13 Cent. Dig., cols. 2154-2160, §§ 329-334.

§ 88. —— Decisions of Courts of Other Countries.

[a] Where the guardian of an insane man in Hawaii obtained a divorce for him, the judgment will not be invalid in California on the ground that, as there was no express statute permitting a divorce action by the husband's guardian, he could not do so under the general provision that the guardian of an insane person shall appear for and represent his ward in all legal suits and proceedings, since, as the courts of Hawaii have held otherwise, their construction of their statutes cannot be assailed.—McGrew v. Mutual Life Ins. Co. of New York, 132 Cal. 85, 84 Am. St. Rep. 20-n., 64 Pac. 103.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 754; 13 Cent. Dig., cols. 2145, 2146, § 324.

§ 89. Previous Decision of Same Case as Law of the Case.

Decision on former appeal as law of the case. See Appeal and Error, §§ 1334-1344.

[a] Ruling of the court sustaining demurrers is not the law of the case in any such sense as to preclude the court from vacating the same. De La Beckwith v. Superior Court of Colusa County, 146 Cal. 496, 80 Pac. 717.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 757; 13 Cent. Dig., cols. 2169-2171, § 340.

§ 90. Number of Judges Necessary to Adjudication—Court of Sessions.

[a] Under Constitution, article 6, section 8, authorizing the county judge, with two justices of the peace, to hold courts of sessions

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with certain criminal jurisdiction, does not authorize the holding of a court of sessions by the county judge and one justice.—People v. Ah Chung, 5 Cal. 103.

[b] Entry in records of court, when only county judge and one associate were present, of the resignation of an absent associate and the appointment by the court of a justice of the peace in his stead, is a nullity.—People v. Barbour, 9 Cal. 230.

[c] The court of sessions is composed of a county judge and two associates, and the presence of all is necessary to the transaction of business.—People v. Barbour, 9 Cal. 230.

[d] If, at the time appointed for holding the court of sessions, either of the associates be absent, it becomes the duty of the county judge to designate some justice of the county to take the place of the absentee, and until this is done there can be no court for any purpose.—People v. Barbour, 9 Cal. 230.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 758, 759; 13 Cent. Dig., cols. 2172-2177, §§ 344-350.

§ 91. —— District Court of Appeals.

[a] Where three justices of the district court of appeals fail to agree in a habeas corpus proceeding, as required by Constitution, article 6, section 4, the writ must be deemed denied.—Sauer, Ex parte (Cal. App.), 84 Pac. 995.

§ 92. —— Supreme Court.

[a] Where majority of judges do not concur in overruling former cases, they are not to be considered as overruled.—People v. Westlake, 62 Cal. 304.

[b] Majority consisting in four justices may decide any matter within jurisdiction of supreme court, and legislature cannot require concurrence of more.—Jessup, In re, 81 Cal. 472, 22 Pac. 742.

[c] Ruling in an opinion concurred in by only three justices is not binding as authority.—Farrell v. Trustees, 85 Cal. 416, 24 Pac. 868.

§ 93. —— Effect of Division and Change of Personnel.

[a] Constitution, article 6, section 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary. On motion to affirm a judgment it appeared that the cause had been several times heard and submitted, in which no decision was reached owing to the change in the personnel of the court, and an equal division of opinion among the judges qualified to act; but before an opinion was written three new judges qualified to hear the case were selected. Held, that the cause should be presented on its merits before the newly constituted court, and the motion will be denied. Luco v. De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543.

§ 94. Opinions—Preparation and Filing.

Duty of judge to decide case in ninety days. See Judges, § 18.

[a] When an action has been tried in the superior court of a certain county, the absence of the judge therefrom will not devest him of jurisdiction to prepare and sign the findings and decisions in the action while he is in another county; and the clerk, on receiving them, may file them and enter judgment.—Comstock Quicksilver Min. Co. v. Superior Court of Santa Cruz County, 57 Cal. 625.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., col. 2184, § 359.

§ 95. —— Necessity for Written Opinion.

[a] Legislature cannot require supreme court to render its opinions in writing.—Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

[b] Practice of giving reasons in writing for judgments is of modern origin. And it is discretionary with the court whether it give an opinion upon pronouncing judgment; and, if given, whether it be oral or in writing.—Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

[c] Code of Civil Procedure, section 632, providing that, on the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk in twenty days after the cause is submitted, and unless the decision is so filed the action must be tried again, is merely directory.—McQuillan v. Donahue, 49 Cal. 157.

[d] Decrees of court are required to be in writing and remain of record.—Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460.

§ 96. —— Right of Supreme Court to Adopt Trial Court or Commissioners' Opinion.

[a] Duty of writing its opinions is not specifically imposed upon supreme court; it may adopt as its own the opinion of trial judge or its commissioners (concurring opinion).—Paige v. Hayne, 83 Cal. 123-125, 17 Am. St. Rep. 211, 23 Pac. 1.

§ 97. —— Construction.

[a] The rule is well settled, upon the soundest principles of reason, that the language of a judicial opinion, in general, must be held as referring to the particular case decided. People v. Winkler, 9 Cal. 234.

[b] It is a maxim, not to be disregarded, that general expressions in every judicial opinion are to be taken in connection with the case in which those opinions are used.—Uhlfelder v. Levy, 9 Cal. 607.

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[c] In construing judicial decisions, that only is held to be authoritatively decided which was necessarily involved in the decision of the cause.—Banks v. Moreno, 39 Cal. 233; Sharon v. Sharon, 75 Cal. 26, 27, 16 Pac. 345.

[e] Language of decision must be considered in light of circumstances involved in case before the court.—Coburn v. Brooks, 78 Cal. 446, 21 Pac. 2.

[f] General expressions in opinions must be construed with reference to facts involved. Havemeyer v. Superior Court, 84 Cal. 392, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; Morris v. Moody, 84 Cal. 149, 24 Pac. 37.

[h] Expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and cannot be safely applied in their largest and most universal sense to dissimilar cases.—Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Estate of Johnson, 98 Cal. 531, 33 Pac. 460; Chapman v. State, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457.

[k] General expressions in opinions in a particular case are to be taken as pertinent only to facts then before the court, and not as applicable determination of questions not then in contemplation.—Grant v. Murphy, 116 Cal. 432, 58 Am. St. Rep. 188, 48 Pac. 481.

§ 98. —— Operation and Effect.

[a] When counsel in the argument of a case assume a certain principle advanced by them as correct law, and the court decides the case upon the assumption thus made by counsel, without discussing the correctness of this assumption, the opinion is not authority that such assumption is correct law.—Donner v. Palmer, 31 Cal. 500.

[b] The presumption is that all the facts in a record, bearing on the points decided, have received due consideration by the supreme court, whether all, or a part, or none, of those facts are mentioned in the opinion.—Mulford v. Estudillo, 32 Cal. 131.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 762; 13 Cent. Dig., col. 2185, § 360.

§ 99. Records.

Record on appeal See Appeal and Error, X.
Court records as evidence. See Evidence, §§ 284, 304.
False records and alteration of records as forgery. See Forgery, § 12.

[a] At common law a record signifies a roll of parchment upon which the proceedings and transactions of a court are drawn up by its officers, and which is then deposited in its treasury in perpetuam rei memoriam. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question. (Per Sawyer, C. J.)—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[b] The privilege of having these enrolled memorials constitutes the great leading distinction, in English and American law, between courts of record and courts not of record, or superior and inferior courts. (Per Sawyer, C. J.)—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[c] In the United States paper has universally supplied the place of parchment, as the material of the record, and the roll form has fallen into disuse, but whether on parchment or paper, in the roll form or otherwise, this judgment-roll is what is known in law as the record, and is what is meant by courts and law-writers when they speak of records of superior courts or courts of record. (Per Sawyer, C. J.)—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[d] This technical record is the only strict and proper proof of the proceedings of the courts in which they are preserved, and is regarded in law as proof of so absolute a nature as to admit of no contradiction, not even by the files and minutes of the court in which the record is preserved. But in those courts and tribunals where the proceedings are not enrolled or recorded, as well the existence of their proceedings as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. (Per Sawyer, C. J.)—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[e] Section 203 of the Practice Act provides for a judgment-roll, and prescribes what it shall contain, and it is made to embrace all the essentials of the common-law record. (Per Sawyer, C. J.)—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[f] Judgment-book is part of records of court.—Simmons v. Threshour, 118 Cal. 101, 50 Pac. 312.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 762-765; 13 Cent. Dig., cols. 2186-2193, §§ 362-374.

§ 100. —— Necessity.

[a] Grounds of decisions of supreme court are required to be recorded for guidance of public in their business transactions.—People v. Hayne, 83 Cal. 124, 17 Am. St. Rep. 211, 23 Pac. 1.

[b] When jurisdiction has once been acquired it is not lost by a failure to preserve a record of the acts by which it was acquired, and the acts of a court in exercising its inherent power to amend its record, or to supply a lost record, will be presumed to have been properly exercised.—Sichler v. Look, 93 Cal. 600, 29 Pac. 223.

[c] Decrees of court are required to be in writing and remain of record, and those affected thereby have a right to stand by such record, and, unless a change is made in the record, and knowledge brought home to the party sought to be charged thereby, he has

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a right to regard the decree as entered as the final direction of the court, and to disregard any oral modification thereof having only a mere potential existence.—Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 762; 13 Cent. Dig., col. 2186, § 362.

§ 101. —— What Constitutes Filing of Paper.

[a] Paper is filed when delivered to proper officer; indorsing it with time of filing is no part of filing.—Smith v. Biscailuz, 83 Cal. 358, 23 Pac. 314.

§ 102. —— Nunc Pro Tunc Entry.

[a] A court has no power, after the adjournment of a term, to direct the clerk to enter in the minutes, nunc pro tunc, an order made at the adjourned term, where there is nothing in the record to show that such order was made.—Hegeler v. Henckell, 27 Cal. 491.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 764; 13 Cent. Dig., cols. 2187-2189, § 368.

§ 103. —— Amendment and Correction.

[a] While the term lasts the court has power to amend the record. After the term has passed, the record cannot be amended unless there is something in the record to amend by. The settled statement, until certified is not record.—Branger v. Chevalier, 9 Cal. 172.

[b] The records of courts are under the control of the judges so far as essential to the proper administration of justices, and this control is beyond the reach of legislation.—Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

[c] An error in the record of the proceedings of the supreme court cannot be attacked collaterally, but should be brought seasonably to the notice of the court by a direct motion to correct it.—Willson v. Broder, 24 Cal. 190.

[d] Clerical errors and misprisions with respect to entries of judicial proceedings may be corrected by the court even after the adjournment of the term, but the record itself must show the error.—Hegeler v. Henckell, 27 Cal. 491.

[e] Supreme court has no authority to correct records in the lower courts. Applications to correct errors in the records of district courts, if any exist, must be made in the lower courts.—Boston v. Haynes, 31 Cal. 107.

[f] When court had in fact jurisdiction of defendant, but return of constable failed to show that fact, record may be amended after judgment so as to show jurisdiction, if there are no intervening rights to be affected.—Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309.

[g] All courts of record have the inherent power to correct their records so that they shall conform to the actual facts and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself without notice, or at the instance of any party interested; and when made, the corrected record, as well as the order making the correction, is conclusive upon any other court in which the record is offered in evidence.—Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

[h] The power of a court to cause its acts and proceedings to be correctly set forth in its records, and to correct its records in accordance with the facts, extends to criminal as well as civil cases.—People v. Ward, 141 Cal. 628, 75 Pac. 306.

[i] The court has inherent power to correct a clerical misprision on the face of its records.—Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174.

[j] The power of a court to correct is records is not lost by mere lapse of time, and the rule as to the effect of the adjournment of the term has become obsolete.—People v. Ward, 141 Cal. 628, 75 Pac. 306.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 764, 765; 13 Cent. Dig., cols. 2189-2192, §§ 369-373.

§ 104. —— Conclusiveness.

[a] Courts of such extended jurisdiction and grave responsibility as the district courts must, from the very nature of the case, be trusted as to the fidelity of their records, and their decision thereon is final and conclusive.—People ex rel. Galvin v. Judge of Tenth Judicial District, 9 Cal. 19.

[b] Record that parties waived a jury cannot be contradicted by affidavit of judge.—Smith v. Brannan, 13 Cal. 107.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 762; 13 Cent. Dig., cols. 2192, 2193, § 374.

III. SUPREME COURT AND DISTRICT COURT OF APPEALS.

CONSTITUTIONAL AND STATUTORY PROVISIONS CONSTRUED, § 105.
NATURE AND EXTENT OF JURISDICTION, § 106.
SOURCE AND DETERMINATION, § 107.
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—— DISBARMENT PROCEEDINGS, § 110.
APPELLATE JURISDICTION, § 111.
ISSUANCE OF PREROGATIVE WRITS, § 112.
MODE AND TIME OF EXERCISING JURISDICTION, § 113.
DISTRICT COURT OF APPEALS, § 114.

Power of supreme court to naturalize aliens. See Aliens, § 41.

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§ 105. Constitutional and Statutory Provisions Construed.

[a] Special cases are not included within the meaning of the word "cases" as it is used in that portion of the constitution which defines the jurisdiction of the supreme court. (Per Rhodes, C. J.)—Appeal of Houghton, 42 Cal. 35, 94 Am. Dec. 630.

[b] Special cases are special proceedings characteristically differing from ordinary suits at the common law. They do not proceed according to the course of the common law, but give new rights and afford new remedies. Such cases are not cases at law within the appellate jurisdiction of the supreme court, as defined by the constitution, even though they involve questions of value. (Per Wallace, J.)—Appeal of Houghton, 42 Cal. 35.

[c] Code of Civil Procedure, section 963, clause 1, authorizing an appeal to the supreme court in an action brought into the superior court from another court, does not apply to cases commenced in a justice's court, in which an appeal to the supreme court is denied by Constitution, article 6, section 4.—Edsall v. Short, 122 Cal. 533, 55 Pac. 327.

[d] Constitution, article 6, section 11, giving justice's courts concurrent jurisdiction with superior courts in cases to enforce liens on chattels, where the amount of the liens and the value of the chattels does not exceed three hundred dollars, does not give the supreme court jurisdiction of an appeal in such a case originally begun in a justice's court and appealed to the superior court; section 4 precluding the exercise of such jurisdiction in cases in equity arising in justices' courts.—Edsall v. Short, 122 Cal. 533, 55 Pac. 327.

§ 106. Nature and Extent of Jurisdiction.

[a] The constitution has not clothed supreme court with the powers and jurisdiction of the court of king's bench in England.—Attorney General, Ex parte, 1 Cal. 85.

[b] Supreme court cannot exercise functions not delegated.—Luther v. Master Ship Apollo, 1 Cal. 15, 66, 90, 92, 348.

[c] Powers of supreme court are exclusively appellate.—Knowles, Ex parte, 5 Cal. 306.

§ 107. —— Source and Determination.

[a] The supreme court being created by the constitution, and its powers being therein defined, the jurisdiction conferred by the constitution must be taken as exclusive of all other jurisdiction.—Attorney General, Ex parte, 1 Cal. 85.

[b] Jurisdiction of supreme court is derived from constitution alone, and the legislature can neither enlarge nor restrict it. When a special case is devised, the question whether the supreme court has jurisdiction in the matter must be determined by an interpretation of the provisions of the constitution, and not by reference to the statute. (Per Rhodes, C. J.)—Appeal of Houghton, 42 Cal. 35, 94 Am. Dec. 630.

§ 108. Original Jurisdiction.

[a] The supreme court is strictly an appellate tribunal, and has no original jurisdiction except in cases of habeas corpus, and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of a collector of the foreign license tax. Attorney General, Ex parte, 1 Cal. 85.

[b] Supreme court has no original jurisdiction to try title to an office.—People v. Harvey, 62 Cal. 508.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2337-2472, §§ 499-791.

§ 109. —— To Determine Salary of Judges of District Court of Appeals.

[a] The supreme court is the only tribunal empowered to determine the amount of the salary of the justices of the district court of appeals.—Harrison v. Colgan (Cal. Sup.), 81 Pac. 1010.

§ 110. —— Disbarment Proceedings.

[a] Under Code of Civil Procedure, section 287, supreme court will entertain accusation as an original proceeding for disbarment of an attorney only when prosecution is instituted by a bar association or other public body in the public interest.—In re Ashley, 146 Cal. 600, 80 Pac. 1030.

[b] Under Code of Civil Procedure, section 287, proceeding for disbarment of attorney on accusation of private person alleging misconduct prejudicial to himself should be instituted in the superior court of the county where alleged misconduct occurred.—Ashley, In re, 146 Cal. 600, 80 Pac. 1030.

§ 111. Appellate Jurisdiction.

[a] Supreme court has jurisdiction of order of court of first instance, affecting the merits in the case, where the appeal was brought before the passage of the act of February 28, 1850.—Payne v. Pacific Mail S. S. Co., 1 Cal. 33.

[b] The discretion of the probate court is subject to review by the supreme court, and like all other matters of discretion in case of gross abuse would be corrected.—Keller v. De Franklin, 5 Cal. 432.

[c] Supreme court has appellate jurisdiction in insolvency cases.—Kohlman v. Wright, 6 Cal. 231.

[d] The supreme court has no jurisdiction on appeal, where the ad damnum in the complaint does not exceed three hundred dollars.—Maxfield v. Johnson, 30 Cal. 545.

[e] A fine imposed by the county court for wrongfully demanding and collecting a toll for the privilege of passing over a road is not a municipal fine, within Constitution, article 6, section 4, which defines the appellate jurisdiction of the supreme court, nor is the legality of the fine to be imposed upon

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conviction involved in the trial of the case under that section.—People v. Johnson, 30 Cal. 98.

[f] Constitution, article 6, section 4, giving the supreme court appellate jurisdiction in all cases in equity, and in all actions at law involving the title or possession of real estate, or the legality of any tax, impost, assessment, or municipal fine, in which the demand for the value of the property in controversy exceeds three hundred dollars, vests it with appellate jurisdiction over an election contest in the county court.—Knowles v. Yates, 31 Cal. 82.

[g] The supreme court has jurisdiction of an appeal from a case commenced in a justice's court for damages in a less sum than three hundred dollars, and removed to the district court upon the filing of a verified answer showing that the determination of the action would necessarily involve the decision of a question of title to real property.—Doherty v. Thayer, 31 Cal. 140.

[h] The supreme court has jurisdiction to review all cases which the district courts have jurisdiction to try.—Solomon v. Reese, 34 Cal. 28.

[i] The appellate jurisdiction of the supreme court exists, and is capable of effective assertion, independently of legislative aid, as to the procedure through which an appeal is to be exerted. (Per Wallace, J.)—Appeal of Houghton, 42 Cal. 35, 94 Am. Dec. 630.

[j] The supreme court has jurisdiction to entertain an appeal in special cases, such as a proceeding to condemn land for the use of a railroad company.—Stockton etc. R. Co. v. Galgiani, 49 Cal. 139.

[k] Though the constitution contains no provision conferring on the supreme court appellate jurisdiction in cases of mandamus, such jurisdiction exists.—Palache v. Hunt, 64 Cal. 473, 2 Pac. 245.

[l] The supreme court, having appellate jurisdiction "in all cases . . . . which involve the title or possession of real estate," has jurisdiction of defendant's appeal in an action under Civil Code, section 485, declaring a railroad company, in case it does not fence its right of way, liable for cattle killed by its train on its road, which passed through or along the property of the owner thereof—plaintiff having to show ownership, or at least possession, of the adjoining land, and issue thereon being raised by the pleadings; and it is immaterial that defendant, by his appeal, raises no question as to such ownership or possession.—Baker v. Southern California Ry. Co., 110 Cal. 455, 42 Pac. 975.

[m] The appellate jurisdiction of the supreme court must be tested by the sum demanded in the complaint.—Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457.

[n] A proceeding by accusation for alleged misdemeanors in office, under section 772 of the Penal Code, is a criminal proceeding not prosecuted by information or indictment, and is not within the appellate jurisdiction of the supreme court, and an appeal from the judgment rendered therein will be dismissed.—Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1.

[o] In a proceeding by indictment against an officer for alleged misconduct in office, if the charges are substantiated, the fact that in such proceeding the court must enter a decree that the party accused be deprived of his office, and also enter a judgment in favor of the informer for the sum of five hundred dollars, does not make the demand a case at law for an amount greater than three hundred dollars within the appellate jurisdiction of the supreme court; but such judgment is for a fine, and the fact that it is payable to the informer, rather than into the county treasury, is wholly immaterial, and the provision therefor is purely incidental to the main purpose of the act, which is to secure the removal of the officer guilty of unlawful conduct.—Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1.

[p] Where the complaint in an action under Civil Code, section 485, imposing on railroads a liability to adjoining land owners for killing stock, avers ownership of adjoining land, as required, title to land is involved in the action so as to give the supreme court jurisdiction of an appeal from the judgment therein.—Boyd v. Southern California Ry. Co., 126 Cal. 571, 58 Pac. 1046.

[q] Statement of counsel, made for the purpose of having the evidence taken down, that the case involved title to land, cannot be accepted as a substitute for matter of record to show that title was involved, from which the jurisdiction of the court is to be ascertained. Raisch v. Sausalito Land etc. Co., 131 Cal. 215, 63 Pac. 346.

[r] Supreme court has no jurisdiction of an appeal from an order, made after final judgment, refusing to strike out plaintiff's cost-bill, which amounts to less than three hundred dollars.—Ertle v. Placer County, 44 Pac. 229.

[s] Where the amount claimed was in excess of two thousand dollars, an appeal was properly taken to the supreme court under Constitution, article 6, section 4.—McAulay v. Tahoe Ice Co. (Cal. App.), 86 Pac. 912.

§ 112. Issuance of Prerogative Writs.

[a] The provision of the statute organizing the supreme court that it shall have power to issue writs of habeas corpus, mandamus, injunction, supersedeas, certiorari, and such other writs and process as may be necessary to the exercise of its jurisdiction, is, in so far as it attempts to vest the court with original jurisdiction to issue original writs other than writs of habeas corpus, repugnant to Constitution, article 6, section 4, providing that the supreme court shall have appellate jurisdiction in certain stated cases, and have power to issue writs of habeas corpus and such other writs as are necessary to the exercise of its appellate jurisdiction.—People, Ex parte, 1 Cal. 85.

[b] Supreme court had no original jurisdiction under old constitution in mandamus, supersedeas, or prohibition.—People v. Turner, 1 Cal. 144.

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[c] Supreme court could only issue such writs and processes as were necessary to exercise of appellate jurisdiction.—Haight v. Gay, 8 Cal. 300.

[d] Supreme court has right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers and its authority to issue process necessary to give them effect.—Purcell v. McKune, 14 Cal. 230.

[e] Supreme court has only appellate jurisdiction, and is only authorized to issue writ of certiorari in and of such jurisdiction.—Milliken v. Huber, 21 Cal. 166, 169.

[f] The supreme court has original jurisdiction in cases of mandamus.—Tyler v. Houghton, 25 Cal. 26.

[g] The supreme court has original jurisdiction to grant writs of certiorari.—Miller v. Sacramento County Supervisors, 25 Cal. 93.

[h] Power of county courts to grant writs of certiorari, except in aid of their appellate jurisdiction, doubted, but the point not decided.—Faut v. Mason, 47 Cal. 7.

[i] In Constitution, article 6, section 4, the provision that the supreme court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, "and all other writs necessary or proper to the complete exercise of the appellate jurisdiction," does not change the provision of the old constitution, having the words, "and also all the writs necessary," etc., and the supreme court still has original jurisdiction to issue the same.—Hyatt v. Allen, 54 Cal. 353.

[j] In issuing prerogative writs the supreme court and the several superior courts are peers, each having original jurisdiction; whether the judgment of each is final, it is not necessary in this case to decide. Semble.—Santa Cruz etc. Co. v. Board of Supervisors of the County of Santa Clara, 62 Cal. 40.

[k] Where an appeal was taken to the supreme court from a judgment decreeing that a certain dam was maintained without authority, such court had no jurisdiction to grant a petition for an original injunction, alleging that certain of the defendants had threatened to enforce the judgment by removing the dam, and would do so unless restrained, such act amounting only to a threatened trespass by the parties, involving no act by the court. Rose v. Mesmer, 131 Cal. 631, 63 Pac. 1010.

FOR AUTHORITIES FROM OTHER STATES:

See 51 L. R. A. 33, note; 58 L. R. A. 833, note. See, also, 13 Cent. Dig., cols. 2337-2472, §§ 499-791.

§ 113. Mode and Time of Exercising Jurisdiction.

[a] The supreme court is always open, Sundays and holidays included. Where, therefore, a cause has been heard and decided by one of the departments, a hearing in bank cannot be granted after the expiration of thirty days, although the last day of the thirty falls on Sunday.—Adams v. Dohrmann, 63 Cal. 417.

[b] The provision in the constitution that, within thirty days after judgment pronounced in a cause by a department of the supreme court, it may be ordered to be heard and decided in bank, is merely a provision for the consideration and determination thereof after judgment, and does not imply an additional or oral argument, the court having discretion to hear on the record and arguments or to direct additional arguments; and the word "heard" signifies the consideration, as distinguished from the trial, of a cause, and the court has control and jurisdiction of a cause for that period; and the department that pronounced the judgment itself, the court in bank, or the justices of the court, may proceed to reconsider the cause, and to modify, correct, or vacate the judgment, and do so of their own motion.—Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

[c] Under the constitution of this state there is but one supreme court, and the jurisdiction which is vested in it may be exercised either in bank or in department. The court in bank has the power to correct an error in or modify the judgment rendered in a department, at any time within thirty days, of its own motion, irrespective of any application therefor, and it is not necessary that the cause be argued in bank upon an order therefor, to give the court in bank jurisdiction thereof.—Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

§ 114. District Court of Appeals.

[a] The discretion of the supreme court to order the removal of a cause from a district court of appeal to the supreme court for hearing under Constitution, article 6, section 4, as amended by Laws of 1903, page 738, will not be exercised to revise the decision of a district court of appeal as to the facts shown by the record.—People v. Davis (Cal. App.), 81 Pac. 716, 147 Cal. 346, 81 Pac. 718.

[b] Under Supreme Court Rule 32, held appeal involving more than the amount of which the court of appeal has jurisdiction will be transferred to the supreme court.—Weldon v. Rogers (Cal. App.), 82 Pac. 352.

[c] Under Constitution, article 6, section 4, the district court of appeal has no jurisdiction of a direct appeal in an action for the enforcement of a trust and an accounting, and an appeal so taken will be transferred to the supreme court.—Marston v. Kuhland (Cal. App.), 84 Pac. 357.

IV. SUPERIOR COURT.

SUPERIOR COURT OF SAN FRANCISCO, § 115.
NATURE AND EXTENT OF JURISDICTION, § 116.
SOURCE OF POWER, § 117.
EQUITY JURISDICTION, § 118.
—— POWER OF LEGISLATURE TO REGULATE, § 119.
JURISDICTION AND POWER WHILE SITTING IN PROBATE CASES, § 120.

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CASES TRANSFERRED FROM JUSTICE COURT, § 121.
CASE IRREGULARLY BROUGHT FROM POLICE COURT, § 122.
MANDAMUS, § 123.
QUO WARRANTO, § 124.
JURISDICTION DEPENDENT UPON AMOUNT IN CONTROVERSY, § 125.
—— AMOUNT CLAIMED AS TEST, § 126.
—— AMOUNT CLAIMED IN COUNTERCLAIM, § 127.
—— JOINDER OF SEPARATE CLAIMS TO MAKE AMOUNT, § 128.
—— COSTS AND INTEREST, § 129.
—— CASES IN WHICH JURISDICTION ATTACHES REGARDLESS OF AMOUNT, § 130.
APPELLATE JURISDICTION, § 131.

Jurisdiction of superior court over insolvent banks. See Banks and Banking, § 41.
Jurisdiction of superior court over insolvent savings bank. See Banks and Banking, § 126.
Jurisdiction over insolvent corporations. See Corporations, § 438.

§ 115. Superior Court of San Francisco.

[a] Superior court of city of San Francisco has constitutionally all powers which are specified in the act creating it.—Seale v. Mitchell, 5 Cal. 401.

[b] Whether superior court of San Francisco had jurisdiction to render judgment over two hundred dollars is no longer an open question. It has such jurisdiction on the principle of stare decisis.—Curtis v. Richards, 9 Cal. 33.

[c] Though the superior court of San Francisco is municipal court, and of inferior, limited, and special jurisdiction, there is nothing in the constitution to prevent the legislature from extending that jurisdiction, so that it can enforce its proper judgments by a levy on lands of the defendant outside the city.—Hickman v. O'Neal, 10 Cal. 292.

[d] Late superior court of San Francisco was a municipal and inferior court, but its character as such depended on the subjects of its jurisdiction and its relation to other tribunals, and not upon the form of its process or the counties to which it might be issued. Chipman v. Bowman, 14 Cal. 157.

§ 116. Nature and Extent of Jurisdiction.

[a] The superior court was no less "an inferior court" from the possession of the power to send its process out of the city. Its jurisdiction was not enlarged by the possession of that power. The prescribing of this mode or any other mode of enforcing its decree or exercising its powers is merely a matter of remedy or practice, which is left to the legislative direction.—Hickman v. O'Neal, 10 Cal. 292.

[b] Superior court was not intended to be an inferior court in respect to the mode of enforcing its process, but in respect to the character of the subjects of its jurisdiction and a subordinate relation to other tribunals. Hickman v. O'Neal, 10 Cal. 292.

[c] Superior court of San Francisco had jurisdiction of action for settlement of partnership real estate situated out of the county, but could not affect title by its decree.—Watts v. White, 13 Cal. 321.

[d] The superior court of San Francisco was a court of superior jurisdiction.—McCauley v. Fulton, 44 Cal. 355.

[e] Jurisdiction of superior court to try the question of a usurpation of an office is not derived from any act creating a particular office, but from its constitutional grant of general jurisdiction in civil cases.—Henshaw, Ex parte, 73 Cal. 486, 15 Pac. 110.

[f] Where right of recovery depends on whether defendant had defective or good title to land, case involves title to land, and superior court has original jurisdiction.—Copertini v. Oppermann, 76 Cal. 186, 18 Pac. 256.

[g] Superior court is court of general jurisdiction.—Bishop v. Superior Court, 87 Cal. 231, 25 Pac. 435.

[h] Since the superior court has jurisdiction, both in equity and in probate, having jurisdiction of the person and subject matter, it may administer relief in equity, and also in accordance with the law relating to matters in probate.—Pennie v. Roach, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106.

[i] The superior court has original jurisdiction of all questions pertaining to the title or possession of real property, and having jurisdiction of the parties upon the appeal from the justice's court, may properly try an issue as to the possession and right of possession of land.—Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

[j] Constitution, article 6, section 5, provides that actions in the superior court to recover possession of real estate, to quiet title thereto, and to enforce liens thereon, shall be commenced in the county wherein the property or a part thereof is situate. Held, that an action against a resident to have an absolute conveyance of real property situate without the state declared to be a mortgage, and to redeem therefrom, and to obtain an accounting of profits thereunder, is within the jurisdiction of the superior court, so far as the accounting is concerned, though no accounting can be ordered until the court determines that the conveyance is a mortgage.—Peninsular Trading etc. Co. v. Pacific Steam Whaling Co., 123 Cal. 689, 56 Pac. 604.

[k] The superior court has jurisdiction of an action to recover the sum of one thousand dollars for breach of a bond for that sum, which was exacted as a condition of granting a license to sell liquors under a municipal ordinance, and which provided that the applicant should conduct the business in a quiet, orderly and reputable manner, and not permit any disturbance of the public order or decorum by any noisy, riotous or disorderly conduct.—City of Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 656, 765; 13 Cent. Dig., cols. 2194-2200, §§ 375-382.

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§ 117. Source of Power.

[a] The jurisdiction of the superior courts is conferred by the constitution, and cannot be taken away by any act of the legislature. City of Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530.

§ 118. Equity Jurisdiction.

[a] An action to set aside an election of officers, as not held in conformity with law, is within the jurisdiction of the superior court sitting as a court of equity, though such jurisdiction has not been expressly conferred on it by statute.—Wright v. Central California Colony Water Co., 67 Cal. 532, 8 Pac. 70.

[b] Superior courts are given equitable jurisdiction in broadest terms by constitution. Spring Valley Water Works v. San Francisco, 82 Cal. 305, 16 Am. St. Rep. 116, 22 Pac. 910, 1046.

[c] Every superior court has jurisdiction over all cases in equity, under the constitution, other than real actions, which must be commenced in the county where the real estate is situated. In all other cases in equity, the provisions of the statute regarding the change of venue do not affect the jurisdiction of the court in which the suit in equity was commenced.—Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139.

[d] Under Constitution, article 6, section 5, suit under Statutes of 1899, page 103, chapter 88, to abate a nuisance, held within the exclusive jurisdiction of the superior court.—People v. Wing, 147 Cal. 379, 81 Pac. 1103.

§ 119. —— Power of Legislature to Regulate.

[a] While the constitution confers on the superior courts jurisdiction in equity cases, the legislature has the power to regulate the practice in such courts of granting preventive relief, including injunctions.—Wright v. Superior Court of Santa Clara County, 139 Cal. 469, 73 Pac. 145.

§ 120. Jurisdiction and Power While Sitting in Probate Cases.

[a] Probate jurisdiction of superior court is separate and distinct from its jurisdiction in ordinary civil actions.—Allgier, In re, 65 Cal. 228.

[b] Probate jurisdiction of superior court is separate and distinct from its jurisdiction in civil actions.—Henry v. Hudson, 63 Cal. 454.

[c] Superior court has jurisdiction to determine rights and duties of executors and beneficiaries under probated wills.—Williams v. Williams, 73 Cal. 104, 14 Pac. 394.

[d] Superior court, while sitting as court of probate, has only such powers as are given by statute with incidental power necessary to exercise power conferred.—Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206.

[e] In exercise of its probate powers jurisdiction of superior court is special and limited.—Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206.

[f] The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact the determination of which is ancillary to a proper judgment in such case.—Estate of Burton, 93 Cal. 459, 29 Pac. 36.

[g] Superior court, acting in probate proceedings, obtains its authority to award costs from the statute, and not by virtue of its general probate jurisdiction. Its power is confined to the terms of section 1720 of the Code of Civil Procedure.—Henry v. Superior Court, 93 Cal. 569, 29 Pac. 230.

[h] The probate court has no power to determine suits between heirs or devisees and strangers as to the title to property.—Buckley v. Superior Court, 102 Cal. 6, 41 Am. St. Rep. 135, 36 Pac. 360.

[i] Proceedings for the administration of the estates of deceased persons and for their distribution are purely statutory; and the court, while sitting as a court of probate, has no other powers than those given it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction conferred upon it.—Buckley v. Superior Court, 102 Cal. 6, 41 Am. St. Rep. 135, 36 Pac. 360.

[j] In this state the superior courts are given jurisdiction by the constitution of all matters of probate, in like manner as they are given jurisdiction of cases at law and in equity, and the grant of jurisdiction in regard to matters of probate is part of the general jurisdiction of the superior court. Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458.

[k] There is no probate court of the city and county of San Francisco, but the superior court has jurisdiction of probate matters, and there is no law authorizing the designation of any one department of said court for probate jurisdiction; but each of the twelve judges has jurisdiction in probate matters.—Estate of Pearsons, 113 Cal. 577, 45 Pac. 849.

[l] Jurisdiction of superior court over probate matters is conferred upon it by constitution and is not limited to that given it by statute.—Heydenfeldt v. Superior Court, 117 Cal. 350, 49 Pac. 210.

[m] Superior court sitting in probate has no power to determine disputes between heirs, devisees or legatees and persons claiming to be grantees of their shares under conveyances made by them prior to ancestor's death.—Ryder's Estate, 119 Cal. 369, 370, 74 Pac. 993.

[n] Superior court sitting in probate is court of special limited jurisdiction circumscribed by provisions of statute conferring it.—Strong's Estate, 119 Cal. 666, 667, 51 Pac. 1078.

[o] Superior court sitting in probate exercises special and limited jurisdiction entirely

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statutory and restricted, in absence of express statutory authority, to controversies strictly within probate proceedings.—Ryder's Estate, 119 Cal. 368, 74 Pac. 993.

[p] The superior court, sitting in probate, has no jurisdiction to adjudicate the question of the allowance of preferred claims against the estate of a deceased person in any other proceeding than a proceeding in rem in which the statutory notice to all the world has been given, such as is required upon the settlement of accounts against the estate.—Estate of Smith, 122 Cal. 462, 55 Pac. 249.

[q] Cases for the construction of wills, and of trusts thereunder arising under the former constitution, which vested all equity jurisdiction in the district courts, and established separate probate courts, are inapplicable to the present judicial system established under the new constitution, which vests both equity and probate jurisdiction in the superior court. One judge of the superior court sitting in equity cannot control another sitting in probate.—Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914.

[r] Probate courts cannot determine conflicting interests of heirs or lienors in an estate except in an appropriate proceeding and under proper pleadings.—Heeney's Estate, In re (Cal. App.), 86 Pac. 842.

§ 121. Cases Transferred from Justice Court.

[a] The jurisdiction of the superior court in causes transferred to it under section 838 of the Code of Civil Procedure is original, and not appellate, and if it would have had no jurisdiction if the action had been commenced therein it can have none by the filing of pleadings certified by a justice of the peace. It cannot exercise original jurisdiction in those matters in which its jurisdiction is only appellate.—Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47, 28 Pac. 54.

[b] The superior court cannot acquire jurisdiction of a cause improperly transferred to it from a justice's court by thereafter determining that it has jurisdiction and proceeding in the trial of the cause and rendering judgment therein.—Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47, 28 Pac. 54.

§ 122. Case Irregularly Brought from Police Court.

[a] In an action to recover city taxes it appeared the police court wrongfully retained jurisdiction of the case after demand was made to transfer to the superior court, and appeal was taken from a judgment on the merits to the latter court. Parties appeared in the superior court, and trial was had on the issues. Held, that, as the superior court had original jurisdiction of the subject matter, such jurisdiction was not affected by the irregular manner by which it got jurisdiction of the parties.—City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562.

§ 123. Mandamus.

[a] Superior court has no jurisdiction over proceedings by mandamus.—People ex rel. Hagan v. King, 1 Cal. 345.

§ 124. Quo Warranto.

[a] The superior court of the city of San Francisco has no jurisdiction of proceedings by quo warranto; and a judgment of that court, by which it was determined that A was not entitled to hold his seat as a member of the board of aldermen of that city, was accordingly reversed on appeal.—People ex rel. Hughes v. Gillespie, 1 Cal. 342.

[b] Superior court has jurisdiction of quo warranto proceeding to oust supervisor from office.—People v. Bingham, 82 Cal. 242, 22 Pac. 1039.

§ 125. Jurisdiction Dependent upon Amount in Controversy.

[a] The superior court has no jurisdiction, where amount recoverable from each stockholder is less than three hundred dollars.—Myers v. Sierra Valley Stock etc. Assn., 122 Cal. 669, 55 Pac. 689.

[b] Under Constitution, article 6, section 5, the superior court has no jurisdiction of a complaint to recover one hundred and ninety-two dollars and fifty cents.—Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322.

[c] Plaintiff, the purchaser of certain prunes, sued to recover for their conversion by the seller. The contract of sale was for "an undivided interest equal to two per cent" of the seller's ownership. The value of the entire crop, which plaintiff claimed to recover, was alleged at seven hundred dollars. Held that, as the actual damage to plaintiff by the conversion was an amount equal to but two per cent of the entire crop (that is, fourteen dollars), the action was not within the jurisdiction of the superior court.—California Cured Fruit Assn. v. Ainsworth, 134 Cal. 461, 66 Pac. 586.

FOR AUTHORITIES FROM OTHER STATES:

Jurisdiction dependent on value, how to be determined: 21 Am. St. Rep. 617, note; 28 L. R. A. 221, note; 61 L. R. A. 781, note; 28 L. R. A. 225, note. See, also, 11 Cyc. 766; 13 Cent. Dig., cols. 2226-2287, §§ 413-436.

§ 126. —— Amount Claimed as Test.

[a] Where a court renders a judgment within its jurisdiction, the fact that the complaint prayed a recovery in excess of the jurisdiction will not affect the validity of the judgment.—Wratten v. Wilson, 22 Cal. 465.

[b] Ad damnum clause in complaint is test of jurisdiction.—Maxfield v. Johnson, 30 Cal. 545.

[c] The amount claimed by the plaintiff in a suit is the test of the jurisdiction of the court, and not the amount found due by the court or jury.—Solomon v. Reese, 34 Cal. 28;

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Pennybecker v. McDougal, 48 Cal. 160; Derby v. Stevens, 64 Cal. 287, 30 Pac. 820.

[d] Jurisdiction is determined by amount for which judgment is asked, and not by averment of damage.—Sanborn v. Contra Costa County, 60 Cal. 425.

[e] Under Code of Civil Procedure, section 76, giving the superior courts original jurisdiction in cases in which the demand, exclusive of interest, etc., amounts to three hundred dollars, the ad damnum clause in the complaint is the test of jurisdiction; and where the demand, according to that clause, exceeds three hundred dollars, exclusive of interest, the superior court has jurisdiction of the action, though each of the separate claims united in the action is less than three hundred dollars.—Baily v. Sloan, 65 Cal. 387, 4 Pac. 349; Galloway v. Jones (Cal.) 13 Pac. 712.

[f] Amount claimed in ad damnum clause of complaint is test of jurisdiction.—Greenbaum v. Martinez, 86 Cal. 461, 25 Pac. 12.

[g] Amount prayed for in complaint does not conclude question of jurisdiction, regardless of allegations on which it is founded.—Lehnhardt v. Jennings, 119 Cal. 199, 48 Pac. 56.

[h] Amount sued for determines jurisdiction of court.—Lehnhardt v. Jennings, 119 Cal. 198, 199, 48 Pac. 56.

[i] The amount for which judgment is demanded in the complaint determines the jurisdiction of the court, and, if a plaintiff in good faith mistakenly alleges therein an amount due him sufficient to give the court jurisdiction, the subsequent discovery of the error will not deprive the court of jurisdiction.—Rodley v. Curry, 120 Cal. 541, 52 Pac. 999.

[j] The amount claimed in the complaint is the test of the jurisdiction of the superior court.—City of Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2232-2263, §§ 414-426.

§ 127. —— Amount Claimed in Counterclaim.

[a] Constitution, article 6, section 5, confers jurisdiction on the superior court in cases in which the demand is three hundred dollars. Code of Civil Procedure, section 438, subdivision 2, provides that, in an action on contract, any other demand may be set up as a counterclaim. Held, that where the contract pleaded in counterclaim is for a less sum than three hundred dollars, and shows that plaintiff's action is unfounded, because the contract sued on has been superseded by another, defendant is not entitled to judgment on his counterclaim.—Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820.

[b] Under Code of Civil Procedure, section 437, providing that defendant's answer may contain a statement of any new matter constituting a counterclaim, and section 438, providing that such counterclaim may be set up in actions arising on contract, where plaintiff sues in the superior court on a demand arising on contract, defendant may set up as a counterclaim a demand also arising on contract with plaintiff, though his demand is insufficient in amount to give the court jurisdiction in an independent action.—Freeman v. Seitz, 126 Cal. 291, 58 Pac. 690.

§ 128. —— Joinder of Separate Claims to Make Amount.

[a] Several liability of different defendants cannot be combined to give jurisdiction to superior court.—Thomas v. Anderson, 58 Cal. 99.

[b] Under the law making the liability of stockholders to creditors several only, Civil Code, section 322, authorizing two or more separate actions to be united in one, but requiring separate judgments to be entered against each defendant, and Constitution, 1849, article 6, section 6, limiting the jurisdiction of the district court to demands not less than three hundred dollars, the district (now superior) court cannot, in an action against several stockholders alleging a liability less than three hundred dollars as to some of defendants, take jurisdiction as to them.—Derby v. Stevens, 64 Cal. 287, 30 Pac. 820.

[c] Where seven defendants are sued, and the complaint demands a several judgment against five of them for less than three hundred dollars, the superior court has no jurisdiction as to these five.—Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62.

[d] The fact that each indemnitor is bound for less than three hundred dollars does not deprive the superior court of jurisdiction to give judgment against each on supplemental motion, under Code of Civil Procedure, section 1055, in an action against the sheriff of which it has jurisdiction.—Moore v. McSleeper, 102 Cal. 217, 36 Pac. 593.

[e] Parties having separate claims and having no joint interest in their aggregate cannot give superior court jurisdiction by joining their claims in one action.—Winrod v. Wolters, 141 Cal. 403, 74 Pac. 1037.

[f] A superior court has no jurisdiction of an action to recover from each of several stockholders of a corporation his proportion of a debt contracted by the corporation, where the amount sued for is less than three hundred dollars, though the aggregate amount sought to be recovered from the several stockholders be more than three hundred dollars.—Evans v. Bailey, 6 Pac. 424.

§ 129. —— Costs and Interest.

[a] Costs constitute no part of amount in controversy, and are not included for purpose of making a sum sufficient to give the supreme court jurisdiction.—Maxfield v. Johnson, 30 Cal. 545; Zabriskie v. Torrey, 20 Cal. 173; Votan v. Reese, 20 Cal. 89.

[b] Settled rule is that amount sued for exclusive of interest is test of jurisdiction in all

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cases where actions are brought to recover money. (Morrison, C. J., dissenting.)—Dashiell v. Slingerland, 60 Cal. 653.

[c] Constitution, article 6, section 5, giving the superior courts jurisdiction of cases in which the demand, exclusive of interest, amounts to three hundred dollars, does not give them jurisdiction of an action on a note originally for less than three hundred dollars, but which, by compounding the interest, has created a new principal, amounting to more than three hundred dollars.—Christian v. Superior Court of San Diego County, 122 Cal. 117, 54 Pac. 518; Howe v. Halsey, 54 Pac. 748.

[d] The superior court has no jurisdiction of an action upon a note for two hundred dollars, though the amount of principal and interest exceeded three hundred dollars; and such action was properly dismissed.—Gallagher v. McGraw, 132 Cal. 601, 64 Pac. 1080.

§ 130. —— Cases in Which Jurisdiction Attaches Regardless of Amount.

[a] In an action by a landlord against his tenant for one hundred and eighty-three dollars, rent due under a lease, and, as a second cause of action, for the restitution of the same premises, which were alleged to have been unlawfully detained after the expiration of a subsequent lease thereof, with damages for such unlawful detention, judgment was rendered for the rent demanded (one hundred and eighty-three dollars), but restitution of the premises was denied. Held, that the superior court had jurisdiction to render the judgment in question, though it was for less than the jurisdictional amount (three hundred dollars) of such court, since the relief demanded in prayer of judgment was within the jurisdiction of the court.—Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Lord v. Thomas, 27 Pac. 410.

[b] Action against tax collector for fraudulent assessment does not involve "legality of tax," and superior court has no jurisdiction where amount involved is less than three hundred dollars.—Perkins v. Ralls, 71 Cal. 88, 11 Pac. 860.

[c] The superior court has jurisdiction of an action under Civil Code, section 2941, providing that where a mortgage is paid, and the mortgagee refuses to satisfy the same of record, he shall forfeit to the mortgagor one hundred dollars, where the answer puts in issue plaintiff's title to the mortgaged land.—Randolph v. Kraemer, 106 Cal. 199, 39 Pac. 533.

§ 131. Appellate Jurisdiction.

[a] The constitutional provision that the superior courts "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts, in their respective counties, as may be prescribed by law," limits the exercise of their jurisdiction to the extent and mode which the legislature may prescribe. Sheer v. Superior Court of Lassen County, 94 Cal. 354, 29 Pac. 716.

V. PROBATE COURTS.

HISTORY, § 132.
STATUTES CONSTRUED, § 133.
NATURE AND EXTENT OF JURISDICTION, § 134.
OVER ESTATES OF DECEDENTS, § 135.
OVER GUARDIANS, § 136.
EQUITABLE POWERS, § 137.
ACTIONS INVOLVING TITLE TO LAND, § 138.
SETTING ASIDE VOID ADMINISTRATION, § 139.

Jurisdiction of superior court sitting as probate court. See ante, § 120.

§ 132. History.

[a] There was no probate court in California prior to organization of state.—Castro v. Castro, 6 Cal. 158.

§ 133. Statutes Construed.

[a] Act of 1863 concerning probate courts did not apply to courts previously existing. Pryor v. Downey, 50 Cal. 389, 19 Am. Rep. 656.

§ 134. Nature and Extent of Jurisdiction.

[a] Probate court is court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains all of its jurisdiction.—Clarke v. Perry, 5 Cal. 58.

[b] Probate court has jurisdiction to try and determine issues of fact arising in proceedings before it.—Keller v. De Franklin, 5 Cal. 432.

[c] Probate court is inferior court, and therefore cannot take jurisdiction or administer remedies other than those given in, and in the manner prescribed by, the statute.—Grimes' Estate v. Norris, 6 Cal. 621.

[d] The probate courts, though limited to certain specified subjects, are upon the footing of courts of superior common-law jurisdiction. Irwin v. Scriber, 18 Cal. 499.

[e] Courts of probate in this state, in the construction of their proceedings had before the passage of the act of 1858, are to be regarded as courts of limited and inferior jurisdiction.—Townsend v. Gordon, 19 Cal. 188.

[f] Under section 1597 of the Code of Civil Procedure, probate court has no jurisdiction in cases of part performance, but only where contract is written.—Cory v. Hyde, 49 Cal. 469.

[g] Functions of alcaldes and courts of first instances, over estates of deceased persons, were not transferred to probate court.—McNeil v. First Congregational Soc., 66 Cal. 106, 4 Pac. 1096.

[h] A contest for proceeds of insurance policy payable by its terms to widow and minor children of deceased cannot be inaugurated in probate court.—Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492.

[i] The probate court has only a limited and statutory jurisdiction, and can only set-

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tle the accounts of administrators or guardians in the manner prescribed by the code.—Reither v. Murdock, 135 Cal. 197, 67 Pac. 748.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 791-796; 13 Cent. Dig., cols. 2301, 2302, § 469; cols. 2304-2309, §§ 471-472.

§ 135. Over Estates of Decedents.

[a] Constitution does not confer on probate court jurisdiction of all matters relating to estates of deceased persons, but of such matters only as the statute directs it to exercise jurisdiction over.—Bush v. Lindsey, 44 Cal. 121.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2301-2309, §§ 469, 470, 472.

§ 136. Over Guardians.

[a] Probate court has exclusive jurisdiction to settle accounts of living guardian.—Allen v. Tiffany, 53 Cal. 16.

[b] The probate court has no jurisdiction to adjudge that a ward is indebted to his guardian for money advanced by the guardian to the ward at his request after he had become of age, and after his estate had been expended for his benefit.—Kincaid's Estate, In re, 120 Cal. 203, 52 Pac. 492.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2302-2304, § 470.

§ 137. Equitable Powers.

[a] Probate courts have no equitable jurisdiction.—Meyers v. Farquharson, 46 Cal. 190.

[b] The probate court proceeds in accordance with the principles of equity, and, having jurisdiction of a cause for one purpose, may afford complete and adequate relief in the premises.—In re Clary, 112 Cal. 292, 44 Pac. 569.

[c] The court of probate is of special and limited jurisdiction, and has not the requisite machinery to try a question of fraud committed therein against the rights of interested parties; and it is the peculiar province of a court of equity to grant relief from such fraud at the instance of the aggrieved parties, who have no adequate remedy in the court of probate.—Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951.

§ 138. Actions Involving Title to Land.

[a] Probate court cannot determine question of title to homestead.—Davis v. Caldwell, 12 Cal. 125.

[b] The probate court has no jurisdiction of a petition of the heirs of a deceased person to have his homestead divided between the widow and themselves.—James, In re, 23 Cal. 415.

[c] A probate court has no authority, on the petition of an executor, to order him, on the receipt of money loaned, to reconvey real estate conveyed to his testator by deed absolute on its face, but intended only as security of such money.—Anderson v. Fisk, 41 Cal. 308.

[d] The probate court, in setting apart, for the use of the family of the deceased husband or wife, property which has been dedicated as a homestead, under the homestead act, does not change, transfer or adjudicate the question of title, but the purpose and effect of such an order is that the property is relieved from administration, and does not constitute assets of the estate of the deceased.—Rich v. Tubbs, 41 Cal. 34.

[e] Title to land cannot be tried by the probate court in a proceeding to set apart a homestead to a widow, though the court may examine the titles to the several parcels for purposes of selection.—Burton, In re, 64 Cal. 428, 1 Pac. 702.

[f] After the homestead has been set apart to the widow, the court has no jurisdiction over it for the purpose of distribution.—Gilmore, In re, 81 Cal. 240, 22 Pac. 655.

[g] Probate court has no jurisdiction to inquire into consideration, validity or operation of deed of separation between testator and his widow.—Corker v. Corker, 87 Cal. 650, 651, 25 Pac. 922.

[h] On a petition to set apart as a homestead property inventoried as belonging to the decedent's estate, the probate court has no jurisdiction to try adverse claims to such property.—Kimberly, In re, 97 Cal. 281, 32 Pac. 234.

[i] On a final settlement by an executor, a legatee under the will objected, on the ground that the executor had personal property of the estate in his possession not accounted for, The executor set up that such property did not belong to the estate, and that he held it as guardian of E., a minor, whose property it was. Held that, the legal title to such property being directly in issue, the probate court had no jurisdiction to hear and determine to whom it belonged, and a finding by such court that the property was a part of the estate, and a decree charging the same to the executor in his account, is beyond its power.—Haas, In re, 97 Cal. 232, 31 Pac. 893.

[j] Probate court will not be prohibited from proceeding under sections 1461 to 1468, Code of Civil Procedure, either upon ground that those provisions are unconstitutional, or upon ground that proceedings in probate court involve passing upon title to property, and are not within jurisdiction of court.—Levy v. Superior Court, 105 Cal. 600, 38 Pac. 965.

[k] The probate court has no jurisdiction to determine the rights of those claiming adversely to the estate; but if serious questions arise from such claims, the court may delay the final decree until they can be determined in another forum.—Estate of Burdick, 112 Cal. 387, 44 Pac. 734.

[l] Probate courts have exclusive jurisdiction of final distribution of estates of dece-

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dents.—Crew v. Pratt, 119 Cal. 149, 51 Pac. 38.

[m] Probate court has no jurisdiction to determine rights of those claiming adversely to estate.—Plass v. Plass, 121 Cal. 135, 53 Pac. 448.

[n] Probate courts have jurisdiction to determine whether or not an estate has any interest in or title to property, in order to determine whether there is anything to distribute. They will not cumber their records with orders of distribution where there is nothing to distribute; but, where there is some title, the court has not jurisdiction to determine its quality.—Dunn, In re. Myr. Prob. 122.

§ 139. Setting Aside Void Administration.

[a] The court which granted administration upon the estate of a man supposed to have been dead, but who afterward appeared, is the proper court to which application should be made for an order vacating and annulling the proceedings.—Stevenson v. Superior Court of San Francisco, 62 Cal. 60.

[b] In a proceeding to set aside the administration of an alleged decedent afterward found to be alive, the probate court, after declaring the grant of administration and all subsequent proceedings void, had no authority to order the administrator to pay over money he had received, and, in default, that execution issue.—Costa v. Superior Court of Santa Clara County, 137 Cal. 79, 69 Pac. 840.

VI. SPECIAL, INFERIOR AND OBSOLETE COURTS.

IN GENERAL, § 140.
ALCALDES, § 141.
COUNTY COURTS, § 142.
—— WHAT ARE "SPECIAL CASES," § 143.
DISTRICT COURTS, § 144.
—— APPELLATE JURISDICTION, § 145.
FIRST INSTANCE COURTS, § 146.
MUNICIPAL COURT OF SAN FRANCISCO, § 147.
POLICE COURTS, § 148.
SESSIONS COURT, § 149.

§ 140. In General.

[a] Whenever new right is created by statute, and the enforcement of such right is committed to a court even of original jurisdiction, such court quoad hoc is an inferior court, and must pursue the statute strictly.—Cohen v. Barrett, 5 Cal. 195.

[b] Where an act of Congress confers jurisdiction on a court to determine the title to certain lands, the court cannot adjudicate on the title to other lands not mentioned in the act.—Umbarger v. Chaboya, 49 Cal. 525.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 658, 771-789; 13 Cent. Dig., cols. 2205-2299, §§ 404-468.

§ 141. Alcaldes.

[a] Under the laws of Mexico, an alcalde alone has no judicial power; but with certain exceptions, of which the right of possession to real estate is not one, every suit must be brought before the judge of the first instance. Ladd v. Stevenson, 1 Cal. 18.

§ 142. County Courts.

[a] Although the county court is authorized to try cases of forcible entry and detainer upon appeal de novo, still such a trial is an exercise of appellate, and not of original, jurisdiction.—Townsend v. Brooks, 5 Cal. 52.

[b] When an action had been commenced in a district court in good faith for a sum greater than two hundred dollars, exclusive of interest, a judgment may be rendered for an amount less than the sum limiting the jurisdiction of the court in the commencement of the action, as prescribed in the constitution. Jackson v. Whartenby, 5 Cal. 94.

[c] County court has no jurisdiction to enforce a mechanic's lien where the amount in controversy exceeds two hundred dollars.—Brock v. Herrick, 5 Cal. 279.

[d] County judge had no power to grant ferry franchise.—Chard v. Harrison, 7 Cal. 113.

[e] A proceeding to enforce a mechanic's lien is a special statutory action, in the nature of a proceeding in rem; and it is no objection to the jurisdiction of the county court in such a suit that the amount of the lien exceeds the sum limited as fixing the general jurisdiction of that court.—Van Winkle v. Stow, 23 Cal. 457.

[f] The proceeding in a county court to determine conflicting claims to town lots under the act of 1860 (Laws 1860, p. 6), is original and not appellate, and the action is governed by the same rules applicable to actions commenced in a court of record.—Ryan v. Tomlinson, 31 Cal. 11.

[g] Answer pleading that grain replevied was harvested by defendant on his own preemption claim does not necessarily involve right to real property.—Beguhl v. Swan, 39 Cal. 411.

[h] A judgment rendered by the county court upon appeal for the sum of three hundred dollars is void.—Will v. Sinkwitz, 39 Cal. 570.

[i] County courts were courts of superior jurisdiction.—Yenawine v. Richter, 43 Cal. 312.

[j] A county court had a right to grant a new trial.—(1858) Dickinson v. Van Horn, 9 Cal. 207; (1872) Yenawine v. Richter, 43 Cal. 312.

[k] County courts had general appellate jurisdiction over inferior tribunals.—Faut v. Mason, 47 Cal. 7.

[l] County courts have not the general power of supervision over inferior tribunals which pertains to the court of king's bench in England.—Faut v. Mason, 47 Cal. 7.

§ 143. —— What are "Special Cases."

[a] Term "special cases" in the constitution does not include any class of cases for

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which the courts of general jurisdiction have always supplied a remedy.—Parsons v. Tuolumne Water Co., 5 Cal. 43, 63 Am. Dec. 76.

[b] An act conferring upon the county courts jurisdiction to prevent or abate nuisances is unconstitutional and void.—Parsons v. Tuolumne Water Co., 5 Cal. 43, 63 Am. Dec. 76.

[c] Cases of insolvency under the act of 1852 are special cases within the meaning of the constitution.—Harper v. Freelon, 6 Cal. 76.

[d] Act giving jurisdiction over the subject of contested elections to the judge of the county court is constitutional and district judges are embraced within it.—Saunders v. Haynes, 13 Cal. 145.

[e] Aside from previous decisions of this court the true construction of our constitution (art. 4, sec. 9) is that the legislature has power to confer on county courts jurisdiction in such specially enumerated and defined cases as, in its discretion, should be confided to those tribunals. Cases from New York quoted and approved. In this state a more restricted view has been taken.—People ex rel. Jacks v. Day, 15 Cal. 91.

[f] Proceeding before corporate authorities of the town, under the act of 1860, is a "special case" within article 6, section 9, of the constitution. It is a purely statutory proceeding, commenced and prosecuted for the ascertainment of a particular fact to guide the corporate authorities in the execution of the trust devolved upon them under the act, and not an ordinary action at law or equity, nor conducted according to the forms of such action.—Ricks v. Reed, 19 Cal. 551.

[g] The proceeding to enforce a mechanic's lien is "a special case," within the meaning of the state constitution, over which the legislature had authority to give jurisdiction to the county courts.—McNiel v. Borland, 23 Cal. 144.

[h] Mandamus is not a special case.—People v. Kern County Supervisors, 45 Cal. 679.

[i] The constitution gives jurisdiction of "special cases" to the county courts, unless the statute confers jurisdiction upon some other court.—Spencer Creek Water Co. v. Vallejo, 48 Cal. 70.

[j] Act conferring jurisdiction on county judge in condemnation proceedings is unconstitutional.—Spencer Creek Water Co. v. Vallejo, 48 Cal. 70.

§ 144. District Courts.

[a] District court had no jurisdiction beyond statute.—Selby v. Bark Alice Tarlton, 1 Cal. 103.

[b] On petition of attorney general for a writ of quo warranto against a tax collector, held, that the court had no jurisdiction, and the prayer of the petition was denied.—Ex parte Attorney General, 1 Cal. 85.

[c] To give the district court jurisdiction, the amount sued for must be not less than two hundred dollars, exclusive of interest.—Arnold v. Van Brunt, 4 Cal. 89.

[d] District court is court of general original jurisdiction; its process is coextensive with the state.—Reyes v. Sanford, 5 Cal. 117.

[e] In suit for divorce and partition of property acquired during coverture the jurisdiction of the district court is not limited as to the amount.—Deuprez v. Deuprez, 5 Cal. 387.

[f] As the jurisdiction of the fourth district court extends over the entire city of San Francisco, an allegation, in an insolvency petition to the judge of that court, that the insolvent is a resident of the city of San Francisco, is sufficient to show jurisdiction of the court.—Slade v. Creditors, 10 Cal. 483.

[g] The district court, by virtue of its common-law powers alone, derives its power to try issues of fact, and that court, as a court of law, has no jurisdiction over probate matters. Its jurisdiction over matters of account and the like is derived from its grant of equitable power in the constitution, and in that respect it has only concurrent jurisdiction with the probate court.—Pond v. Pond, 10 Cal. 495.

[h] That an offset pleaded, added to the amount sued for, exceeds two hundred dollars, does not give jurisdiction.—Myres v. Liening, 13 Cal. 650.

[i] The district court has jurisdiction of any case, no matter what be the amount sued for, if the title to real property is involved, unless the entire value of such property is shown to be so small as not to confer the jurisdiction.—Cullen v. Langridge, 17 Cal. 67.

[j] Fourth district court, although the district only comprises a portion of the county of San Francisco, is a court for the whole county, having jurisdiction over persons and subject matter therein. The territorial limits assigned to this court are given for the purposes of convenience in elections, etc., and not for the purpose of limiting its powers.—People v. Robinson, 17 Cal. 363.

[k] District court has jurisdiction in an action for foreclosure of mortgages upon estates of deceased persons.—Pechaud v. Rinquet, 21 Cal. 76.

[l] If total amount of tax exceeds jurisdictional sum, district court has jurisdiction.—People v. Leet, 23 Cal. 164.

[m] Under Constitution, article 6, section 6, as amended, the district court has authority to issue writs of mandamus, certiorari, prohibition, and habeas corpus.—Perry v. Ames, 26 Cal. 372.

[n] An action to recover taxes is an action at law under the act of 1861 when the complaint prays for a money judgment; but it is a suit in equity under the act of 1862 when the complaint prays for a foreclosure of the lien and sale of the premises.—People v. Mier, 24 Cal. 61.

[o] An action under the revenue law of 1861, which provides for a judgment in the nature of a money judgment, is not a suit in equity, and the district court will have no jurisdiction unless the amount in dispute exceeds

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three hundred dollars.—People v. Mier, 24 Cal. 61.

[p] If action is brought under provisions of act of May 12, 1862, it is a case in equity, and the district court has jurisdiction, although the amount claimed is less than three hundred dollars.—People v. Mier, 24 Cal. 61.

[q] District courts, by article 6, section 6 of the constitution, have "original jurisdiction in all cases in equity," and an act of the legislature depriving them of that jurisdiction or transferring it to any other court is unconstitutional and void.—Willis v. Farley, 24 Cal. 490.

[r] When, in actions to recover taxes, the amount sued for is less than three hundred dollars, and there is no prayer for the foreclosure of the tax lien, order of sale, etc., the district courts have no jurisdiction.—Bell v. Crippen, 28 Cal. 327.

[s] District courts have jurisdiction to issue writs of mandate regardless of the amount involved in the action. (Per Sawyer, J., Curry, C. J., concurring.)—Cariaga v. Dryden, 30 Cal. 244.

[t] District courts have jurisdiction of actions to recover one-half value of partition fence, although the amount sought to be recovered is less than three hundred dollars. Such actions involve the title of the parties to their respective lands.—Holman v. Taylor, 31 Cal. 338.

[u] Section 6 of article 6 of the constitution gives the district court jurisdiction of all actions in which the title or possession of real property is an issuable fact in the case, upon which the plaintiff relies for a recovery, or the defendant for a defense. It is not necessary that the title or possession be put in issue, but one or the other must be an issuable fact, necessary to be averred in the pleadings.—Holman v. Taylor, 31 Cal. 338.

[v] District courts have jurisdiction of all actions to recover damages for trespass upon lands, regardless of the amount of damages claimed.—Holman v. Taylor, 31 Cal. 338.

[w] Under Constitution, article 6, section 6, as amended by act of 1862, the district courts have no jurisdiction in probate matters, as the amendment omits all reference to issues joined in probate courts, while the section prior to the amendment conferred unlimited jurisdiction in all issues of fact found in probate matters.—Bowen, In re, 34 Cal. 682.

[x] District courts in this state, by virtue of their organization and common-law powers, have full authority, except when limited by the constitution or Practice Act, to pronounce such judgment as the exigency of each case shall require.—Stewart v. Levy, 36 Cal. 159.

[y] It is the intention of the constitution to give exclusive jurisdiction to the district courts in actions of trespass in those cases only in which the right to the possession of land is involved.—Pollock v. Cummings, 38 Cal. 683.

[z] District courts have jurisdiction of actions for collection of delinquent taxes, when the tax amounts to more than three hundred dollars, and also, regardless of amount, when it is sought to enforce the lien of the tax.—People v. Olvera, 43 Cal. 492.

[aa] When jurisdiction is limited to a county, "district" is synonymous with county.—McCauley v. Fulton, 44 Cal. 356.

[bb] District courts have jurisdiction to make all necessary orders respecting process issued, or to be issued, on their judgments. Clark v. Sawyer, 48 Cal. 133.

[cc] District courts have jurisdiction of actions to recover value for goods sold for use of vessel on high seas.—Crawford v. Roberts, 50 Cal. 235.

[dd] Code, section 564, subdivision 6, is but declaratory of the equity jurisdiction conferred upon the district courts by the former constitution, in giving them jurisdiction of "all cases in equity," and includes only the suits in which it has been the usage of courts of equity to appoint a receiver.—Bateman v. Superior Court, 54 Cal. 285.

§ 145. —— Appellate Jurisdiction.

[a] The supreme court alone has a revisory jurisdiction, by way of appeal, over judgments of courts of first instance; and, in respect to such judgments, district courts are not courts of review, and have no jurisdiction to examine into their regularity or validity, unless, perhaps, in case of a judgment fraudulently rendered.—Belt v. Davis, 1 Cal. 135.

[b] Constitution article 6, section 6, confers on the district courts original jurisdiction in cases where the amount in dispute exceeds two hundred dollars. The fourth section of the same article gives appellate powers to the supreme court, and the ninth section permits the legislature to give to county courts original or appellate jurisdiction in all cases, or in cases arising in justice's courts. Held, that an act providing for appeals to the district court is unconstitutional.—People v. Peralta, 3 Cal. 379; Caulfield v. Hudson, 3 Cal. 389.

[c] No appellate power belongs to the district court.—Hernandes v. Simon, 3 Cal. 464.

[d] District courts have no appellate jurisdiction.—Reed v. McCormick, 4 Cal. 342.

[e] The sixth section of article 6 of the constitution, which provides that in all issues of fact joined in the probate courts the jurisdiction of the district courts shall be unlimited, does not give the district court appellate jurisdiction from the probate courts, and acts conferring it are void.—Reed v. McCormick, 4 Cal. 342.

[f] The supervisors of a county are a quasi political corporation, and as such the district courts of this state, by virtue of their general jurisdiction as superior courts, have a supervisory power and control over their proceedings, to the exercise of which appellate power is not necessary.—People ex rel. Church v. Hester, 6 Cal. 679.

[g] There is no relation of inferiority in the constitution or powers of the probate court as

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respects the district court. They are unlike, but, within their respective spheres, equal. They are both constitutional courts. No appeal lies from one to the other.—Pond v. Pond, 10 Cal. 495.

[h] The general power of supervision over inferior tribunals which pertains to the court of king's bench in England pertains to the district courts in this state.—Miliken v. Huber, 21 Cal. 166.

§ 146. First Instance Courts.

[a] Court of first instance had jurisdiction of divorce cases within sphere of its ordinary jurisdiction, when marriage was not a sacrament but a civil contract.—Harman v. Harman, 1 Cal. 215.

[b] Under Mexican law, courts of first instance had jurisdiction of divorce, in case of marriage without sanction of the church.—Harman v. Harman, 1 Cal. 215.

[c] Court of first instance had jurisdiction of estates of deceased persons prior to probate act.—Ryder v. Cohn, 37 Cal. 69.

§ 147. Municipal Court of San Francisco.

[a] The San Francisco municipal court is a court of inferior jurisdiction, within Constitution, article 6 section 1, as amended in 1862. Stratman, Ex parte, 39 Cal. 517.

[b] The municipal criminal court of San Francisco, established by act of the legislature March 31, 1870, is a constitutional court. Stratman, Ex parte, 39 Cal. 517, affirmed on this point.—People v. Nyland, 41 Cal. 129.

[c] The city criminal court of the city and county of San Francisco is a court of record, because it has a clerk and bailiff, and has power to fine and imprison, although it has no seal.—Thistleton, Ex parte, 52 Cal. 220.

§ 148. Police Court.

[a] In an action brought in a police court to recover a license tax for the transaction of business, if the answer denies the legality of the tax, the police court cannot try the cause, but must transfer it to the district court.—City of Santa Barbara v. Stearns, 51 Cal. 499.

[b] Police judge's court of city and county of San Francisco is court within meaning of section 1388 of the Penal Code, and may exercise jurisdiction granted by that section. Boys and Girls' Aid Society v. Reis, 71 Cal. 627, 12 Pac. 796.

[c] Judges of the police court are not named in the County Government Act of 1893, either as county or township officers, and no provision is found therein relative to their duties or term of office. That court has its existence by virtue of section 1 of article 6 of the constitution, authorizing the legislature to establish inferior courts in any incorporated city, town, or city and county, and the act of 1893, page 9, establishing it in the city and county of San Francisco. Their term of office is fixed at two years, and their successors are also to be elected at the general election to be held in November, 1896.—Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87.

[d] Police court of Sacramento was abolished by adoption of freeholders' charter in 1894.—Sparks, Ex parte, 120 Cal, 397, 52 Pac. 715.

[e] Police court of Los Angeles was lawfully organized under act of March 18, 1885. Mitchell, In re, 120 Cal. 385, 52 Pac. 799.

§ 149. Sessions Court.

[a] Court of sessions is vested with power of taxation and appropriation for county purposes.—Thompson v. Rowe, 2 Cal. 68.

[b] Under the act of 1851 the court of sessions was authorized to appropriate one-half of the current revenue to the current expenses to the exclusion of prior indebtedness. Thompson v. Rowe, 2 Cal. 68.

[c] Court of sessions must be composed of three persons: the county judge and two associate justices.—People v. Ah Chung, 5 Cal. 103.

[d] Court of sessions has no appellate jurisdiction in either civil or criminal cases. Their jurisdiction is original, not appellate. In all cases where an appeal lies from a justice's court it must be taken to the county court.—People v. Fowler, 9 Cal. 85.

[e] Court of sessions, under constitution, can only exercise powers of judicial character. Hardenburgh v. Kidd, 10 Cal. 402.

VII. FEDERAL COURTS.

IN GENERAL, § 150.
VALIDITY OF JUDICIARY ACT, § 151.
POWER OF STATE LEGISLATURE, § 152.
ACTIONS BETWEEN ALIENS, § 153.
CASES INVOLVING CONSTRUCTION OF TREATY, § 154.
CUSTODY OF ACCUSED PENDING HABEAS CORPUS PROCEEDINGS, § 155.
WHAT CONSTITUTES FEDERAL QUESTION, § 156.
ADOPTION OF PRACTICE OF STATE COURTS, § 157.
REVIEW OF DECISIONS OF STATE COURTS, § 158.
APPEAL FROM CIRCUIT TO SUPREME COURT AS SUSPENDING DEATH SENTENCE, § 159.
JURISDICTION OF DISTRICT COURTS, § 160.

Jurisdiction of federal courts in bankruptcy cases. See Bankruptcy, § 4.

§ 150. In General.

[a] Judiciary system created by constitution of United States is entirely disconnected with and independent of the judiciary of the several states.—Ferris v. Coover, 11 Cal. 176.

FOR AUTHORITIES FROM OTHER STATES:

See 24 C. C. A. 523, note; 36 C. C. A. 276, note. See, also, 11 Cyc. 843-981; 13 Cent. Dig., cols. 2473-2987, §§ 792-1198.

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§ 151. Validity of Judiciary Act.

[a] The twenty-fifth section of the act of Congress of 1789, commonly called the Judiciary Act, is constitutional.—Ferris v. Coover, 11 Cal. 175.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 2473-2477, § 792.

§ 152. Power of State Legislature.

[a] There is no provision in the constitution which delegates to the legislature of California the power to enlarge the jurisdiction of the federal courts.—Ferris v. Coover, 11 Cal. 176.

[b] It is not within the constitutional power of a state legislature to confer jurisdiction upon federal courts or prescribe the means or mode of its exercise.—Greely v. Townsend, 25 Cal. 604.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 845; 13 Cent. Dig., cols. 2480-2486, §§ 795, 796.

§ 153. Actions Between Aliens.

[a] United States courts have no jurisdiction, based upon the citizenship of the parties, over actions between aliens and aliens, but only over actions between citizens and aliens. Orosco v. Gagliardo, 22 Cal. 83.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 865, 866; 13 Cent. Dig., cols. 2576-2578, §§ 847-849.

§ 154. Cases Involving Construction of Treaty.

[a] United States supreme court has jurisdiction of cases involving construction of treaty with Mexico.—Gardner v. Miller, 47 Cal. 570.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 857; 13 Cent. Dig., cols. 2364, 2365, § 840.

§ 155. Custody of Accused Pending Habeas Corpus Proceedings.

[a] Questions concerning custody of accused pending hearing of his case on habeas corpus in federal court held within jurisdiction of federal courts.—Lee Look, In re, 146 Cal. 567, 80 Pac. 858.

§ 156. What Constitutes Federal Question.

[a] Whether proceeding by information instead of indictment is violation of federal constitution is federal question.—Edgar, Ex parte, 119 Cal. 126, 127, 51 Pac. 29.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 857; 13 Cent. Dig., cols. 2538-2545, §§ 820-824.

§ 157. Adoption of Practice of State Courts.

[a] Statute of the several states, regulating remedies by means of judicial proceedings, are to be understood as intended to apply only to proceedings in the courts of the particular state where adopted, unless it clearly appears that they were intended to have a wider scope.—Majors v. Cowell, 51 Cal. 478.

[b] A statute authorizing the filing of a notice of lis pendens, and declaring its effect, should be construed as applying only to suitors in state courts.—Majors v. Cowell, 51 Cal. 478.

FOR AUTHORITIES FROM OTHER STATES:

See 5 C. C. A. 594, 27 C. C. A. 392, notes. See, also, 11 Cyc. 884-890; 13 Cent. Dig., cols. 2660-2716, §§ 899-938.

§ 158. Review of Decisions of State Courts.

[a] Neither a writ of error nor appeal lies to take a case from a state court to the supreme court of the United States.—Johnson v. Gordon, 4 Cal. 368.

[b] Appellate jurisdiction of the supreme court of the United States, conferred by the second section of article 3 of the constitution, does not extend to the state courts, but is confined to the inferior courts mentioned in the preceding section. (Per Terry, C. J.) Ferris v. Coover, 11 Cal. 176.

[c] There is no provision in the federal constitution from which a supervisory power over the state courts can be vested in the supreme court of the United States by any fair or legitimate implication or construction. (Per Terry, C. J.)—Ferris v. Coover, 11 Cal. 175.

[d] A doctrine that the right of appeal from the decisions of the state courts to the United States supreme court is unlimited would permit writs of error in every case, whether civil or criminal, and would delay the whole machinery of justice in the courts of the state in every case, however destitute of any right to a writ of error.—Ferris v. Coover, 11 Cal. 175.

[e] An action of ejectment, raising the question whether a grant made by the Mexican government passed title to the tract within the limits of the grant is not a case in which a writ of error lies under the judiciary act.—Ferris v. Coover, 11 Cal. 175.

[f] This court does not recognize an unlimited right of appeal from its decisions to the supreme court of the United States. The act of Congress of 1789 gives no such right. The appellate power of the supreme court in this respect is strictly limited to the cases given in the act. Like any other special authority, it is to be strictly pursued, and the record must show upon its face the facts which give the power. In a case falling within the provisions of section 25 this court acknowledges the right of appeal, but denies it in all other cases.—Ferris v. Coover, 11 Cal. 175.

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[g] It is only final judgments or decrees of the highest court of a state which can be re-examined upon a writ of error by the supreme court of the United States.—Hart v. Burnett, 20 Cal. 169.

[h] Action of the presiding judge of a state court on the application for a citation upon a writ of error, directed to the justices of that court, issued by the clerk of the circuit court of the United States, is so far judicial in its nature that he may refuse to issue the citation when, in his judgment, it is clear that the writ of error will not lie for want of jurisdiction.—Hart v. Burnett, 20 Cal. 169.

[i] A judgment of this court on appeal, reversing the judgment of a lower court in an action of ejectment, and remanding the cause for a new trial—following a decision finally determining certain questions of law arising in the case which will control the court below in its further action—is not a final judgment within the meaning of the twenty-fifth section of the judiciary act of 1789.—Hart v. Burnett, 20 Cal. 169.

[j] The true test as to whether a writ of error lies to the supreme court of the United States from the final judgment of a state court is to be arrived at, not from mere averment in the pleadings, but from the matter decided as developed in the whole record.—Greely v. Townsend, 25 Cal. 604.

[k] The citation upon a writ of error, by which a cause is removed from the highest court of law or equity in a state to the supreme court of the United States, is not a writ of right, but the court may award it or not, according as it determines, from an examination of the record, that it is within that class of cases that may be thus removed.—Greely v. Townsend, 25 Cal. 604.

[l] A decision that the title of a claimant of land upon which he has settled, under the pre-emption laws of the United States, is superior to the title acquired by a subsequent location under a school land warrant and a patent issued under the laws of the state, does not necessarily involve the construction of any act of Congress, but only of the state law under which the location under the warrant was made; and in such a case a writ of error to the United States supreme court will not lie.—Athearn v. Poppe, 25 Cal. 631.

[m] If a judgment is reversed by the supreme court of the United States, with directions to the court below to enter a decree in accordance with the opinion, and its mandate is filed in the lower court, the judgment is set aside, even if the lower court does not make any order conforming its judgment to that of the supreme court, and if the lower court denies a motion made to thus modify the judgment.—Reynolds v. Hosmer, 45 Cal. 617.

[n] If an appeal is taken to the United States supreme court from a decree of the district court confirming a title, an order entered thereafter by the district court pending the appeal that the appeal was thereby dismissed, is absolutely void.—Younger v. Pagles, 60 Cal. 517, 519.

[o] The action of this court, upon the presentation of a writ of mandate from the supreme court of the United States, is limited by the directions found in the writ; and where the mandate contains no reference to the affirmation of the judgment theretofore rendered by this court in the cause therein specified, it is useless for the court to reaffirm its order of judgment, and an order reaffirming it will be stricken from the record. Blythe, Estate of, 118 Cal. 347, 50 Pac. 545.

FOR AUTHORITIES FROM OTHER STATES:

See 62 L. R. A. 513, note. See, also, 11 Cyc. 926-940; 13 Cent. Dig., cols. 2813-2883, §§ 1045-1093.

§ 159. Appeal from Circuit to Supreme Court as Suspending Death Sentence.

[a] Appeal from order of United States circuit court denying petition of condemned person for writ of habeas corpus suspends proceedings under death sentence of state court.—People v. Durrant, 119 Cal. 203, 204, 51 Pac. 185.

FOR AUTHORITIES FROM OTHER STATES:

See 48 C. C. A. 351, note. See, also, 11 Cyc. 921-923; 13 Cent. Dig., cols. 2795-2797, §§ 1022-1026.

§ 160. Jurisdiction of District Courts.

[a] If a district court of the United States is authorized by special act of Congress to adjudicate on the validity of a Mexican grant to a tract of land described in a petition filed by the claimant in that court, the court has jurisdiction to reject the grant except a portion thereof, and confirm that portion not thus rejected.—Umbarger v. Chaboya, 49 Cal. 525.

[b] If an act of Congress gives jurisdiction to a district court of the United States to adjudicate on the title to certain lands, the court has no authority, under the act, to adjudicate on the title to lands other than those mentioned in the act.—Umbarger v. Chaboya, 49 Cal. 525.

[c] It seems that a federal court cannot rightfully transfer property from this state to another state for the mere purpose of giving to the courts of that state jurisdiction to distribute such property, thereby depriving the courts of this state of such jurisdiction; but a United States district court may, without violation of that principle, order the distribution of the surplus proceeds of a vessel taken under a libel in admiralty from the custody of a receiver of a state court in Oregon, to be made to such receiver as the only person having a vested interest therein. Swinnerton v. Oregon Pac. R. R. Co., 123 Cal. 417, 56 Pac. 40.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 951-953; 13 Cent. Dig., cols. 2904-2912, §§ 1119-1132.

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VIII. CONCURRENT AND CONFLICTING JURISDICTION AND COMITY.

EXCLUSIVE OR CONCURRENT JURISDICTION, § 161.
CONSTITUTIONALITY OF ACT CONFERRING CONCURRENT JURISDICTION, § 162.
EFFECT OF STATUTE CREATING CAUSE OF ACTION AND CONFERRING JURISDICTION ON PARTICULAR COURT, § 163.
JURISDICTION CONCURRENT WITH THAT OF PROBATE COURT, § 164.
JURISDICTION CONCURRENT WITH THAT OF JUSTICE OF THE PEACE, § 165.
ACTIONS TO ABATE NUISANCE, § 166.
RIGHT TO ELECT TRIBUNAL, § 167.
PRIORITY OF JURISDICTION, § 168.
SCOPE AND EFFECT OF PRIOR PROCEEDINGS, § 169.
PROCEEDINGS IN PROBATE COURTS AND OTHER COURTS, § 170.
PROCEEDINGS IN EQUITY AND IN PROBATE COURT, § 171.
GRANTING INJUNCTION IN CASE PENDING IN ANOTHER COURT, § 172.
ANTAGONISTIC JUDGMENTS RENDERED IN COURTS OF CONCURRENT JURISDICTION, § 173.
PRISONERS UNDER ARREST, COMMITMENT OR SENTENCE, § 174.
—— DISCHARGE OF INSOLVENT HELD UNDER PROCESS OF ANOTHER COURT, § 175.
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ENJOINING ENFORCEMENT OF JUDGMENT, § 177.
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TRANSFER OF CAUSES, § 179.
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—— COURT FIRST IN POSSESSION OF SUBJECT MATTER, § 187.
—— ADMIRALTY CASES, § 188.
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—— ENJOINING PROCEEDINGS, § 192.

Conflicting jurisdiction in condemnation proceedings. See Eminent Domain, § 94.
Effect of judgments of courts of concurrent jurisdiction. See Judgment, § 441.

§ 161. Exclusive or Concurrent Jurisdiction.

[a] Under the constitution the district courts of the state have jurisdiction in cases of nuisance. The grant, by the legislature, of jurisdiction in such cases, to the county courts, cannot take away the jurisdiction given to the district courts by the constitution.—Fitzgerald v. Urton, 4 Cal. 235.

[b] Justices' courts have jurisdiction in cases of forcible entry. The ninth section of the sixth article of the constitution cannot be construed to confer exclusive original jurisdiction in all special cases upon the county courts.—O'Callaghan v. Booth, 6 Cal. 63.

[c] The grant of original jurisdiction in the constitution, to a particular court, of a class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases.—Courtwright v. Bear River etc. Min. Co., 30 Cal. 573.

[d] Grant of jurisdiction to a court does not imply that it is exclusive.—Rosenberg v. Frank, 58 Cal. 403.

[e] Where a will creates no trust estates, and the questions relating to the distribution thereof are purely legal, a court of equity has no jurisdiction of a suit by the administrator for a decree instructing the probate court as to such distribution, since the jurisdiction of such questions by the probate court is exclusive.—Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 982-985; 13 Cent. Dig., cols. 2989-3022, §§ 1199-1227; cols. 3044-3048, §§ 1247-1259; col. 3053, §§ 1266-1269.

§ 162. Constitutionality of Act Conferring Concurrent Jurisdiction.

[a] The provision of the constitution that district courts shall have jurisdiction of suits in which the amount in controversy exceeds two hundred dollars, and that the legislature may establish such municipal and other inferior courts as may be deemed necessary, does not require the jurisdiction of the district court to be exclusive, and hence the provision of the statute establishing the superior court of San Francisco, giving it jurisdiction of certain suits in which the amount in controversy exceeds two hundred dollars, is valid.—Seale v. Mitchell, 5 Cal. 401.

[b] The legislature cannot confer upon one court the functions and powers which the constitution has conferred on another.—Zander v. Coe, 5 Cal. 230.

[c] The legislature, in conferring jurisdiction of cases of insolvency on both the district and the county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction.—Harper v. Freelon, 6 Cal. 76.

[d] Constitutional provision conferring jurisdiction in all matters of probate or superior court held not to prevent legislature from determining which court has jurisdiction in any particular estate.—Dungan v. Superior

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Court of Fresno County (Cal. Sup.), 84 Pac. 767.

§ 163. Effect of Statute Creating Cause of Action and Conferring Jurisdiction on Particular Court.

[a] Where a statute creating a new right, and prescribing a particular remedy for violation thereof, provides that the remedy must be pursued in a particular court, no other court has jurisdiction.—Reed v. Omnibus R. Co., 33 Cal. 212.

[b] The district court has no jurisdiction over actions to recover a forfeiture imposed on railroad companies by the act of April 14, 1863, for charging a passenger an excess of fare, as such act expressly confers jurisdiction on justices of the peace.—(1867) Reed v. Omnibus R. Co., 33 Cal. 212; (1868) Smith v. Omnibus R. Co., 36 Cal. 281.

§ 164. Jurisdiction Concurrent with that of Probate Court.

[a] The jurisdiction vested in the probate court over the estates of deceased persons does not devest the district courts of their general jurisdiction over actions concerning partnerships, even when brought by the administrator of a deceased partner.—Griggs v. Clark, 23 Cal. 427.

[b] If the real estate which the testator owns at the time of his death is devised by will to his children, and an executor is appointed with full power to sell, and he sells the real estate and converts it into money, the probate court has exclusive jurisdiction to compel to him to account.—Auguisola v. Arnaz, 51 Cal. 435.

[c] Probate courts have exclusive jurisdiction to compel an executor to account for the personal property of the estate which has come into his hands, whether it be such as the testator owed at the time of his death, or the proceeds of other property of the estate sold by the executor under a power in the will, or the proceeds of real estate owned by the testator and also sold by the executor under a power in the will, and they have also exclusive jurisdiction of the final distribution of the estates of decedents.—Auguisola v. Arnaz, 51 Cal. 435.

§ 165. Jurisdiction Concurrent with that of Justices of the Peace.

[a] Although the jurisdiction of mining claims is given justices of the peace, that of the district court remains unaffected, if the amount in controversy exceeds two hundred dollars.—Hicks v. Bell, 3 Cal. 219.

§ 166. Actions to Abate Nuisance.

[a] Actions to prevent or abate nuisances are cases in equity, and the grant in the constitution to the county courts of original jurisdiction in such actions does not deprive the district courts of concurrent jurisdiction under their equity powers.—Courtwright v. Bear River etc. Min. Co., 30 Cal. 573.

§ 167. Right to Elect Tribunal.

[a] The jurisdiction of the fourth district court in the county of San Francisco continues the same as it was previous to the creation of the twelfth judicial district. The jurisdiction of the fourth district court and of the twelfth district court, within the limits of the city of San Francisco, is equally extensive, and proceedings may be commenced in either court, at the option of the suitor.—Slade v. His Creditors, 10 Cal. 483.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 983; 13 Cent. Dig., cols. 3021, 3022, §§ 1225-1227.

§ 168. Priority of Jurisdiction.

[a] Court of concurrent jurisdiction first acquiring jurisdiction retains it until judgment.—Sharon v. Sharon, 84 Cal. 430, 23 Pac. 1100, 1102.

[b] The rule that the judgment of a court which first acquires jurisdiction of the subject matter of a cause of action and of the parties thereto will prevail over the judgment of another court whose jurisdiction was subsequently acquired, rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts of distinct of concurrent jurisdiction.—Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 985; 13 Cent. Dig., col. 3022, § 1228.

§ 169. Scope and Effect of Prior Proceedings.

[a] The fact that a child is under the jurisdiction of a court, under Civil Code, section 138, in divorce proceedings between its parents, does not prevent another court from having jurisdiction of the same child in proceedings for its adoption on the consent of the parent to whose custody it has been given. Younger v. Younger, 106 Cal. 377, 39 Pac. 779.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 985-987; 13 Cent. Dig., cols. 3023-3041, §§ 1229-1239.

§ 170. Proceedings in Probate Courts and Other Courts.

[a] The district court has no jurisdiction over a claim for services rendered to a former administrator of an estate while the administration is still in the hands of the probate court.—Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352.

§ 171. Proceedings in Equity and in Probate Court.

[a] A mortgage creditor of an estate of a deceased person may maintain an action for the foreclosure of his mortgage in the district court, without waiting for the settlement

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of the estate in the probate court.—Willis v. Farley, 24 Cal. 490.

§ 172. Granting Injunction in Case Pending in Another Court.

[a] There is no prohibition in the constitution against granting authority to the county judge to issue injunctions in cases brought in the district court.—Thompson v. Williams, 6 Cal. 88.

[b] Grant of authority to county judge to award injunctions in cases in district court is a mere power to issue mesne process auxiliary to the proper jurisdiction of the district court, and is not trenching upon it.—Thompson v. Williams, 6 Cal. 88.

§ 173. Antagonistic Judgments Rendered in Court of Concurrent Jurisdiction.

[a] The fact that two courts of concurrent jurisdiction render judgments antagonistic to each other, involving the same subject matter does not prove that the judgment of either is void, or, necessarily, that either is erroneous, but, the question being which shall prevail, the question may be raised when an attempt is made to enforce the judgment in the court below.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26.

§ 174. Prisoners Under Arrest, Commitment or Sentence.

[a] A prisoner's application for discharge, under Penal Code, section 1382, on the ground that an indictment was not found against him at the next term of court at which he was held to answer, must be made, in the first place, to the court where the prosecution against him is pending.—Fennessy, Ex parte, 54 Cal. 101.

§ 175. —— Discharge of Insolvent Held Under Process of Another Court.

[a] The rule that, in actions in rem, exclusive jurisdiction is given to that tribunal which acquires it by a judicial seizure, has been changed by the Practice Act, and the service of process on a person standing in a particular relation to the thing is equivalent to its seizure, for the purpose of conferring jurisdiction; and therefore jurisdiction in rem may exist in several courts at the same time over the same subject.—Averill v. The Hartford, 2 Cal. 308.

[b] Under the law making service of process in an action in rem on a person standing in a particular relation to the thing seized equivalent to its seizure, the court whose process has made first actual seizure of the thing has exclusive power over its disposition and the distribution of the fund arising therefrom.—Averill v. The Hartford, 2 Cal. 308.

§ 176. Injunction or Prohibition Against Proceedings.

[a] A court has no jurisdiction to enjoin review, or interfere with the judgment or proceedings of a court of co-ordinate jurisdiction.—People v. Turner, 1 Cal. 149.

[b] One district court cannot mandamus another.—People v. Turner, 1 Cal. 149.

[c] Rule that one court cannot restrain proceedings of co-ordinate court is not altered in a case where the suit in equity brings in other parties not included in the action at law sought to be enjoined.—Uhlfelder v. Levy, 9 Cal. 607.

[d] Where the provisions of the code require the action to be tried in a particular county, there would be an exception to the rule that one court cannot restrain the proceedings of a co-ordinate court, as the positive provision of the statute must be carried out.—Uhlfelder v. Levy, 9 Cal. 607.

[e] The prosecution of a suit in one court cannot be enjoined by another court of co-ordinate jurisdiction.—Judson v. Porter, 51 Cal. 562.

[f] Prosecution of a suit in one court cannot be enjoined by another court of co-ordinate jurisdiction, the court in which it is pending being able to afford adequate relief.—Wilson v. Baker, 64 Cal. 475, 2 Pac. 253.

[g] Superior court cannot enjoin execution of mandate of supreme court. Order of supreme court controls conflicting order of superior court.—Quan Wo Chung v. Laumeister, 83 Cal. 387, 17 Am. St. Rep. 261, 3 Pac. 320.

[h] Court will not allow proceeding before it in violation of injunction of co-ordinate court.—Sharon v. Sharon, 84 Cal. 432, 23 Pac. 1100, 1102.

[i] The superior court of one county has no jurisdiction upon a bill of discovery filed therein, to enjoin the parties from proceeding with the trial of a prior action pending between them in the superior court of another county, and prohibition will lie to prevent the enforcement of such injunction. (Shaw, J., dissenting.)—Wright v. Superior Court, 139 Cal. 469, 73 Pac. 145.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 990, 991; 13 Cent. Dig., cols. 3054-3064, §§ 1270-1278.

§ 177. Enjoining Enforcement of Judgment.

[a] Courts have no power to interfere with the judgments and decrees of other courts of concurrent jurisdiction.—Anthony v. Dunlap, 8 Cal. 26.

[b] Party cannot bring suit in one court to restrain a decree of another court of co-ordinate jurisdiction.—Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

[c] District courts have no power to restrain the execution of the judgments or orders of courts of co-ordinate jurisdiction. Gorham v. Toomey, 9 Cal. 77.

[d] One district court cannot restrain the execution of a judgment or decree of an-

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other district court. Proceedings for such purpose should always be instituted in the court rendering the judgment or decree and having control of its execution.—Crowley v. Davis, 37 Cal. 268.

[e] One district court has no jurisdiction to enjoin a judgment rendered in another district court. The fact that the judge of the court where the judgment sought to be enjoined was rendered is disqualified from sitting in the case does not constitute an exception to the rule.—Flaherty v. Kelly, 51 Cal. 145.

§ 178. Vacating Judgment of Co-ordinate Court.

[a] Injunction granted by county judge may be controlled or dissolved by district judge. Borland v. Thornton, 12 Cal. 440.

[b] One department of superior court may vacate order erroneously made by another department.—Dorland v. Hansen, 81 Cal. 204, 15 Am. St. Rep. 44, 22 Pac. 552.

§ 179. Transfer of Causes.

[a] Causes may be removed from one district or county to another county or district in the manner provided by statute.—Reyes v. Stanford, 5 Cal. 117.

[b] The fact that the judge of the municipal court of San Francisco was not appointed when certain cases were transferred to it from the county court did not vitiate the transfer.—Stratman, Ex parte, 39 Cal. 517.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 992-996; 13 Cent. Dig., cols. 3072-3101, §§ 1288-1323.

§ 180. —— From Supreme Court to District Court of Appeals.

[a] Motion to transfer a cause from the supreme court to the district court of appeal denied.—Gates v. Green (Cal. Sup.), 84 Pac. 37.

[b] Where a notice is of an appeal to the wrong court, the proper practice is to file the record and make a motion in that court to transfer the cause.—Russell's Estate, In re (Cal. Sup.), 84 Pac. 155; Russell v. Maria Kip Orphanage (Cal. Sup.), 84 Pac. 155.

[c] An application to transfer an appeal from the district court of appeals to the supreme court in bank held not filed within sixty days after the judgment of the district court of appeals became final, as provided by Constitution, article 6, section 4.—National Bank of California v. Los Angeles Iron etc. Co. (Cal. Sup.), 84 Pac. 468.

§ 181. —— Causes Which may be Transferred.

[a] It is doubtful whether, in an action purely for a forcible entry and detainer, the title can be involved in the controversy, so that the statute authorizing the removal of the suit to the district court from a justice of the peace would be applicable; but the title may be involved, and the suit capable of removal, where it is an action against a tenant and others for unlawfully holding over after a lease had expired, and where it is an action not founded on forcible entry and detainer.—Henderson v. Allen, 23 Cal. 519.

§ 182. —— Sending Issues from Probate Court to Another Court for Trial.

[a] Rule 50, established by this court, requiring the probate judge, when an issue of fact is joined, to certify it for trial to the district court, is intended to be limited to cases proper for such action.—Keller v. De Franklin, 5 Cal. 432.

[b] The issues of fact joined in the probate court, and which are sent to the district court for trial, are of that class upon which the probate judge is unwilling to pass his judgment, or where, from great conflict of evidence, a reasonable doubt must exist in his mind as to which side has the right. Keller v. De Franklin, 5 Cal. 432.

[c] Since the adoption of the constitutional amendment of 1862, district courts have no jurisdiction to try issues framed in the probate courts, and sections 20, 294, of the probate act, authorizing the trial of such issues, have become inoperative.—Tomlinson In re, 35 Cal. 509.

§ 183. Effect of Transfer, and Proceedings had Thereafter.

[a] The probate court does not lose its jurisdiction over a subject of which it has taken cognizance, by adopting the proceeding of an issue whereby to determine the issue advisedly; the finding of a jury in the district court is merely in aid of its jurisdiction, by settling the facts, and thus furnishing the material upon which it is to act, and after such findings the functions of the district court cease.—Pond v. Pond, 10 Cal. 495.

[b] Issues of facts are sent from the probate court to the district court, not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. But it was never intended to transfer any portion of the jurisdiction of probate courts to the district courts. Nor was it designed by the act of 1855, directing these issues, to make the judgments of district courts binding upon the courts of probate.—Pond v. Pond, 10 Cal. 495.

[c] On petition of creditors of an insurance company, under Insolvent Act of 1880, the superior court of San Francisco, department 10, adjudged such corporation to be insolvent. Afterward the attorney general applied in department 4 of such court, under Political Code, section 601, to dissolve such corporation for insolvency, and the insolvency proceedings were transferred to department 4. Held, that such transfer did not confer on the court any greater jurisdiction in the

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action by the attorney general than it otherwise had.—State Inv. etc. Co. v. Superior Court of City and County of San Francisco, 101 Cal. 135, 35 Pac. 549.

§ 184. Courts of Different States or Counties—Prisoners Under Arrest or Commitment.

[a] Superior courts of this state have power to issue writs of habeas corpus commanding the production of the body of a prisoner held under authority of a warrant for his arrest issued by the governor of this state, upon the requisition of a governor of another state, that the causes of his detention may be inquired into; and the refusal of the custodian to obey the writ is a contempt of court.—Robb, In re, 64 Cal. 431, 1 Pac. 881.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1017-1019; 13 Cent. Dig., cols. 3214-3227, §§ 1431-1449.

§ 185. State and Federal Courts—Exclusive or Concurrent Jurisdiction.

[a] The federal government, in taking private property in California for a fort site, under the act of the legislature of February 14, 1859, providing for relinquishing to the United States lands for sites of lighthouses and other purposes, etc., may properly proceed in the state courts.—Gilmer v. Lime Point, 18 Cal. 229.

[b] Where the United States acquires territory by convention with another sovereign power, it has authority to enact laws for the protection and determination of the property rights of the inhabitants of such territory in accordance with the terms of the treaty, and such laws, affecting title to real property within a state, must be construed by the United States courts.—Gardiner v. Miller, 47 Cal. 570.

[c] The action of a federal court in vacating and setting aside a decree rendered therein is not open for review in a state court.—Blythe Co. v. Bankers' Inv. Co., 147 Cal. 82, 81 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

State courts cannot lawfully interfere with execution of final process of federal courts: 76 Am. Dec. 223, note; 48 L. R. A. 33, note. See, also, 11 Cyc. 996-1003; 13 Cent. Dig., cols. 3102-3125, §§ 1324-1342; cols. 3154-3157, §§ 1372-1375.

§ 186. —— Assumption and Exercise of Conflicting Jurisdiction.

[a] On appeal to the supreme court of California, the point that the subject matter of the action has been adjudicated and determined against the respondent by a United States circuit court cannot be presented for the first time in the supreme court by the presentation of the proceedings and judgment of said court, where it appears that, conceding said last-named judgment is paramount to that of the court below, both of said courts had jurisdiction of the subject matter and the parties, and that, without the pendency of the action in the federal court being brought to its attention, the court below proceeded to final judgment.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26.

[b] Upon the hearing of a motion for alimony, it appeared that the decree of divorce was based upon a contract of marriage signed by the parties; that the divorce suit was still pending, an appeal having been taken from the decree entered therein; that before the present proceedings, defendant sued plaintiff in the circuit court of the United States, and a decree was entered in such suit declaring said marriage contract fraudulent and void, and an order was entered perpetually enjoining the plaintiff from alleging the validity of the contract, and from making any use of the same in evidence or otherwise to support any claim under it. Upon interposing this decree on the hearing of the motion the defendant asked the court to compel the plaintiff to obey said injunction. Held, that it was error to refuse this request and enter a judgment for alimony. Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100.

FOR AUTHORITIES FROM OTHER STATES:

See 42 L. R. A. 451, note; 13 Cent. Dig., cols. 3144-3154, §§ 1355-1371.

§ 187. —— Court First in Possession of Subject Matter.

[a] There is no common arbiter between the state and federal courts and comity between them becomes a necessity and is a law which cannot be disregarded; and when a federal court is first in possession of the subject of the litigation, it must be left to determine when its possession and control of the property has ended, without interference from a state court.—Swinnerton v. Oregon Pac. R. R. Co., 123 Cal. 417, 56 Pac. 40.

[b] An order directing a receiver of a state court to turn over the property to a United States marshal holding a writ of assistance, pending an appeal in which a supersedeas had been filed, held an abuse of discretion. Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 Pac. 319.

[c] Where a suit was brought in a federal court to cancel a lease against an assignee alone, it was immaterial that the property was in the hands of a receiver of the state court, and that leave had not been obtained to sue.—Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 Pac. 319.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cent. Dig., cols. 3130-3144, §§ 1346-1354.

§ 188. —— Admiralty Cases.

[a] In an action for freight money, brought in the courts of this state, it is not a sufficient answer to set up that the vessel has been libeled, for the nondelivery of freight, in the district court of the United States. Both ac-

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tions may proceed at the same time, without the fear or danger of any collision or clashing of jurisdiction.—Russell v. Alvarez, 5 Cal. 48.

[b] It is only on the distinct ground that the appellate power of the supreme court of the United States extends to the state courts in proper cases, that the concurrent original jurisdiction of the state and federal courts over civil admiralty cases can be sustained. (Per Burnett, J.)—Warner v. Steamship Uncle Sam, 9 Cal. 697.

[c] State and federal courts have concurrent jurisdiction to enjoin removal of moorings from navigable waters.—Cresent City etc. Co. v. Simpson, 77 Cal. 289, 19 Pac. 426.

§ 189. —— Bankruptcy Proceedings.

[a] The state court is not deprived of jurisdiction of an action brought on a bond given by a defendant in an attachment proceeding conditioned to pay any judgment which might be entered against him, by an assignment by the defendant pursuant to the bankrupt law, prior to judgment in the attachment suit but after the execution of the bond.—Goodhue v. King, 55 Cal. 377.

§ 190. —— Cases Affecting Ambassadors and Consuls.

[a] Under Constitution of the United States, article 3, section 2, providing that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers, and consuls, a state court has no jurisdiction in a civil case over the person of a consul of a foreign government resident in the state.—Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512; Wilcox v. Luco, 45 Pac. 676.

[b] Under Constitution of the United States, article 3, section 2, extending the judicial power of the United States to all cases affecting ambassadors, public ministers, and consuls, a state court has no jurisdiction in a civil case over the person of a foreign consul residing in the state.—Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 45 Pac. 676.

[c] In the absence of statutory provisions, exclusive jurisdiction of an action against a consul of a foreign government is not vested in the federal courts by Constitution of United States, article 3, section 2, declaring that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers, and consuls. Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 50 Pac. 758.

§ 191. —— Prisoners Under Arrest, Commitment or Sentence.

[a] The courts or judges of a state have no authority to release a prisoner upon a habeas corpus when the prisoner is in the custody of the authorities of the United States, pursuant to a judgment of conviction by a federal tribunal of exclusive jurisdiction in the case.—Le Bur, Ex parte, 49 Cal. 159.

FOR AUTHORITIES FROM OTHER STATES:

Concurrent and conflicting jurisdiction, authority of state courts on habeas corpus: 37 Am. Dec. 200, note. See, also, 11 Cyc. 1006-1010; 13 Cent. Dig., cols. 3157-3174, §§ 1376-1385.

§ 192. —— Enjoining Proceedings.

[a] State court cannot enjoin proceedings of federal court.—Phelan v. Smith, 8 Cal. 520.

[b] That some of the defendants, in an action in a state court for the wrongful death of plaintiff's intestate on a sailing vessel, made application, as the owners of the vessel, to a federal court, for a limitation of their liability under the United States statutes relating to the merchant marine, and that the federal court enjoined plaintiff from further proceedings in the state court against these defendants, is not a bar to the plaintiff proceeding in such court against the other defendants, where he has received no satisfaction for the wrong complained of.—Grundel v. Union Iron Works, 127 Cal. 438, 78 Am. St. Rep. 75, 59 Pac. 826, 47 L. R. A. 467.

FOR AUTHORITIES FROM OTHER STATES:

See 16 C. C. A. 90, 27 C. C. A. 575, 63 C. C. A. 285, notes. See, also, 11 Cyc. 1016; 13 Cent. Dig., cols. 3205-3213, §§ 1418-1430.

COURTS OF FIRST INSTANCE.

See Courts, § 146.

COURT'S OWN MOTION.

Rejection of juror of court's own motion. See Jury, § 91.
Change of venue on court's own motion. See Venue, § 30.

COURT STENOGRAPHERS.

Appointment and compensation. See Courts, § 53.

COVENANTS.

Include promises under seal in general, and more particularly such promises relating to the title, possession, or use of real property; their nature, requisites, validity, incidents, construction, operation, and effect; what constitutes a breach of covenant, and actions therefor.

I. REQUISITES AND VALIDITY, §§ 1-3.
II. CONSTRUCTION AND OPERATION, §§ 4-23.
III. PERFORMANCE OR BREACH, §§ 24-34.
IV. ACTIONS FOR BREACH, §§ 35-44.

Estoppel by. See Estoppel, § 19.
In sheriff's deed. See Execution, § 173.

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Of quiet enjoyment in leases. See Landlord and Tenant, § 16.
In leases. See Landlord and Tenant, §§ 15, 16.
For repairs and improvements in leases. See Landlord and Tenant, § 78.
To pay debt secured by mortgage as essential part of land mortgage. See Mortgages, § 27.

I. REQUISITES AND VALIDITY.

WHAT CONSTITUTES, § 1.
CONSIDERATION, § 2.
IMPLIED COVENANTS, § 3.

§ 1. What Constitutes.

[a] Proviso that grantee should sell to no one but grantor is a covenant.—Maynard v. Polhemus, 74 Cal. 143, 15 Pac. 451.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1042; 14 Cent. Dig., cols. 29, 30, § 1.

§ 2. Consideration.

[a] Covenant not to sue must be based on valid consideration.—Upper San Joaquin etc. Co. v. Roach, 78 Cal. 555, 21 Pac. 304.

§ 3. Implied Covenants.

Implied covenants and leases. See Landlord and Tenant, § 15.

[a] The law will not imply covenants of seisin in a conveyance of land by deed.—Fowler v. Smith, 2 Cal. 39.

[b] Words "good and sufficient deed" import only a conveyance good in form, and sufficient to pass the title actually held by the covenantor, and not that he would convey a good title.—Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725.

[c] Words "grant, bargain and sell," do not warrant title.—Bryan v. Swain, 56 Cal. 616.

[d] A deed of grant, expressly granting a water right as an appurtenance to the land conveyed, implies a covenant against a previous conveyance thereof; and where such water right was appurtenant to the land, when the negotiations for purchase thereof were begun by the grantee, and was conveyed to a third person, prior to such deed of grant, the purchaser is entitled to recover from his grantor the value of the water right, as damages for the breach of such implied covenant.—Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472.

FOR AUTHORITIES FROM OTHER STATES:

Covenants implied in conveyances: 2 Am. Dec. 234, note. See, also, 11 Cyc. 1045-1051; 14 Cent. Dig., cols. 33-47, §§ 7-19.

II. CONSTRUCTION AND OPERATION.

IN GENERAL, § 4.
REAL OR PERSONAL, § 5.
PERSONS LIABLE ON PERSONAL COVENANTS, § 6.
PERSONS LIABLE ON REAL COVENANTS, § 7.
DEPENDENT, INDEPENDENT OR DIVISIBLE, § 8.
LIMITATION TO PREMISES CONVEYED, § 9.
LIMITATION TO ESTATE CONVEYED, § 10.
COVENANTS OF TITLE—COVENANT FOR FURTHER ASSURANCE, § 11.
—— COVENANTS AGAINST ENCUMBRANCES, § 12.
COVENANTS RUNNING WITH THE LAND, § 13.
—— EFFECT OF AGREEMENT OF PARTIES, § 14.
—— COVENANTS CONFERRING BENEFITS, § 15.
—— COVENANT TO PAY TAXES, § 16.
—— COVENANT OF SEISIN, § 17.
—— COVENANT OF RIGHT TO CONVEY, § 18.
—— COVENANT AGAINST ENCUMBRANCES, § 19.
—— COVENANT OF WARRANTY, § 20.
—— COVENANTS IMPOSING BURDENS, § 21.
—— COVENANTS AS TO USE OF PROPERTY, § 22.
—— COVENANTS CREATING EASEMENTS OR LIENS, § 23.

§ 4. In General.

[a] If a deed conveys a tract of land by metes and bounds, excepting therefrom such portion of such land as may have before been conveyed by the grantor to other persons, and contains a general covenant of warranty of the land thereby intended to be conveyed, and also a covenant that if any portion of the land has been before conveyed to other persons the grantor will convey to the grantee other lands of like quantity and quality; the former covenant relates to lands which the deed purports to convey, and not to the land which the grantor covenanted to convey in the latter covenant.—Vance v. Pena, 33 Cal. 631.

[b] Declaration in deed of general purpose to be accomplished near certain point in certain way is only a recital and not part of the covenant.—Roberts v. Krafts, 141 Cal. 28, 74 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

Covenants of deeds, when grantees become liable upon: 47 Am. Rep. 473, note. See, also, 11 Cyc. 1051-1063; 14 Cent. Dig., cols. 47-72, §§ 20-37.

§ 5. Real or Personal.

[a] A proviso, in the habendum clause in a deed, to the effect that, if the grantee should ever sell any of the land conveyed, it should be sold to the grantor at a stipulated price, if construed as a covenant, is merely personal.—Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451.

FOR AUTHORITIES FROM OTHER STATES:

Real and personal covenants and distinctions between: 47 Am. Dec. 569, note.

§ 6. Persons Liable on Personal Covenants.

[a] Covenant that grantee should sell to no one but grantor is personal and not bind-

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ing on heirs or assigns.—Maynard v. Polhemus, 74 Cal. 143, 15 Pac. 451.

[b] Under Civil Code, section 1113, providing that conveyances of realty, unless otherwise restrained, shall be subject to an implied covenant that it is free from incumbrances, which may be sued on as if expressed in the deed, a suit for breach of such implied covenant may be maintained against a mortgagee joining in the conveyance with the owner, since his obligation arises from the personal covenants implied in the deed.—Holzheier v. Hayes, 133 Cal. 456, 65 Pac. 968.

[c] A covenant in a deed to a yacht club, that "in consideration of the conveyance," the lot should not "be used for any business or store purposes, other than for hotel or lodging-house, or club purposes," is a personal covenant, which only binds the yacht club during its tenure, and does not bind it affirmatively to use the lot for club purposes, nor preclude the use thereof for a ferry by a successor in interest, whose deed contained no restriction, where such use is not shown to be injurious to the remaining property of the original grantor, and is in its nature beneficial to the public.—Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308.

[d] Personal covenants bestowing benefits and imposing restrictions on the use of land may be enforced in equity against a subsequent purchaser with notice.—Hunt v. Jones (Cal. Sup.), 86 Pac. 686.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1058; 14 Cent. Dig., col. 59, § 30.

§ 7. Persons Liable on Real Covenants.

[a] A conveyed land to B, bounding it on a certain street not laid out. He granted the right of way in the street, the "street forever to be and remain free and open as a public street." A died, and his other land, including the street, was partitioned among his heirs, his widow administering his estate. B prayed that A's heirs be compelled to open the street. Held, that he was not entitled to the relief sought; that there was no covenant binding the heirs; and that, if there was a breach of a covenant of seisin, plaintiff should have presented his claim for damages to A's administratrix.—McDonald v. McElroy, 60 Cal. 484.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1101, 1102; 14 Cent. Dig., cols. 142-148, §§ 90-92.

§ 8. Dependent, Independent or Divisible.

Dependent and independent covenants in contracts. See Contracts, § 121.

[a] Covenant to pay taxes is divisible.—Ellis v. Bradbury, 75 Cal. 236, 17 Pac. 3.

[b] Covenant for purchase money and covenant to convey are independent.—Donovan v. Judson, 81 Cal. 338, 22 Pac. 864.

[c] Intention of parties to make covenants dependent or independent is ascertained from their written agreement.—Donovan v. Judson, 81 Cal. 338, 22 Pac. 864.

[d] Where, by the terms of a contract for the sale of real estate the vendor agreed to execute a conveyance of the property on or before a specified date, provided the purchasers should, on or before that date, pay the balance of the purchase price, the covenants are mutual and dependent, and the purchasers cannot sue for damages for failure of the vendor to make the conveyance, unless the complaint alleges a full performance, or offer to perform, on their part; but it is sufficient to aver an offer in writing by the purchasers to pay the residue of the purchase money, accompanied by a demand for a deed; and it is not incumbent upon the purchasers to allege or prove an actual production or tender of the money to the vendor, in order to enable them to maintain the action, if the vendor did not signify his acceptance of the offer.—Peckham v. Stewart, 97 Cal. 147.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1053; 14 Cent. Dig., cols. 51-53, § 25.

§ 9. Limitation to Premises Conveyed.

[a] P. conveyed to V. a certain tract of land, describing it by metes and bounds, excepting from it all that portion of land lying in a certain locality which might have been before conveyed to other persons by the grantor. The deed contained a covenant that, if any portion of this land had been before conveyed to any person except to one F., the grantor would convey to the grantee other lands equal in quality and quantity. The deed also contained a general covenant of warranty of the land "thereby intended to be conveyed." Held, that the covenant of warranty related to the land which the deed purported to convey, and not to the land contemplated by the former covenant.—Vance v. Pena, 33 Cal. 631.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1059; 14 Cent. Dig., cols. 63, 64, § 33.

§ 10. Limitation to Estate Conveyed.

[a] Where a tenant in common makes a quitclaim deed of a specific tract of the common property, and inserts therein a covenant of warranty, such covenant will attach merely to the interest which the deed purports to convey.—Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1059; 14 Cent. Dig., cols. 64-66, § 34.

§ 11. Covenants of Title—Covenant for Further Assurance.

[a] There was a deed of bargain and sale, with an agreement that the price should be paid when the United States confirmed the

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vendor's title, and that he should then execute a deed. Held, that the title passed by the first deed at the time of its delivery, that the confirmation of title was not a condition precedent thereto, and that the agreement was merely for further assurance, and not for a future conveyance of the title.—Smith v. Brannan, 13 Cal. 107.

[b] Defendant's grantor executed an instrument by which he released and quitclaimed to defendant land on which he had only a school land certificate of purchase, and by which he further agreed to perfect his title, and make defendant a good deed. Held, that the instrument was a quitclaim deed, and conveyed all the grantor's interest, and that the agreement for a subsequent deed was only a covenant of further assurance.—Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1073; 14 Cent. Dig., cols. 82, 83, § 45.

§ 12. —— Covenants Against Encumbrances.

[a] Grantor covenants against his own acts in creating mortgage, not against those of his grantor.—Woodward v. Brown, 119 Cal. 297, 63 Am. St. Rep. 106, 51 Pac. 2.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1070; 14 Cent. Dig., cols. 80, 81, § 43.

§ 13. Covenants Running with the Land.

[a] A and B, owning tracts of land separated by a stream, agreed that the waters thereof should be conducted to a reservoir on A's lands by ditches and flumes constructed at their joint expense, and that B might construct ditches and convey one-half the water to his own land. Held, that the agreement ran with the land, and that A's successor in interest could not, by going to a point higher up the stream and diverting the water to the reservoir, claim the whole of it for his own use.—Weill v. Baldwin, 64 Cal. 476, 2 Pac. 249.

[b] Covenants running with the land must be contained in grants of the estate.—Simson v. Mills, 80 Cal. 118, 22 Pac. 25.

FOR AUTHORITIES FROM OTHER STATES:

Running with the land, what are: 56 Am. Rep. 151, note.

What covenants run with the land: 82 Am. St. Rep. 664, note. See, also, 11 Cyc. 1080-1102; 14 Cent. Dig., cols. 89-148, §§ 52-92.

§ 14. —— Effect of Agreement of Parties.

[a] A provision in an agreement between a land owner and an irrigation company, that the covenant to take water and pay therefor should "run with and bind the land," creates a lien on the land as against a subsequent purchaser with notice, but does not bind such purchaser personally.—Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53.

§ 15. —— Covenants Conferring Benefits.

[a] Where one conveying a part of a tract of land conveys a portion of the water rising on the tract, a covenant by him as to the delivery of the water on the grantee's land is one which runs with the land retained by the grantor.—Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777.

[b] A covenant in a deed, made for the benefit of the land conveyed, will run with the land, and inure to a grantee thereof. But a covenant between the grantor and grantee of a deed in fee, which merely imposes a burden of restrictions upon the grantee, and does not reserve or create any interest in the grantor, or establish a condition subsequent to the grant, and does not purport to inure to the protection of an assignee of the grantor, or to bind the assignees of the grantee, is personal in its nature, and does not run with the land or charge an assignee of the grantee with such burden.—Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1089; 14 Cent. Dig., cols. 95-99, § 58.

§ 16. —— Covenant to Pay Taxes.

[a] Covenant to pay taxes runs with the land.—Ellis v. Bradbury, 75 Cal. 236, 17 Pac. 3.

§ 17. —— Covenant of Seisin.

[a] Where the covenantor is disseised at the time of making the deed, the covenant of seisin is broken as soon as made, and, being a chose in action, does not pass with the land to the assignee.—(Cal. 1871) Salmon v. Vallejo, 41 Cal. 481.

FOR AUTHORITIES FROM OTHER STATES:

Consideration necessary to sustain covenant to stand seised: 8 Am. Dec. 366, note. See, also, 11 Cyc. 1085; 13 Cent. Dig., cols. 99-101, § 59.

§ 18. —— Covenant of Right to Convey.

[a] The covenant of right to convey being broken, if at all, as soon as made, the right of action thereon is a mere chose in action and does not run with the land.—Salmon v. Vallejo, 41 Cal. 481.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1086; 14 Cent. Dig., cols. 101, 102, § 60.

§ 19. —— Covenant Against Encumbrances.

[a] The covenant against encumbrances, if broken at all, is broken upon the execution of the deed containing it; and therefore does not run with the land to a subsequent grantee.—Salmon v. Vallejo, 41 Cal. 481.

[b] Covenant against encumbrances is personal and does not run with the land.—Woodward v. Brown, 119 Cal. 294, 63 Am. St. Rep. 108, 51 Pac. 2.

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[c] A covenant in a deed that the land conveyed is free from tax liens is a personal covenant of the same character as a covenant against any other encumbrances, and does not run with the land, or pass to the convenantee's assignee.—McPike v. Heaton, 131 Cal. 109, 63 Pac. 179.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1086; 14 Cent. Dig., cols. 102, 103, § 61.

§ 20. —— Covenant of Warranty.

[a] In real estate the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted.—Blackwell v. Atkinson, 14 Cal. 470.

FOR AUTHORITIES FROM OTHER STATES:

Covenants of warranty, married woman's liability upon: 43 Am. Dec. 426, note. See, also, 11 Cyc. 1088; 14 Cent. Dig., cols. 104-106, § 64.

§ 21. —— Covenants Imposing Burdens.

[a] Under Civil Code, sections 1460-1466, specifying what covenants run with the land when contained in a grant of the estate, the covenants in a contract to furnish water to certain land for irrigation purposes do not run with the land, not being contained in the grant of the estate, and no personal judgment can be had against a purchaser of the land for his refusal to perform them.—Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Fresno Canal etc. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1089; 14 Cent. Dig., cols. 106-110, §§ 65, 66.

§ 22. —— Covenants as to Use of Property.

[a] A railway company obtained a right of way through land owned by a married woman in consideration of one dollar, and the covenants to maintain a depot, run daily trains, etc. The roadbed was abandoned, but not until after title to the property was acquired by the husband. Held, that the covenants, not being "made for the direct benefit of the property, or some part of it," as required by Civil Code, section 1462, did not run with the land, and the husband, not showing an express assignment of his wife's interest in the contract, and his wife not having joined in the action, cannot recover for failure on the part of defendants to perform.—Lyford v. North Pac. C. R. Co., 92 Cal. 93, 28 Pac. 103.

[b] Under Civil Code, section 1462, providing that every covenant contained in a grant of realty which is made for the direct benefit of the property runs with the land; and section 1461, directing that "the only covenants which run with the land are those specified in this title and those which are incidental thereto—a covenant that the property conveyed shall not be used for any business purposes does not run with the land, but is a personal covenant, not binding on the assigns of the covenantor, nor inuring to the benefit of the successors or assigns of the covenantee.—Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308.

FOR AUTHORITIES FROM OTHER STATES:

Covenants restricting right to build on adjacent parcel of land: 35 Am. Dec. 716, note. See, also, 11 Cyc. 1091; 14 Cent. Dig., cols. 110-114, §§ 67-69.

§ 23. —— Covenants Creating Easements or Liens.

[a] Covenant creating a water right as an appurtenance or easement runs with the land. Weill v. Baldwin, 64 Cal. 476, 2 Pac. 249.

[b] An agreement by a land owner to take water for irrigation purposes for a certain length of time from a certain company, it being stipulated that such covenant is to "run with and bind the land," is not a covenant running with the land, though it creates a lien on the land, as against any purchaser with notice.—Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1092; 14 Cent. Dig., cols. 114-117, §§ 70, 71.

III. PERFORMANCE OR BREACH.

BREACH IN GENERAL, § 24.
COVENANT OF SEISIN, § 25.
COVENANTS OF TITLE, § 26.
COVENANT OF RIGHT TO CONVEY, § 27.
COVENANT AGAINST ENCUMBRANCE, § 28.
COVENANT FOR QUIET ENJOYMENT—ACTS OF TRESPASSER, § 29.
—— EVICTION, § 30.
COVENANT TO PROCURE RECONVEYANCE, § 31.
COVENANT OF WARRANTY, § 32.
—— EVICTION, §§ 33, 34.

Breach of covenant in lease as terminating tenancy. See Landlord and Tenant, § 52.

§ 24. Breach in General.

[a] Premises are discharged from covenant of reconveyance if payment is not made or tendered as specified.—Low v. Henry, 9 Cal. 551.

[b] Without an eviction there is no breach of the covenant; but it is not necessary that the eviction should be by process of law, consequent on a judgment.—McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

[c] A covenant that the tract conveyed, or that the grant under which it is held, includes a specified quantity, is personal, and, if broken, is broken as soon as made.—Salmon v. Vallejo, 41 Cal. 481.

[d] Where covenants are mutual and dependent, neither party can put other in default without tendering performance unless it is waived.—Heine v. Treadwell, 72 Cal. 220, 13 Pac. 503.

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[e] Whether a breach of covenant is so material as to justify the other party in abandoning performance of the contract is to some extent a question of fact; and it is a question of fact whether a part performance was so deficient as to justify such abandonment.—Fountain v. Semi-Tropic Land and Water Co., 99 Cal. 677, 34 Pac. 497.

§ 25. Covenant of Seisin.

[a] The covenant of seisin is personal, and, when broken, is broken as soon as made.—Salmon v. Vallejo, 41 Cal. 481.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 1107-1110; 14 Cent. Dig., cols. 161-171, §§ 104-109.

§ 26. Covenant of Title.

[a] A purchaser of personalty, who has taken possession under a bill of sale purporting to convey title, and who is in the undisputed possession and enjoyment thereof, is not entitled to recover substantial damages based on the breach of the seller's covenant to furnish a good title.—Barnum v. Cochrane, 143 Cal. 642, 77 Pac. 656.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 1106; 14 Cent. Dig., cols. 158-160, §§ 101-103.

§ 27. Covenant of Right to Convey.

[a] The covenant of right to convey, if not true, is broken as soon as made.—Lawrence v. Montgomery, 37 Cal. 183; Salmon v. Vallejo, 41 Cal. 481.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 1110; 14 Cent. Dig., cols. 171-173, § 110.

§ 28. Covenant Against Encumbrances.

[a] The covenant against encumbrances, if not true, is broken as soon as made.—(1871) Salmon v. Vallejo, 41 Cal. 481.

[b] The fact that one of the deeds under which a grantor deraigned title contained a covenant that no liquor saloon should be maintained on the premises, with a condition of reversion in case of breach of such covenant, did not constitute a breach of the grantor's implied covenant against encumbrances, in the absence of any eviction or disturbance of the grantee, or any damage suffered by him.—Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 1111-1118; 14 Cent. Dig., cols. 173-198, §§ 111-129.

§ 29. Covenant for Quiet Enjoyment—Acts of Trespassers.

Damages for breach of. See post, § 1.

[a] The covenant for quiet enjoyment does not warrant against the acts of trespassers. (1862) Playter v. Cunningham, 21 Cal. 229; (1866) Branger v. Manciet, 30 Cal. 624.

FOR AUTHORITIES FROM OTHER STATES:
See 11 Cyc. 1118-1120; 14 Cent. Dig., cols. 198-206, §§ 130-137.

§ 30. —— Eviction.

[a] The warranty implied in a sale made by general terms, under the system of the civil law, is equivalent to a covenant that the buyer shall quietly possess and enjoy, and nothing more. And to give a buyer a right of action upon this warranty, there must have taken place an actual judicial eviction, by the sentence of a competent tribunal, and this sentence carried into effect.—Fowler v. Smith, 2 Cal. 568.

[b] Eviction need not be by legal process to constitute breach of covenant for quiet enjoyment.—Levinson v. Schwartz, 21 Cal. 229.

[c] The rejection by the United States of the Mexican claim under which the covenantor held is sufficient eviction to support an action for a breach of the covenant of quiet enjoyment.—McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

[d] A covenant for quiet enjoyment in a deed is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible title. The paramount title need not be established by judgment before the covenantee will be authorized to surrender possession, nor need there be an actual dispossession. If the paramount title is so asserted that he must yield or leave, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach.—McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

[e] The fact that the title to land conveyed by a deed stands in a third person does not constitute a breach of the covenants implied therein, nor of an express covenant for quiet enjoyment, where the grantee enters and remains in the undisturbed possession of the land.— Bryan v. Swain, 56 Cal. 616.

[f] There is no breach of covenant of quiet enjoyment without actual or constructive eviction.—Levitzky v. Canning, 33 Cal. 299; McAlester v. Landers, 70 Cal. 82, 11 Pac. 505.

§ 31. Covenant to Procure Reconveyance.

[a] Where vendor covenanted to procure a reconveyance to himself of portions of the land described in the deed which he had conveyed to others, such covenant is broken upon a failure to procure such conveyance within a reasonable time, or to convey to the vendee other lands of equal value, and the statute of limitations will commence running from such breach.—Vance v. Pena, 41 Cal. 686.

§ 32. Covenant of Warranty.

Damages for breach of covenant of warranty. See post, § 42.

[a] Where defendant conveyed to plaintiff by a deed of warranty, the covenants in the

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deed are not broken by the act of the defendant's grantor in claiming that his deed was intended merely as a mortgage, and bringing an action against the plaintiff and defendant to redeem the same, where the plaintiff defended such action successfully.—West v. Masson, 67 Cal. 169, 7 Pac. 452.

FOR AUTHORITIES FROM OTHER STATES:

Covenants of warranty, when broken: 14 Am. Dec. 53, note. See, also, 11 Cyc. 1121-1130; 14 Cent. Dig., cols. 208-240, §§ 139-168.

§§ 33, 34. Eviction.

[a] Eviction by process of law is requisite to enable action to be maintained on the covenant of warranty.—Norton v. Jackson, 5 Cal. 262.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1125-1130; 14 Cent. Dig., cols. 222-240, §§ 157-168.

IV. ACTION FOR BREACH.

GROUNDS OF ACTION, IN GENERAL, § 35.
DEFENSES, § 36.
EQUITY JURISDICTION, § 37.
ACCRUAL OF CAUSE, § 38.
PLEADING, § 39.
EVIDENCE—JUDGMENT AS EVIDENCE OF EVICTION OR PARAMOUNT RIGHT, § 40.
DAMAGES—COVENANT FOR QUIET ENJOYMENT, § 41.
— COVENANT OF WARRANTY, § 42.
— COSTS AND EXPENSES OF LITIGATION, § 43.
FINDINGS OF COURT, § 44.

§ 35. Grounds of Action in General.

[a] In order to enable one to maintain an action on a covenant, there must not only be a breach of the covenant, but some loss or damage to the covenantee.—Swall v. Clarke, 51 Cal. 227.

FOR AUTHORITIES FROM OTHER STATES:

Warranty of title, eviction necessary to recovery: 1 Am. Dec. 9, note.

Mutual and independent, suit on, when may be maintained: 26 Am. Dec. 624, note. See, also, 11 Cyc. 1132; 14 Cent. Dig., cols. 245-246, § 172.

§ 36. Defenses.

[a] In an action for breach of implied covenant against encumbrances, that plaintiff failed to perform his agreement as to the satisfaction of a deficiency judgment against one of the defendants is immaterial, where no damage was suffered thereby.—Holzheier v. Hayes, 133 Cal. 456, 65 Pac. 968.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1135-1138; 14 Cent. Dig., cols. 249, 250, § 175; cols. 257-264, §§ 179-185.

§ 37. Equity Jurisdiction.

[a] Equity has jurisdiction in proper cases, to enforce personal covenants imposing restrictions upon the use of lands contained in grants thereof; but it will not enforce all such covenants that may be desired, and will not enforce them, unless the facts of the case justify equitable relief. In determining whether to enforce them or not the court will consider not only the effect which the use complained of would have upon the property of the plaintiff, but also the effect upon the interest of the public.—Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1133; 14 Cent. Dig., cols. 250, 251, § 176.

§ 38. Accrual of Cause.

[a] Cause of action for breach of covenant for quiet enjoyment accrues at time of eviction, actual or constructive.—McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1134; 14 Cent. Dig., cols. 252-257, §§ 177, 178.

§ 39. Pleading.

[a] Complaint upon covenant for quiet enjoyment must aver a withholding of possession under title paramount.—Levinson v. Schwartz, 21 Cal. 229.

[b] P. and V. were owners of a tract of land under a Mexican grant, and afterward patented to them by the United States government. P. conveyed a portion of said land to the plaintiff, excepting a certain portion previously conveyed by P. and V., and covenanted that, if any portion of said land had been conveyed by P. and V., he would convey to the plaintiff other lands in quantity and quality of equal value. Held, that a complaint for breach of the covenant which did not allege such joint conveyance was bad, as not stating a casus fœderis under the covenant counted on.—Vance v. Pena, 33 Cal. 631.

[c] Complaint against the heirs for a breach of covenant of warranty must allege that the heir was named in and bound by the covenant. McDonald v. McElroy, 60 Cal. 484, 496.

[d] Complaint in action for breach of covenant to pay taxes need not set forth all steps necessary to constitute valid assessment.—Ellis v. Bradbury, 75 Cal. 236, 17 Pac. 3.

[e] Where the cause of action upon the covenant set forth in the original complaint was defectively pleaded, but the defects were supplied in the amended complaint, in which the new cause of action upon the distinct covenant was pleaded, which was barred by the statute of limitations, it was error to sustain a general demurrer to the amended complaint.—Storer v. Austin, 136 Cal. 588, 60 Pac. 297.

§ 40. Evidence—Judgment as Evidence of Eviction or Paramount Right.

[a] S. conveyed to H. a tract of land which he held under a Mexican grant, and cove-

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nanted that such grant was valid, and that, if the title should not be confirmed by the United States courts in which it was there pending, upon the final adjudication of the same the said S. and his legal representatives would be liable to H. for the purchase money. The United States district court adjudged the title to be invalid, but no appeal was taken from the judgment, nor was there any waiver of the right to appeal, or acquiescence in the finality of the judgment on the part of S. within the five years allowed for such appeal. Held, that the judgment was not final, within the meaning of the term as used in the covenant, until the time for appeal had expired.—Hills v. Sherwood, 33 Cal. 474.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1152-1158; 14 Cent. Dig., cols. 301-323, §§ 211-224; cols. 390-395, §§ 264-267.

§ 41. Damages—Covenant for Quiet Enjoyment.

[a] The measure of damages in an action for a breach of a covenant for quiet enjoyment, where there has been an actual dispossession, is the purchase money and interest. Where the plaintiff has purchased the paramount title, it is the sum actually and in good faith paid therefor, and the amount expended in defending his possession, provided such damages do not exceed the purchase money and interest.—McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

[b] Damages for breach of covenant of quiet enjoyment are prescribed in section 3304 of Civil Code.—McAlester v. Landers, 70 Cal. 83, 84, 11 Pac. 505.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages in actions for breach of covenant of quiet enjoyment: 58 Am. Rep. 606, note. See, also, 11 Cyc. 1167-1172; 14 Cent. Dig., cols. 352-354, § 243.

§ 42. —— Covenant of Warranty.

[a] Where defendant in good faith sold and attempted to convey to plaintiff by warranty deed the land within a certain inclosure, but did not have full title to, and her deed did not cover, a portion of the land, plaintiff's remedy would be in an action for damages for breach of the warranty, which, under Civil Code, section 3304, would be such portion of the price as the value of the property affected by the breach bore at the time of the granting to the value of the whole property.—Hoffman v. Kirby, 136 Cal. 26, 68 Pac. 321.

FOR AUTHORITIES FROM OTHER STATES:

Actions for breach of warranty of title, damages recoverable: 24 Am. St. Rep. 266, note. See, also, 11 Cyc. 1167-1172; 14 Cent. Dig., cols. 355-373, §§ 245-253.

§ 43. —— Costs and Expenses of Litigation.

[a] Where the covenantee is obliged, by the acts of the covenantor, to bring an action to recover possession of the premises, his damages in a subsequent action on the covenants include his costs and counsel fees in the former action.—Levitzky v. Canning, 33 Cal. 299.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1176-1178; 14 Cent. Dig., cols. 382-389, §§ 260-262.

§ 44. Findings of Court.

[a] In an action for breach of covenant in a deed, the complaint alleged a certain money consideration, upon which issue was joined; the answer alleging the consideration to consist of certain contracts between the parties, which contracts plaintiff had violated. The findings of fact showed a contract resembling the one set up in the answer, and that plaintiff had violated it; but there was no finding whether the deed rested for its consideration on the payment of money as alleged by plaintiff, or on the contract set up in the answer, though there was evidence touching this issue. Held, that a judgment for defendant was not supported by the findings.—Holzheier v. Hayes, 52 Pac. 838.

FOR AUTHORITIES FROM OTHER STATES:

See 11 Cyc. 1181; 14 Cent. Dig., cols. 397, 398, § 270.

COVENANTS AGAINST ENCUMBRANCES.

See Covenants, § 12.

COVENANTS RUNNING WITH THE LAND.

See Covenants, §§ 13-23.

COVERT AGENCY.

See Principal and Agent.

COVERTURE.

Disabilities and privileges of. See Husband and Wife, IV.

Effect on running of statute of limitations. See Limitation of Actions, § 7.

COWS.

Right to keep cows in city. See Health, § 8.

COYOTE BOUNTY.

Construction, validity and repeal of coyote bounty act. See Bounties, § 3.

Necessity for presentation of claims for. See California, § 83.

CREATING FEAR.

As element of assault and battery. See Assault and Battery, § 20.

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CREATION.

See, also, references under Organization.

Of private corporations. See Corporations, § 1.
Of counties. See Counties, § 3.
Of courts. See Courts, § 43.
Of easement. See Easement, §§ 6-16.
Of estoppel by deed. See Estoppel, II, A.
Of sanitary districts by state board of health. See Health, § 2.
Of joint tenancy. See Joint Tenancy, § 3.
Of justice's court. See Justices of the Peace, § 4.
Of relation of landlord and tenant. See Landlord and Tenant, I.
Mode of creating levee district. See Levees, § 3.
Of liens in general. See Liens, § 1.
Of life estates. See Life Estates, § 1.
Of relation of master and servant. See Master and Servant. I, A.
Of public officers. See Officers, § 3.
Of partnership. See Partnership, §§ 10, 14.
Of school districts. See Schools and School Districts, § 7.
Of tax liens. See Taxation, § 104.
Of tenancy in common. See Tenancy in Common, § 3.
Of towns. See Towns, § 1.
Of vendor's lien. See Vendor and Purchaser, § 106.

CREDENTIALS.

Letters of credit. See Banks and Banking, § 67.

CREDIBILITY OF WITNESSES.

See Witnesses, IV.

Power of appellate court to review. See Appeal and Error, § 1318.
Necessity and sufficiency of instructions relating to. See Criminal Law, §§ 424, 425.
Credibility of testimony of witnesses as affecting weight of evidence. See Criminal Law, § 277.
As question for jury. See Criminal Law, §§ 384, 385; Trial, § 79.
Instructions on, as invading province of jury. See Criminal Law, §§ 395, 396.

CREDIT.

Credits allowed in accounting by assignees for creditors. See Assignments for Benefit of Creditors, § 57.
To third person as consideration for note. See Bills and Notes, § 44.
Limitation on use of state's credit. See California, § 59.
Credits allowed to executor or administrator in accounting for estate. See Executors and Administrators, §§ 508-513.
Credits allowed to guardian in accounting for ward's estate. See Guardian and Ward, § 94.
For insurance premium. See Insurance, § 51.
Payment by transfer of credits. See Payment, § 13.
Taxation of credits. See Taxation, § 22.
Place of taxation of credits. See Taxation, § 51.
Description of credits in assessment-rolls. See Taxation, § 88.

CREDITORS.

Priority between assignees and creditors. See Assignments, § 54.
Assignments for benefit of. See Assignments for Benefit of Creditors.
Notice, to, and acceptance of, assignment for their benefit. See Assignments for Benefit of Creditors, § 13.
Rights and remedies of creditors of assigned estate. See Assignments for Benefit of Creditors, §§ 47-52.
Rights of creditors of insolvent state banks. See Banks and Banking, §§ 46-48.
Rights as to mortgaged chattels. See Chattel Mortgages, § 53.
Rights as to intermingled goods. See Confusion of Goods, § 4.
Composition with. See Composition with Creditors.
Compromise with. See Compromise and Settlement.
Corporate officers are creditors of corporations. See Corporations, § 296.
Stockholders as creditors of corporations. See Corporations, § 189.
Priority of corporate creditors over stockholding creditors. See Corporations, § 392.
Right to redeem from execution sale. See Execution, § 149.
Preference of public administrator over creditors. See Executors and Administrators, § 601.
Notice to creditors of estates of decedents. See Executors and Administrators, §§ 293-296.
What are fixtures between debtor and creditor. See Fixtures, § 21.
Entitled to assert invalidity of transfers made by debtor. See Fraudulent Conveyances, III, A.
Transfers of property to defeat claims of. See Fraudulent Conveyances; Insolvency, §§ 54-58.
Rights as to contracts of guaranty. See Guaranty, IV.
Rights of creditors which are enforceable against homestead. See Homestead, §§ 66-76.
Rights as to wife's separate estate. See Husband and Wife, §§ 80-89.
Entitled to oppose petition in voluntary insolvency. See Insolvency, § 19.
Number necessary to institute involuntary insolvency proceedings. See Insolvency, § 26.
Right to recover property transferred by insolvent. See Insolvency, § 63.
Right to elect assignee in insolvency. See Insolvency, § 38.
Right to oppose discharge of insolvent and grounds of opposition. See Insolvency, §§ 102, 106-112.
Transfer of insurance policy in fraud of creditors. See Insurance, §§ 61, 62.
Rights of creditors of parties to contract for sale of land. See Vendor and Purchaser, § 82.
Rights and remedies of creditors of legatees and devisees. See Wills, §§ 353, 354.

CREDITORS' SUIT.

Include actions to enforce judgments and other general liens against property of debtors liable for payment of their debts but not subject to levy and sale under execution; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom, and on what judgments or other liens, and as to what property, they may be maintained; jurisdiction of such actions and proceedings therein; incidental relief;

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judgments or decrees and enforcement thereof; review of proceedings; and costs in such actions.

NATURE AND SCOPE OF REMEDY, § 1.
ADEQUATE REMEDY AT LAW, § 2.
—— PROCEEDINGS SUPPLEMENTARY TO EXECUTION, § 3.
PROPERTY OR RIGHTS WHICH MAY BE SUBJECTED—PATENT RIGHTS AND INTERESTS THEREIN, § 4.
CONDITIONS PRECEDENT — JUDGMENT OR LIEN, § 5.
—— EXHAUSTION OF ORDINARY LEGAL REMEDIES, § 6.
—— EXECUTION AND RETURN, § 7.
VENUE, § 8.
PARTIES PLAINTIFF, § 9.
PARTIES DEFENDANT, § 10.
INTERVENERS, § 11.
PLEADING, § 12.
TRIAL, § 13.
JUDGMENT, § 14.

To avoid conveyance in fraud of creditors. See Fraudulent Conveyances, § 120.

§ 1. Nature and Scope of Remedy.

[a] Creditor's bill may be filed against a partnership upon an attachment lien.—Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 603.

[b] A suit by a creditor to set aside a fraudulent conveyance by the debtor is not strictly a creditors' bill.—Hager v. Shindler, 29 Cal. 48.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 5; 14 Cent. Dig., cols. 407-411, §§ 1, 2.

§ 2. Adequate Remedy at Law.

[a] A bill in equity to subject the assets of an absent debtor to plaintiff's claim must show that plaintiff is without remedy in law. Lupton v. Lupton, 3 Cal. 120.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 5; 14 Cent. Dig., cols. 416-422, §§ 5-8.

§ 3. —— Proceedings Supplementary to Execution.

[a] Proceedings supplementary to execution are a substitute for a creditor's bill, but not an exclusive remedy.—Swift v. Arents, 4 Cal. 390.

[b] Proceedings supplementary to execution, whereby a judgment debtor is required to answer concerning his property, are a substitute for, and supersede, a creditors' bill.—McCullough v. Clark, 41 Cal. 298.

[c] Supplementary proceedings, as established by Code of Civil Procedure, providing that a debtor may be examined and compelled to deliver property, placed beyond reach of execution, into the hands of receiver appointed to dispose of it in aid of execution, are a substitute for a creditors' bill.—McCullough v. Clark, 41 Cal. 298.

[d] It seems that supplementary proceedings take place of creditors' bill in this state.—Habenicht v. Lissak, 78 Cal. 357, 12 Am. St. Rep. 63, 20 Pac. 874.

[e] Before equity can be invoked in a creditor's bill it must be shown that the remedies at law are unavailing, and the bill must aver that an execution has been returned unsatisfied.—Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857.

[f] A creditors' bill to reach property transferred by defendant to his codefendant, and which is claimed by the latter adversely to defendant, will lie, since the remedy by proceedings supplemental to execution (Code Civ. Proc., secs. 717-720) would in such case be inadequate.—Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 421, 422, § 7.

§ 4. Property or Rights Which may be Subjected—Patent Rights and Interests Therein.

[a] A patent right may be subjected by a bill in equity to the payment of a judgment debt of the patentee.—Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120.

FOR AUTHORITIES FROM OTHER STATES:

Choses in action, whether subject to, creditors' suit: 14 Am. Dec. 542, note.

Life insurance, when subject to creditors' suit: 29 Am. St. Rep. 360, note. See, also, 12 Cyc. 25-33; 14 Cent. Dig., cols. 425-450, §§ 12-41.

§ 5. Conditions Precedent—Judgment or Lien.

[a] Lien by attaching enables a creditor to file a creditor's bill without waiting for judgment and execution.—Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605.

[b] The right to maintain a creditor's suit to subject moneys, alleged to have been fraudulently transferred by a debtor to his wife, to the payment of a judgment against him, does not depend on the validity of a lien attempted to be created by garnishment in aid of execution before the commencement of the action. Judgment (1899), 57 Pac. 73, reversed.—Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 6-25; 14 Cent. Dig., cols. 450-492, §§ 42-87.

§ 6. —— Exhaustion of Ordinary Legal Remedies.

[a] A creditor must exhaust his legal remedies before he can maintain a creditors' bill in equity.—Mesmer v. Jenkins, 61 Cal. 151.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 6-25; 14 Cent. Dig., cols. 468-470, §§ 67-72.

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§ 7. —— Execution and Return.

[a] A creditors' bill to have the property of his debtor applied in satisfaction of his debt must show either that he has recovered a judgment on which an execution has been issued and returned no property found, or that he has a lien on the property.—Castle v. Bader, 23 Cal. 76.

[b] Insolvency or its equivalent, execution returned nulla bona, is necessary to support a creditor's bill to reach equitable assets.—Hager v. Shindler, 29 Cal. 48.

[c] Where a debtor has had execution on his judgment returned unsatisfied, showing that he has exhausted his remedy at law, he may file a bill to subject property of the debtor which is not subject to execution at law to payment of the judgment.—Hager v. Shindler, 29 Cal. 48.

[d] Although a complaint filed after judgment upon a prior creditor's bill by a subsequent judgment creditor is misnamed a complaint in intervention, it may be regarded and treated as an independent original complaint if it states a cause of action, notwithstanding the misnomer, or redundant matter relating to the original creditor's bill.—Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

For Authorities from Other States:

See 12 Cyc. 16-24; 14 Cent. Dig., cols. 471-492, §§ 73-87.

§ 8. Venue.

[a] Creditor's bill to set aside a fraudulent conveyance is not an action to enforce a lien, and need not be brought where land is situated.—Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77.

For Authorities from Other States:

See 12 Cyc. 34; 14 Cent. Dig., cols. 500, 501, § 98.

§ 9. Parties Plaintiff.

[a] Judgment creditor who has exhausted his legal remedy by execution returned nulla bona may alone, or with other judgment creditors, file a bill against persons holding property of the debtor which cannot be reached by execution.—Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

[b] Creditor's bill brought by two judgment creditors jointly, to reach assets of a corporation, is not demurrable for misjoinder of parties plaintiff.—Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

[c] Where a judgment creditor sues to subject equitable assets to his judgment, defendants cannot require other judgment creditors to be brought in as parties, inasmuch as a creditor commencing such action acquires an equitable lien on such assets, and a priority over other judgment creditors who have not previously commenced any such suit.—Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946.

[d] A creditor of an insolvent corporation not a party to a suit against directors to recover misappropriated assets held not entitled to recover any part of the proceeds of the settlement.—Niccolls v. Rice, 147 Cal. 633, 82 Pac. 321.

For Authorities from Other States:

See 12 Cyc. 36; 14 Cent. Dig., cols. 503-513, §§ 100-111.

§ 10. Parties Defendant.

[a] Corporation and all wrongdoers are necessary parties to creditor's bill against a corporation for misappropriation of funds.—Reed v. Goldstein, 53 Cal. 296.

For Authorities from Other States:

See 12 Cyc. 37, 38; 14 Cent. Dig., cols. 503-515, §§ 100-109, 112, 113.

§ 11. Interveners.

[a] One who is a creditor at large without judgment in his favor at the time of rendition of judgment upon such creditor's bill, cannot after subsequently obtaining judgment in his favor, intervene in the action after judgment, or avail himself of a provision in the judgment that any other judgment creditor of the corporation be allowed to become a party to the suit to establish his claim and to have execution against the defendants.—Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

[b] Upon a judgment creditor's bill in equity to subject the unpaid balance due from stockholders to the corporation for subscription to its stock, judgment creditors of the same class with the plaintiff are entitled to intervene before trial, pursuant to section 387 of the Code of Civil Procedure, and mere creditors at large are entitled to no relief whatever.—Baines v. West Coast Lumber Company, 104 Cal. 1, 37 Pac. 767.

For Authorities from Other States:

See 12 Cyc. 45; 14 Cent. Dig., cols. 517-521, §§ 115, 116, 118, 121; cols. 523, § 125.

§ 12. Pleading.

[a] In an action by a creditor under a judgment by confession to establish a priority of lien on property of the judgment debtor in the hands of subsequent judgment creditors, it should be directly alleged that, at the time the judgment by confession was entered, the money for which it was confessed was unpaid or then due.—Denver v. Burton, 28 Cal. 549.

[b] A creditor's bill to reach equitable assets must allege insolvency or execution returned nulla bona.—Hager v. Shindler, 29 Cal. 47.

[c] A creditor's bill, based on a valid and subsisting judgment, wholly unsatisfied, against an insolvent corporation, need not allege that the judgment was based on a valid

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and subsisting debt.—Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

[d] An objection of defect or misjoinder of parties plaintiff in a creditor's bill cannot be taken by general demurrer on the ground that other creditors should be joined, when the complaint does not show on its face that there are other creditors.—Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 38-43; 14 Cent. Dig., col. 550, §§ 154-177.

§ 13. Trial.

[a] Where, in an action to subject land to a judgment, a person to whom the land was conveyed before the commencement of the action is, by order of the trial court, made a party thereto, he may demand that a deposition already taken be stricken out, and that he be allowed to cross-examine the witnesses who have already testified.—Lange v. Braynard, 104 Cal. 156, 37 Pac. 868.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 53-55; 14 Cent. Dig., cols. 574, 575, § 185.

§ 14. Judgment.

[a] Where fund can only be divided satisfactorily among certain class of person, decree must be so framed that all of them may be brought in for their distributive shares, but even then the bill may often be filed by any one of them on his own behalf. It is only when it subsequently appears to the court that a distribution must be made that a decree will be made for the benefit of all.—Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

[b] Grantee of land who acquires title thereto prior to the commencement of an action in the nature of a creditor's bill against his grantor and his predecessors in interest is not affected by the judgment therein, unless he is made a party to the action.—Lange v. Braynard, 104 Cal. 156, 37 Pac. 868.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 55-58; 14 Cent. Dig., cols. 578-591, §§ 191-209.

CREW.

Of vessels. See Seamen.

CRIMINAL CONSPIRACY.

See Conspiracy.

CRIMINAL CONTEMPT.

See Contempt, § 2.

CRIMINAL CONVERSATION.

Criminal liability for. See Adultery.
Civil action for. See Husband and Wife, §§ 196, 197.

CRIMINAL INTENT.

See Criminal Law, § 5, and cross-references under Intent.

Burden of proving. See Criminal Law, § 86.

CRIMINAL LAW.

Include acts and omissions in violation of law punishable as offenses against the public; the nature and elements of crime in general; capacity to commit crime and nature and extent of responsibility therefor in general, and responsibility of principals, accessaries, etc.; jurisdiction over and place of prosecution of crimes; limitation of time for prosecution; preliminary complaints, warrant, examination, and commitment; arraignment and pleas; evidence in criminal proceedings; trial of indictments, etc., and acquittal or conviction; motions in arrest of judgment and for new trial; judgment or sentence and final commitment; review on appeal, writ of error, or certiorari; prosecution and punishment of successive offenses or of habitual criminals; and modes of punishment and prevention of crime in general.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES, §§ 1-9.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME, §§ 10-15.

A. Insanity, §§ 10-12.
B. Drunkenness, §§ 13-15.

III. PARTIES TO OFFENSES, §§ 16-22.

IV. JURISDICTION, §§ 23-32.

V. VENUE, §§ 33-40.
A. Place of Bringing Prosecution, §§ 33-35.
B. Change of Venue, §§ 36-40.

VI. LIMITATION OF PROSECUTION, §§ 41-43.

VII. FORMER JEOPARDY, §§ 44-53.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT AND SUMMARY TRIAL, §§ 54-64.

IX. ARRAIGNMENT AND PLEAS AND NOLLE PROSEQUI OR DISCONTINUANCE, §§ 65-74.

X. EVIDENCE, §§ 75-285.

A. General Rules, Presumptions and Burden of Proof, §§ 75-90.
B. Facts in Issue and Relevant to Issue and Res Gestae, §§ 91-117.
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D. Materiality and Competency in General, §§ 130-148.
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1. Admissions by Accused, §§ 159-175.
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4. Declarations of Third Persons, §§ 182-186.
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G. Acts and Declarations of Conspirators and Defendants, §§ 193-204½.
H. Documentary Evidence and Exclusion of Parol Evidence Thereby, §§ 205-217.
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XI. TIME OF TRIAL AND CONTINUANCE, §§ 286-305.
XII. TRIAL, §§ 306-507.
A. Preliminary Proceedings, §§ 306-311.
B. Course and Conduct of Trial in General, §§ 312-333.
C. Reception of Evidence, §§ 334-344.
D. Objections to Evidence, Motions to Strike Out and Exceptions, §§ 345-348.
E. Argument and Conduct of Counsel, §§ 349-370.
F. Province of Court and Jury in General, §§ 371-402.
G. Necessity and Sufficiency of Instructions, §§ 403-451.
H. Requests for Instruction, §§ 452-467.
J. Custody, Conduct and Deliberations of Jury, §§ 468-484.
K. Verdict, §§ 485-500.
L. Waiver and Correction of Irregularities and Errors, §§ 501-507.
XIII. NEW TRIAL AND ARREST OF JUDGMENT, §§ 508-577.
XIV. JUDGMENT, SENTENCE AND FINAL COMMITMENT, §§ 578-600.
XV. APPEAL AND ERROR AND CERTIORARI, §§ 601-811.
A. Form of Remedy, Jurisdiction and Right of Review, §§ 601-624.
B. Presentation and Reservation in Lower Court of Grounds of Review, §§ 625-646.
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D. Record, Bill of Exceptions and Statement of Facts, §§ 655-711.
1. Record, §§ 655-685.
2. Bill of Exception, §§ 686-707.
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E. Assignments of Error and Briefs, §§ 712-713.
F. Dismissal, Hearing and Rehearing, §§ 714-723.
G. Review, §§ 724-801.
H. Determination and Disposition of Cause, §§ 802-811.
XVI. SUCCESSIVE AND HABITUAL CRIMINALS, §§ 812-817.
XVII. PUNISHMENT, §§ 818-833.

See, also, Arrest, II; Bail; Contempt; Convicts; Extradition; Fines; Forfeitures; Grand Jury; Habeas Corpus; Indictment and Information; Jury; Prisons; Reformatories; Witnesses.

The law defining and punishing particular crimes and the law of criminal procedure which is, in its nature, particularly applicable to them will be found under the following titles: Abduction; Abortion; Adulteration; Adultery; Arson; Assault and Battery; Bigamy; Blasphemy; Breach of the Peace; Bribery; Burglary; Compounding Felony; Conspiracy; Contempt, § 2; Counterfeiting; Disorderly Conduct; Disorderly House; Disturbance of Public Assemblage; Drunkards; Embezzlement; Embracery; Escape and Rescue; Extortion; False Imprisonment; False Personation; False Pretenses; Fornication; Forgery; Fraud, III; Game, §§ 3, 4; Gaming, § 21; Homicide; Incest; Intoxicating Liquors; Kidnaping; Larceny; Lewdness; Libel and Slander; Lotteries, § 6; Malicious Mischief; Mayhem; Miscegnation; Nuisance, II; Obscenity; Obstructing Justice; Perjury; Piracy; Poisons; Prizefighting; Prostitution; Rape; Receiving Stolen Goods; Riot; Robbery; Seduction; Sodomy; Suicide; Threats; Treason; Unlawful Assemblage; Vagrancy; Weapons.

Arrest on criminal charge. See Arrest, II.

Criminal prosecution as condition precedent to disbarment proceedings. See Attorney and Client, § 36.

Bail in criminal cases. See Bail.

Profane swearing. See Blasphemy.

Prosecution for removal of mortgaged personalty. See Chattel Mortgages, § 75.

Conspiracy to commit crime. See Conspiracy, § 3.

Constitutional prohibition against deprivation of liberty without due process. See Constitutional Law, § 242.

Constitutional prohibition against discrimination in criminal legislation. See Constitutional Law, § 233.

Bills of attainder. See Constitutional Law, § 196.

Ex post facto laws. See Constitutional Law, §§ 191-195.

Contempt as criminal or quasi-criminal offense. See Contempt, § 2.

Validity of contract preventing criminal prosecution. See Contracts, § 82.

Crimes by convicts. See Convicts, § 5.

Costs in criminal cases. See Costs, VIII.

Criminal responsibility for failure of county officer to reside at county seat. See Counties, § 102.

Exemplary damages for acts punishable as crimes. See Damages, § 55.

Offenses against election laws. See Elections, XI.

Applicability of doctrine of equitable estoppel to criminal proceedings. See Estoppel, § 48.

Criminal responsibility for false imprisonment. See False Imprisonment, § 9.

Excessive fines. See Fines, § 6.

Criminal responsibility for negligently setting fire. See Fires, § 2.

Criminal responsibility and prosecution for violation of laws governing fishing. See Fish, §§ 9, 10.

Criminal responsibility for fraud. See Fraud, III.

Violation of game law. See Game, §§ 3, 4.

Gambling and prosecution therefor. See Gambling, §§ 21-30.

Validity of statute against selling liquor to Indians. See Indians, § 8.

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Prosecution for selling liquor to Indians. See Indians, § 9.
Offenses which may or must be prosecuted by indictment. See Indictment and Information, § 6.
Right to enjoin prosecution of criminal action. See Injunction, § 69.
Criminal prosecution as adequate legal remedy and bar to injunction. See Injunction, § 21.
Crimes by insane persons. See Insane Persons, § 29.
Forfeiture for violation of internal revenue laws. See Internal Revenue, § 7.
Prosecution for violation of liquor laws. See Intoxicating Liquors, § 25.
Criminal prosecutions in which jury is allowed. See Jury, §§ 23-28.
Waiver of jury trial in criminal cases. See Jury, §§ 37, 38.
Criminal responsibility of justices of the peace for official acts. See Justices of the Peace, § 20.
Criminal libel. See Libel and Slander, § 53.
Offenses against license laws. See Licenses, § 18.
Offenses by livery-stable keepers. See Livery-stable Keepers, § 4.
Offense of running lottery. See Lotteries, § 6.
Willful injury to or destruction of property from ill-will or resentment toward the owner or mere wantonness. See Malicious Mischief.
Malicious prosecution of criminal action. See Malicious Prosecution, § 2.
Interference with criminal prosecutions by mandamus. See Mandamus, § 39.
Offense of inflicting injury depriving victim of organ or member of body or causing permanent disability or disfigurement. See Mayhem.
Prosecutions for violation of municipal police regulations. See Municipal Corporations, § 269.
Criminal responsibility of public officers. See Officers, § 56.
Criminal prosecution of child. See Parent and Child, § 13.
Prosecution for practicing medicine without authority. See Physicians and Surgeons, § 6.
Fighting by agreement for a prize. See Prize-fighting.
Prohibition of criminal proceedings. See Prohibition, §§ 11, 20.
Common prostitution. See Prostitution.
Sexual intercourse with female without her consent or where consent is extorted by fear or obtained by fraud or where female is incapable, in law, of consenting. See Rape.
Fraudulently receiving or concealing stolen goods. See Receiving Stolen Goods.
Rewards for apprehension and conviction of criminal. See Rewards.
Examination of persons and places for discovery of property unlawfully obtained or withheld or of evidence of commission of offense. See Searches and Seizures.
Unnatural carnal copulation between human beings or between a human being and a beast. See Sodomy.
Expression of title in acts relating to crimes or criminal procedure. See Statutes, § 39.
Rules governing construction of penal statutes. See Statutes, § 94.
Retroactive operation of laws relating to offenses and prosecutions. See Statutes, § 103.
Validity of criminal prosecutions conducted on Sunday. See Sunday, § 4.
Criminal responsibility of tax collector. See Taxation, § 128.
Prosecution for obstructing tax collector. See Taxation, § 129.
Offenses incident to maintenance of telegraphs or telephones. See Telegraphs and Telephones, § 4.
Offense of meeting or assembling for the purpose of executing a common unlawful design. See Unlawful Assembly.
Offense of leading idle, wandering, disorderly or criminal life. See Vagrancy.
Right to bear arms in self-defense or defense of state and offense of having or carrying weapons in violation of law. See Weapons.
Right of accused to compel attendance of witnesses. See Witnesses, § 2.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES.

POWER TO DEFINE AND PUNISH, § 1.
APPLICATION AND OPERATION OF COMMON LAW, § 2.
STATUTORY PROVISIONS, § 3.
—— EFFECT OF AMENDMENT ON PENDING CASES, § 4.
CRIMINAL INTENT AND MALICE, § 5.
FELONIES AND MISDEMEANORS, § 6.
DELIBERATION AND WILLFULNESS, § 7.
DEFENSES, § 8.
ATTEMPTS AND SOLICITATION, § 9.

Nature and elements of particular crimes. See cross-references at head of title and Breach of the Peace, § 1; Bribery, §§ 2-5; Burglary, § 1 et seq.; Counterfeiting, §§ 1-5; Disorderly Conduct, § 1; Embezzlement, §§ 1-11; Extortion, § 3; False Imprisonment, § 9; False Pretenses, §§ 6-16; Forgery, §§ 2-11; (elements of murder) Homicide, I; (elements of manslaughter) Homicide, II; (elements of assault with intent to kill) Homicide, III; (nature of incest) Incest, § 1; (elements of incest) Incest, § 2; Larceny, §§ 1-12; Lotteries, § 6; Lewdness, § 1; Malicious Mischief, § 1; Mayhem, § 1; Receiving Stolen Goods, §§ 1-4; Robbery, § 1; Vagrancy, § 1.

FOR AUTHORITIES FROM OTHER STATES:

Boycotting as a criminal conspiracy: 76 Am. Dec. 783, note.

Criminal prosecutions and civil suits may be carried on simultaneously for the same wrong: 28 Am. Rep. 46, note. See 20 L. R. A. 52, 33 L. R. A. 33, notes. See, also, 12 Cyc. 70-973; 14 Cent. Dig., cols. 625-2952; 15 Cent. Dig., col. 1.

§ 1. Power to Define and Punish.

[a] Power to define offenses and fix penalties therefor rests entirely with the legislature.—People v. Perini, 94 Cal. 573, 29 Pac. 1027.

FOR AUTHORITIES FROM OTHER STATES:

Crimes, what acts legislature may not declare to be: 78 Am. St. Rep. 235, note. See, also, 12 Cyc. 136-139; 14 Cent. Dig., cols. 626-628, §§ 3-7.

§ 2. Application and Operation of Common Law.

[a] Common-law system of pleading and rules of procedure in criminal cases have been

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modified by statutes of this state, by which alone the sufficiency of pleadings in criminal cases is to be determined.—People v. Lopez, 90 Cal. 569, 27 Pac. 427.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 140, 141; 14 Cent. Dig., cols. 629-631, §§ 8-12.

§ 3. Statutory Provisions.

[a] Section providing that where there is an acquittal for variance the court may order the detention of the defendant to the end that a new indictment may be filed is constitutional.—People v. McNealy, 17 Cal. 332.

[b] Fourteenth section of act of April 3, 1863, amendatory of and supplementary to the Criminal Practice Act, providing that no person can be convicted unless on a verdict, a plea of guilty, or upon judgment against him on demurrer, refers to the two hundred and ninety-sixth, instead of the two hundred and ninety-third section of the Criminal Practice Act.—People v. King, 28 Cal. 265.

[c] Persons accused of crimes alleged to have been committed before the Penal Code took effect are to be tried in accordance with the forms of procedure provided in the code. People v. Mortimer, 46 Cal. 114.

[d] "Knowingly" when used in Penal Code imports only knowledge of facts.—People v. Burns, 75 Cal. 630, 631, 17 Pac. 648.

[e] Question whether certain conduct constitutes crime must be decided from language used in statute, not from supposed intent of its framers.—McNulty, Ex parte, 77 Cal. 168, 11 Am. St. Rep. 257, 19 Pac. 237.

[f] Statute conferring power on court to determine degree of crime under plea of guilty is valid.—People v. Chew Lan Ong, 141 Cal. 552, 99 Am. St. Rep. 88, 75 Pac. 186.

FOR AUTHORITIES FROM OTHER STATES:

Repeal of criminal statutes, effect of: 94 Am. Dec. 217, note. See, also, 12 Cyc. 141-147; 14 Cent. Dig., cols. 626-628; §§ 3-5, 7; cols. 632-641, §§ 13-20.

§ 4. —— Effect of Amendment on Pending Cases.

[a] Where act is passed between time of commission of act and death of victim defining the offense, and providing for its punishment, and providing that upon trials for crimes committed previous to its enactment the party shall be tried by the laws in force at the time of the commission of the crime, the prisoner must be tried under the law in force when the violation of the law was committed.—People v. Gill, 6 Cal. 637.

[b] Act of 1863, amendatory of, and which refers in terms to, section 293 of the Criminal Practice Act, will be construed as referring to section 296 of that act, as that is the only section of the statutes to which the amendment can properly apply, and, otherwise, it must be held that the amendment is not only a nullity, but that the legislature intended it as a nullity, and the court is forbidden so to hold.—People v. King, 28 Cal. 265.

[c] An amendment of a statute reducing an offense from a felony to a misdemeanor, and the punishment from a fine not exceeding one thousand dollars, or imprisonment in the state prison not exceeding two years, or by both, to a fine not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail not exceeding two years, or by both, operates as a repeal of the former statute.—People v. Tisdale, 57 Cal. 104.

§ 5. Criminal Intent and Malice.

See, also, references under Intent.

Intent as element of embezzlement. See Embezzlement § 4.

Intent to detain and take from state as element of crime of kidnaping. See Kidnaping, § 1.

Intent as element of larceny. See Larceny, § 3.

[a] Intention is essential to crime.—People v. Freelon, 8 Cal. 519.

[b] To constitute a crime, the criminal act must be accompanied by a criminal intent or criminal negligence.—People v. White, 34 Cal. 183.

[c] Presence or absence of motives is important in determining question, when actual insanity is not made out.—People v. Messersmith, 61 Cal. 246.

[d] A person is presumed to intend all the natural, probable, and usual consequences of his own act, but not all the "possible" consequences of his act.—People v. Munn, 65 Cal. 211, 3 Pac. 650.

[e] Caveat emptor as to notice cannot apply to criminal responsibility.—People v. Brown, 74 Cal. 309, 16 Pac. 1.

[f] In determining intention of defendant it is reasonable to believe that when he made the arrest he intended to do with his prisoner what the evidence shows he did do, and that he had no other purpose. Acts indicate the intention, and the law, in some cases, judges of a man's previous intentions by his subsequent actions.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

[g] Law does not recognize man's criminal intention as a crime, and he can only be prosecuted for an offense actually committed and not for an offense he may have intended to commit.—People v. Elliott, 90 Cal. 586, 27 Pac. 433.

[h] Criminal intent need not be shown, when an act in general terms is made indictable, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

[i] Corpus delicti is made up of certain facts forming its basis, and the existence of criminal agency as the cause of them.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

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FOR AUTHORITIES FROM OTHER STATES:

See 11 L. R. A. 807, note. See, also, 12 Cyc. 147-154; 14 Cent. Dig., cols. 641-644, §§ 21-28.

§ 6. Felonies and Misdemeanors.

Degrees of particular crimes. See specific crimes.

[a] Some offenses may be punished either as felonies or as misdemeanors, and in such cases the punishment inflicted must determine the grade of the offense, and the right of appeal depends on the nature and extent of the punishment.—People v. Cornell, 16 Cal. 187.

[b] Under the provisions of sections 4 and 5 of the Criminal Practice Act, distinguishing felonies and misdemeanors, any offense which may be or is liable to be punished by death or imprisonment in a state prison is a felony; and any offense which is not liable to such punishment, that is, for which that grade of punishment cannot, under any circumstances, be inflicted, is a misdemeanor.—People v. War, 20 Cal. 117.

[c] Misdemeanor is act or omission for which punishment, other than death or imprisonment, is denounced by a statute; that is, by a legislative act.—Pillsbury v. Brown, 47 Cal. 477.

[d] Felony defined.—People v. Rodrigo, 69 Cal. 605, 11 Pac. 481.

[e] Second offense of petit larceny is a felony.—People v. Gutierry, 74 Cal. 83.

[f] Distinction between high and low misdemeanors has never been recognized in this state.—Green v. Superior Court, 78 Cal. 562, 21 Pac. 307, 541.

[g] Penal Code, section 666, providing that the punishment for petit larceny committed by one who has before been convicted of burglary shall be imprisonment in the state prison not exceeding five years, makes petit larceny in such case a felony.—People v. Smith, 143 Cal. 597, 77 Pac. 449.

FOR AUTHORITIES FROM OTHER STATES:

Merger of one crime in another: 5 Am. St. Rep. 899, note. See, also, 14 Cent. Dig., cols. 644-648, §§ 29-31.

§ 7. Deliberation and Willfulness.

[a] Deliberation is action after consideration and reflection.—People v. Sheldon, 68 Cal. 437, 9 Pac. 457.

[b] Deliberate act is willful act.—People v. Sheldon, 68 Cal. 437, 9 Pac. 457.

[c] To do a thing willfully is to do it by design, with a set purpose.—People v. Sheldon, 68 Cal. 437, 9 Pac. 457.

[d] "Willfully" implies purpose or willingness to commit act.—People v. Von Tiedeman, 120 Cal. 135, 52 Pac. 155.

§ 8. Defenses.

Insanity as defense. See post, §§ 10-12.
Defenses to prosecutions for particular offenses. See references under Defenses, and Bigamy, § 7; Embezzlement, § 19; (self-defense in homicide cases) Homicide, §§ 48-59; (defense of habitation) Homicide, § 59; (defense of property) Homicide, § 61; (excusable and justifiable homicide) Homicide, IV; Kidnaping, § 5.

[a] The command of a master to a servant, or principal to his agent, or parent to his child, will not justify a criminal act done in pursuance thereof.—People v. Richmond, 29 Cal. 414.

[b] The conviction of one person for an offense has no tendency to prove that another person did not commit it, and hence is no bar to a prosecution of such second person. So held on an indictment for burglary.—People v. Johnson, 47 Cal. 122.

[c] Promise of immunity by committing magistrate for turning state's evidence is no ground for discharge.—People v. Peter, 48 Cal. 250.

[d] Ignorance of law is no defense.—People v. Burns, 75 Cal. 630, 17 Pac. 646.

[e] Duty to retreat before using violence in self-defense. Authorities reviewed.—People v. Lewis, 117 Cal. 191-194, 48 Pac. 1088.

[f] Ignorance of law, if it renders impossible the special state of mind required to constitute the offense, takes it away, the same as any other cause having that effect.—People v. Goodin, 136 Cal. 455, 69 Pac. 85.

[g] It was error for court to instruct the jury to the effect that the belief of the defendant that he had the legal right to do what he did, if he had in fact no such right, did not justify his acts, and that it is no defense for the defendant to claim that he thought, or had an honest belief, that he had a right to dig up or injure the public highway, and to strike out the defendant's testimony stating the grounds of his belief that he had a right to fence up the road, and to exclude evidence that other portions of the old road had been fenced and plowed, which, if proved, would tend to show an actual abandonment of the old road.—People v. Goodin, 136 Cal. 455, 69 Pac. 85.

[h] Where one shoots a person through criminal negligence, his ignorance of the law can form no basis for acquittal.—People v. Kilvington, 36 Pac. 13.

FOR AUTHORITIES FROM OTHER STATES:

Ignorance of law as an excuse for crime: 10 Am. Dec. 323, note.

Ignorance or mistake of fact as a defense to a criminal prosecution: 30 Am. Rep. 617, note.

Consent to crime by person injured: 72 Am. St. Rep. 700, note.

Coercion as an excuse for crime: 106 Am. St. Rep. 721-728, note; 19 L. R. A. 357, 40 L. R. A. 269, notes. See, also, 12 Cyc. 156-158; 14 Cent. Dig., cols. 651, 652, § 38.

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§ 9. Attempts and Solicitation.

See, also, references under Attempt to Rape. See Rape, § 6.

Attempt to rob. See Robbery, § 4.

[a] Attempt contemplated by statute must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party.—People v. Murray, 14 Cal. 159.

[b] Person may by single act endeavor to accomplish two or more criminal results.—People v. Milne, 60 Cal. 71.

[c] "Attempt" to commit crime is an effort to carry out formed design or intent. Mere intent or preparation long beforehand is not.—People v. Stites, 75 Cal. 575-579, 17 Pac. 693.

[d] Going out to meet confederate with dynamite in possession in furtherance of prearranged plan to place it on track, carrying out of which was frustrated by police, is an attempt.—People v. Stites, 75 Cal. 571-579, 17 Pac. 693.

[e] If actual transaction has commenced which would have completed the crime if not interrupted, there is an attempt.—People v. Stites, 75 Cal. 577, 17 Pac. 693.

[f] Where criminal result of attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed.—People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, 30 Pac. 80.

For Authorities from Other States:

Attempt to commit a crime, what constitutes crime of: 20 Am. St. Rep. 741, note.

Solicitation, whether amounts to attempt to commit a crime: 40 Am. Rep. 656, note; 25 L. R. A. 434, note.

Crimes committed by aid or connivance of persons who are seeking to entrap or convict criminals: 81 Am. Dec. 365, note.

Decoying person to commit a crime: 30 Am. Rep. 129, note; 25 L. R. A. 341, note. See, also, 12 Cyc. 176-180; 15 Cyc. 540; 14 Cent. Dig., cols. 659-661, § 51.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

A. Insanity, §§ 10-12.

B. Drunkenness, §§ 13-15.

A. INSANITY.

TEST OF ACCOUNTABILITY, IN GENERAL, § 10.

INSANE DELUSIONS, TEMPORARY INSANITY AND MERE MENTAL WEAKNESS, FEAR OR EXCITEMENT, § 11.

IRRESISTIBLE IMPULSE OR EMOTIONAL INSANITY AND MORAL INSANITY, § 12.

Separate trial of issue of insanity. See post, § 308.

Crimes by insane persons. See Insane Persons, § 29.

§ 10. Test of Accountability in General.

[a] In a trial for murder, a charge "that the true test of insanity is whether the accused, at the time of the commission of the crime, was conscious that he was doing what he ought not to do" is proper.—People v. Hobson, 17 Cal. 424.

[b] To establish a defense on ground of insanity, it must be clearly proved that at time of committing act accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the particular act with which he stands charged, or, if he did know its nature and quality, that he did not know it was wrong.—People v. Coffman, 24 Cal. 230.

[c] An instruction by the court to the jury to the effect that, if they should find that defendant was insane at the time of the alleged shooting, they should declare him not guilty, without regard to the degree of insanity, is too broad.—People v. Best, 39 Cal. 690.

[d] In attempting to reconcile foreknowledge and providence of divinity with freedom and responsibility of men, law adopts theory of responsibility of men, notwithstanding controlling supervision of Providence.—People v. Ah Sam, 41 Cal. 655, 656.

[e] Insanity, as recognized in the criminal law of this state, is such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the particular act with which he is charged.—Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

[f] Evidence indicating mental change in defendant, and that he had an unbalanced mind, does not establish an excuse for crime where, as tested by the rules of the common law, the jury were authorized to find from the evidence that the defendant was not so insane as to be irresponsible.—People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

[g] Where defendant pleaded insanity as an excuse for the crime, an instruction that if defendant's mind was so affected that he had not sufficient will power to abstain from killing the deceased he should be found not guilty was properly refused.—People v. Methever, 132 Cal. 326, 64 Pac. 481.

For Authorities from Other States:

See 39 L. R. A. 262, note. See, also, 12 Cyc. 164, 176.

§ 11. Insane Delusions, Temporary Insanity and Mere Mental Weakness, Fear or Excitement.

[a] Weakness of mind, and fear and excitement caused by the deceased, to such an extent that the defendant did not know what the effect of his act would be with reference

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to the crime of murder, are no defense.—People v. Hurley, 8 Cal. 390.

[b] Plea of insanity is not to be encouraged. People v. De Cleer, 60 Cal. 382.

[c] If defendant has certain special delusions which completely possess him, but is perfectly sane on all other subjects, he must be judged as though facts with respect to which delusions exist were real.—People v. Hubert, 119 Cal. 221, 63 Am. St. Rep. 72-n., 51 Pac. 329.

[d] In a prosecution for robbery, where defendant pleaded temporary insanity, an instruction that the laws of the state did not recognize transitory mania or temporary insanity as a defense to crime was error.—People v. Ford, 138 Cal. 140, 70 Pac. 1075.

FOR AUTHORITIES FROM OTHER STATES:

Insanity as an excuse or defense for crime: 76 Am. St. Rep. 83, note.

Insanity as a defense to an indictment for crime: 36 Am. Dec. 402, note. See, also, 12 Cyc. 167; 14 Cent. Dig., cols. 668-670, §§ 59-61.

§ 12. Irresistible Impulse or Emotional Insanity and Moral Insanity.

[a] An irresistible impulse is not an excuse for the commission of a crime, where the person committing it is capable of knowing right from wrong.—People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651.

[b] Moral insanity, as distinguished from mental derangement, is no excuse for crime, nor an exemption from punishment therefor. People v. Kerrigan, 73 Cal. 222, 14 Pac. 849.

[c] Irresistible impulse, so called, is not, of itself, a legal defense to a charge of felony. Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

[d] Doctrine that in some forms of insanity patient or sufferer knows nature of his act fully, but at same time he cannot prevent it through paralysis of will power, known as "uncontrollable impulse," has no legal standing in this state.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[e] On a murder trial, it appeared that the killing was done under the influence of anger not caused by any adequate provocation, and after the lapse of a sufficient cooling time. There was evidence that defendant was to some extent mentally unsound as a result of long-continued abuse of intoxicating liquors, though not insane to the extent of not knowing what he was doing, or that his act was a crime. Held, that it was not error to instruct that any partial defect of understanding, which might cause defendant more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose.—People v. Leary, 105 Cal. 486, 39 Pac. 24.

[f] In our courts there is no such doctrine established or recognized as moral insanity, distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[g] Where defendant knows fully the nature of his act, the doctrine that he could not prevent it through paralysis of the will power, or through uncontrollable or irresistible impulse, has no legal standing in this state, and is not a legal defense to crime.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[h] Irresistible impulse is no defense to crime if at time accused had requisite knowledge as to nature and quality of act and its wrongfulness.—People v. Hubert, 119 Cal. 223, 16 Am. St. Rep. 72-n., 51 Pac. 329.

[i] Irresistible impulse is not of itself a defense to a charge of felony.—People v. Owens, 123 Cal. 482, 56 Pac. 251.

[j] Uncontrollable impulse or emotional insanity beginning on the eve of the criminal act and ending with its consummation is no legal defense to the crime.—People v. Trebilcox (Cal. Sup.), 86 Pac. 684.

FOR AUTHORITIES FROM OTHER STATES:

See 18 L. R. A. 224, note. See, also, 12 Cyc. 169; 14 Cent. Dig., cols. 670-675, §§ 62-64.

B. DRUNKENNESS.

IN GENERAL, § 13.
EXISTENCE OF SPECIFIC INTENT ESSENTIAL TO OFFENSE, § 14.
INSANITY RESULTING FROM DRUNKENNESS, § 15.

§ 13. In General.

[a] A defendant indicted for voting twice may show that he was intoxicated when he voted the second time, as tending to show that his mental condition was such that he did not know he was committing the offense. People v. Harris, 29 Cal. 678.

[b] Drunkenness is no defense to the fact of guilt. Evidence of drunkenness can only be received and considered by the jury for the purpose of determining the degree of guilt, and for this purpose it should be received with great caution.—People v. Lewis, 36 Cal. 531.

[c] Drunkenness is never an excuse for crime, except where it has continued so long and been carried to such an excess as to produce delirium tremens or some other form of permanent insanity.—(Cal. 1880) People v. Ferris, 2 Ky. Law Rep. 190, 55 Cal. 588.

[d] Voluntary drunkenness neither excuses nor justifies crime.—(Cal. 1869) People v. Lewis, 36 Cal. 531; (1884) People v. Blake, 65 Cal. 275, 4 Pac. 1.

[e] Act is not less criminal because committed by one voluntarily intoxicated, though his condition may be considered in determining intent.—People v. Young, 102 Cal. 411, 36 Pac. 770.

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[f] Evidence that defendant was frequently under the influence of liquor, and when so affected, was abusive and quarrelsome, and that he "had been drinking" on the day previous to the morning on which, shortly after midnight, he killed deceased, does not call for an instruction on intoxication at the time of the killing.—People v. Kloss, 115 Cal. 567, 47 Pac. 459.

[g] Intoxication has nothing to do with the degree of the crime of burglary, but is only relevant in considering the question of the intent with which the entry was made, but the degree is determined solely by the question as to when the entry was made—whether in the day or at night-time.—People v. Dowell, 141 Cal. 493, 75 Pac. 45.

[h] The defense of intoxication on a trial for assault with intent to murder, held insufficient to overcome a verdict of guilty.—People v. Owens (Cal. App.), 86 Pac. 980.

FOR AUTHORITIES FROM OTHER STATES:

Drunkenness as an excuse for crime: 40 Am. Rep. 560, note; 36 L. R. A. 465, 469, 470, notes. See, also, 12 Cyc. 170-175; 14 Cent. Dig., cols. 675-684, §§ 65-70.

§ 14. Existence of Specific Intent Essential to Offense.

[a] Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees.—(Cal. 1863) People v. Belencia, 21 Cal. 544; (1865) People v. King, 27 Cal. 507, 87 Am. Dec. 95; (1872) People v. Williams, 43 Cal. 344; (1892) People v. Vincent, 95 Cal. 425, 30 Pac. 581.

[b] Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees.—People v. King, 27 Cal. 507, 87 Am. Dec. 95.

[c] Evidence of accused's intoxication when he committed a criminal act is admissible, not as an excuse for the crime, but to enable jury to determine whether his mental condition was such that he knew he was committing an offense.—People v. Harris, 29 Cal. 678.

[d] Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees.—People v. Williams, 43 Cal. 344.

[e] Intoxication is no excuse for crime, but should be considered as affecting defendant's mental condition, with reference to his capability of a specific intent.—(Cal. 1880) People v. Ferris, 55 Cal. 588; (1893) People v. Lane, 100 Cal. 379, 34 Pac. 856; (1894) People v. Young, 102 Cal. 411, 36 Pac. 770.

[f] Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees.—People v. Vincent, 95 Cal. 425, 30 Pac. 581.

[g] Intoxication is no excuse for crime, but should be considered as affecting defendant's mental condition, with reference to his capability of a specific intent.—People v. Lane, 100 Cal. 379, 34 Pac. 856.

[h] Intoxication is no excuse for crime, but should be considered as affecting defendant's mental condition, with reference to his capability of a specific intent.—People v. Young, 102 Cal. 411, 36 Pac. 770.

[i] Under Penal Code, section 22, providing that, whenever the existence of any particular motive is necessary to constitute any particular crime, the jury may consider the fact that the accused was intoxicated at the time in determining his motive, a jury is warranted in holding accused responsible for a robbery committed while intoxicated, which he confessed to when in full possession of his faculties.—People v. Gilmore, 53 Pac. 806.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 172; 14 Cent. Dig., cols. 678-682, § 67.

§ 15. Insanity Resulting from Drunkenness.

[a] Insanity produced by voluntary intoxication does not destroy responsibility.—People v. Lewis, 36 Cal. 531.

[b] Insanity produced by intoxication does not destroy responsibility for crime if the accused, when sane, voluntarily made himself intoxicated.—People v. Williams, 43 Cal. 344.

[c] If permanent insanity is produced by habitual drunkenness, then, like insanity produced by any other cause, it excuses an act which otherwise would be criminal.—People v. Blake, 65 Cal. 275, 4 Pac. 1.

[d] Temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk.—People v. Travers, 88 Cal. 233, 26 Pac. 88.

[e] Settled insanity produced by long-continued intoxication affects responsibility in same way as insanity produced by any other cause.—People v. Travers, 88 Cal. 239, 26 Pac. 88.

[f] Penal Code, section 26, subdivision 5, providing that persons committing a crime

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without being conscious thereof shall not be responsible, applies to cases of somnambulism and the like, and not to a defense, in a trial for murder, of insanity induced by delirium tremens.—People v. Methever, 132 Cal. 326, 64 Pac. 481.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 175; 14 Cent. Dig., cols. 675-678, § 65; cols. 682-684, §§ 69, 70.

III. PARTIES TO OFFENSES.

PRINCIPALS, AIDERS, ABETTORS AND ACCOMPLICES, § 16.
PRINCIPALS IN FIRST DEGREE, § 17.
PRINCIPALS IN SECOND DEGREE, § 18.
ACCESSARIES BEFORE THE FACT, § 19.
ACCESSARIES AFTER THE FACT, § 20.
PROSECUTION AND PUNISHMENT OF PRINCIPALS IN THE FIRST AND SECOND DEGREE, § 21.
PROSECUTION AND PUNISHMENT OF PRINCIPALS AND ACCESSARIES, § 22.

Persons liable for particular crimes. See Arson, § 8; Bribery, § 6; Incest, § 3; Larceny, § 13; Lewdness, § 4.

§ 16. Principals, Aiders, Abettors and Accomplices.

[a] There is no distinction in this state between principals in the first and second degrees.—People v. Bearss, 10 Cal. 68.

[b] Person who incites, counsels, hires, or commands another to commit a crime, but is not within such convenient distance as to be able to come to the immediate assistance of his associates, if required, or to watch to prevent surprise, is an accessary, and not a principal in the second degree.—People v. Hodges, 27 Cal. 340.

[c] Principals in the second degree and accessaries before the fact are all deemed chief actors, that is, principals in the first degree in the commission of the felony, and are to be indicted, tried, and punished as such principals.—People v. Outeveras, 48 Cal. 19.

[d] Accomplice defined.—People v. Bolanger, 71 Cal. 20, 11 Pac. 799.

[e] Rule that detective pretending to be an accomplice in order to ferret crime may prove that he was not an accomplice by showing that he disclosed his acts to his superior was carried too far in this case.—People v. Fong Ching, 78 Cal. 174, 175, 20 Pac. 396.

[f] One who participates in fraudulent misappropriation of funds of corporation by its secretary, under circumstances clearly indicating guilty knowledge and criminal intent, is liable as a principal coworker in performance of acts constituting corpus delicti.—People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

[g] All persons concerned in the commission of a crime, whether directly committing the act constituting the offense, or aiding or abetting in its commission, are principals.—People v. Bunkers (Cal. App.), 84 Pac. 364.

[h] Penal Code, section 32, states the common-law rule with respect to accessaries.—Ex parte Goldman (Cal. App.), 88 Pac. 819.

FOR AUTHORITIES FROM OTHER STATES:

See 41 L. R. A. 650, 26 L. R. A. 779, notes. See, also, 12 Cyc. 183; 14 Cent. Dig., cols. 685-687, §§ 71-74.

§ 17. Principals in First Degree.

[a] Distinction between principal of first and second degree and between principal and accessary before the fact is abolished.—People v. Bearss, 10 Cal. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 184, 185; 14 Cent. Dig., col. 687, § 75.

§ 18. Principals in Second Degree.

[a] Principal in second degree and accessaries before the fact may be indicted and tried as principals.—People v. Bearss, 10 Cal. 68.

[b] In an indictment of M. and N. for murder (the former as principal, the latter as accessary) charging that he was an aider and abettor, separate trials were had, and M. was convicted of manslaughter. Held, that under the statute N. might still be tried and convicted as an aider and abettor.—People v. Newberry, 20 Cal. 439.

[c] Mere fact that one person is with another who enters dwelling-house and steals therefrom, and sees him steal without interference on his part to prevent it, does not render him guilty of the crime of maliciously entering a dwelling-house in the daytime with intent to steal property therein, nor will the proof of such facts cast on him the burden of proving himself innocent.—People v. Ah Ping, 27 Cal. 489.

[d] Merely standing by is not an offense if no act is done to aid and abet.—People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176.

[e] If B and C have had a quarrel with A, and A approaches B and C, and B commands him to halt or he will shoot him, and C then shoots A, the circumstances do not necessarily import a common criminal intent between B and C to kill A, so as to make B guilty.—People v. Leith, 52 Cal. 251.

[f] One who merely encourages another to tie a person is not an accessary to a murder committed by the latter in doing so.—People v. Keefer, 65 Cal. 232, 3 Pac. 818.

[g] To be guilty as a principal, a person must both aid and abet, under Penal Code, section 971, declaring guilty as principals all persons who aid and abet in the commission of a crime.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 185-189; 14 Cent. Dig., cols. 688-697, §§ 76-86.

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§ 19. Accessaries Before the Fact.

[a] Distinction between accessary before the fact and principal is abrogated by section 971, Penal Code. One who, at common law, would have been an accessary, is under statute, guilty as principal.—People v. Rozelle, 78 Cal. 87-89, 20 Pac. 36.

FOR AUTHORITIES FROM OTHER STATES:

Aiding and abetting the commission of a felony: 13 Am. Rep. 177, note. See, also, 12 Cyc. 190-192; 14 Cent. Dig., cols. 297-700, §§ 87-91.

§ 20. Accessaries After the Fact.

[a] Under Penal Code, section 32, providing that "all persons who after full knowledge that a felony has been committed conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessaries," mere silence, after knowledge of the commission of a felony, is not sufficient to constitute one an accessary, without some affirmative act looking toward the concealment of the crime.—People v. Garnett, 129 Cal. 364, 61 Pac. 1114.

[b] To constitute one an accessary, under Penal Code, section 32, for harboring and protecting a "person charged" with felony, there must have been a formal complaint, information, or indictment filed against the criminal.—People v. Garnett, 129 Cal. 364, 61 Pac. 1114.

FOR AUTHORITIES FROM OTHER STATES:

Accessaries after the fact: 80 Am. Dec. 95, note. See, also, 12 Cyc. 192, 193; 14 Cent. Dig., cols. 700-703, §§ 92-95.

§ 21. Prosecution and Punishment of Principals in the First and Second Degree.

[a] At common law aiders and abettors might be convicted, though the principals in the first degree had been acquitted. The statute of this state has not altered the law in that respect.—People v. Bearss, 10 Cal. 68.

[b] Under act concerning crimes and punishments, section 11, abolishing the common-law distinction between principals of the first and second degrees, and the distinction between them and accessaries before the fact, so far as such distinction is capable of abolition, accessaries may be convicted or acquitted without reference to the acquittal or conviction of the principal.—People v. Bearss, 10 Cal. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 193; 14 Cent. Dig., cols. 703-705, §§ 96-102.

§ 22. Prosecution and Punishment of Principals and Accessaries.

[a] Accessary may be convicted, though principal is acquitted.—People v. Barss, 10 Cal. 68, 20 Cal. 439.

[b] Accessary before the fact must be accused and tried as a principal.—People v. Rozelle, 78 Cal. 89, 20 Pac. 36.

[c] In order to hold an accessary before the fact as a principal in case of felony, he must aid and abet in the commission of the offense, though not present. A disjunctive instruction that such an accessary may be charged as a principal, if he aids or abets in the commission of the felony, is erroneous. People v. Compton, 123 Cal. 403, 56 Pac. 44.

[d] Where there was conflicting evidence as to whether the defendant was present at the commission of a mayhem by castration, and if an alibi was proved, there was no sufficient evidence to indicate an aiding and abetting that would make him a principal in the crime, it was error to instruct the jury that they need not acquit the defendant, even though they believed that he was not present at the commission of the crime.—People v. Schoedde, 126 Cal. 373, 58 Pac. 859.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 705-711, §§ 103-111.

IV. JURISDICTION.

NATURE AND SCOPE OF CRIMINAL JURISDICTION, IN GENERAL, § 23.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 23¼.
COURTS VESTED WITH CRIMINAL JURISDICTION, § 23½.
JURISDICTION OF JUSTICES OF THE PEACE, POLICE JUSTICES AND OTHER OFFICERS, § 24.
JURISDICTION OF OFFENSE, § 24½.
LOCALITY OF OFFENSE, § 25.
JURISDICTION OF THE PERSON—INDIANS, § 26.
MODE OF ACQUIRING JURISDICTION, § 27.
TRANSFER OF CAUSES, § 28.
LOSS OF DIVESTITURE OF JURISDICTION, § 29.
JURISDICTION TO BE SHOWN BY RECORD, § 30.
PRESUMPTIONS AS TO JURISDICTION, § 31.
WAIVER OF OBJECTION, § 32.

Civil jurisdiction of courts in general. See Courts, I, and cross-references thereunder.
Jurisdiction of prosecutions in general. See Embezzlement, § 20; False Pretenses, § 20; Sodomy, § 3.
Jurisdiction of state courts over accused Indian. See Indians, § 2.
Jurisdiction to find indictment. See Indictment and Information, § 8.
Civil jurisdiction of courts of justices of the peace. See Justices of the Peace, §§ 21-48.

§ 23. Nature and Scope of Criminal Jurisdiction in General.

[a] The defendant was charged with having committed an assault by means likely to produce great bodily injury. The lower court sustained a demurrer on the ground that it had no jurisdiction of the offense charged. Held, error.—People v. Fahey, 64 Cal. 342, 30 Pac. 1030.

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FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 196, 197; 14 Cent. Dig., col. 713, §§ 112-114.

§ 23¼. Constitutional and Statutory Provisions.

[a] Constitution vests legislature with power to confer such jurisdiction on justices' courts as are not exclusively vested in other courts. The act conferring criminal jurisdiction on justices' courts is constitutional. People v. Fowler, 9 Cal. 85.

[b] Under Constitution, article 22, section 3, the superior court of a county is the successor of the district court, and has jurisdiction to make an order to carry into execution a judgment of death rendered by the district court.—People v. Colby, 54 Cal. 184.

[c] Under Constitution, article 6, giving the superior courts jurisdiction of all misdemeanors not otherwise provided for, and Statutes of 1871-72, page 84, creating a police court of the city and county of San Francisco, and giving it jurisdiction of all misdemeanors punishable by fine not exceeding one hundred dollars or imprisonment for one year, or both, the superior court of the city and county of San Francisco has no jurisdiction to try any misdemeanors, as the latter section covers all misdemeanors.—People v. Joselyn, 80 Cal. 544, 22 Pac. 217.

[d] A person was convicted in a police court attempted to be created under an unconstitutional law. All the processes issued from said court. The pretended trial was held at a session thereof, and judgment was entered by its so-called judge on its records. Held, that the proceedings were void, because the tribunal, being unconstitutional, had no jurisdiction whatever.—Giambonini, Ex parte, 117 Cal. 573, 49 Pac. 732.

[e] San Francisco freeholders' charter, section 2, conferring "concurrent" jurisdiction of misdemeanors on the city's police court, under Constitution, article 11 section 8½, held unconstitutional as opposed to Constitution, article 6, section 5.—Robert v. Police Court of City and County of San Francisco (Cal. Sup.), 82 Pac. 838.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 197-200; 14 Cent. Dig., cols. 714-729, §§ 115-124.

§ 23½. Courts Vested with Criminal Jurisdiction.

[a] The county court has jurisdiction to try an indictment for misdemeanor; the jurisdiction of justices of the peace being exclusive as to misdemeanors where no indictments have been found.—McCarthy, Ex parte, 53 Cal. 412.

[b] Superior court has no jurisdiction of cases of petit larceny, or such other misdemeanors as have been committed by the legislature to the justice's court.—Wallingford, Ex parte, 60 Cal. 103.

[c] Superior court has no jurisdiction of indictment for violation of Sunday law. Gafford v. Bush, 60 Cal. 149.

[d] Superior court has jurisdiction of prosecution for second offense of petit larceny.—People v. Gutierrez, 74 Cal. 83, 15 Pac. 444.

[e] Superior court has no jurisdiction over misdemeanors when such jurisdiction has been conferred on police court.—Green v. Superior Court, 78 Cal. 558, 559, 21 Pac. 307, 541.

[f] Superior court has jurisdiction exclusive of police court where fine might exceed one thousand dollars.—Neustadt, Ex parte, 82 Cal. 275, 23 Pac. 124.

[g] Superior court has no jurisdiction over misdemeanors.—People v. Lawrence, 82 Cal. 182, 22 Pac. 1120.

[h] Misdemeanor of conspiracy under section 181, Penal Code, is not within jurisdiction of superior court.—People v. Hamberg, 84 Cal. 472, 24 Pac. 298.

[i] Superior court is successor of municipal criminal court.—Williams, Ex parte, 87 Cal. 83, 24 Pac. 602.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 200, 201; 14 Cent. Dig., cols. 729-734, §§ 125-129.

§ 24. Jurisdiction of Justices of the Peace, Police Justices and Other Officers.

[a] The act of April 20, 1863, concerning courts of justice in this state, takes away from justices of the peace the power to try and punish Indians for grand larceny conferred upon them by the act of April 22, 1850, for the protection and punishment of Indians. People v. Antonio, 27 Cal. 404.

[b] Whether, when justice of peace had examined witnesses against accused, and proceeded, in other respects, in accordance with the statute, such proceeding would necessarily oust the authority of another magistrate to proceed anew to investigate the same charge, not decided.—Walsh, Ex parte, 39 Cal. 705.

[c] The police judge of San Francisco is vested by the statute with the powers of a magistrate.—Levy v. Brannan, 39 Cal. 485.

[d] The police court of the city and county of San Francisco is not of inferior jurisdiction, in the sense that upon mere collateral inquiry nothing is to be intended in support of its judgment when rendered in a particular case, included by general definition in that class of criminal cases over which jurisdiction has been conferred upon it by law.—Murray, Ex parte, 43 Cal. 455; Simpson, Ex parte, 47 Cal. 127.

[e] Penal Code does not repeal act prescribing jurisdiction of police court of San Francisco.—Simpson, Ex parte, 47 Cal. 127.

[f] Justice court has no jurisdiction of prosecution for public nuisance injurious to health.—Kurtz, In re, 68 Cal. 413, 9 Pac. 449.

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[g] Criminal jurisdiction conferred on justice courts is exclusive.—Green v. Superior Court, 78 Cal. 563, 21 Pac. 307, 541.

[h] Fact that particular misdemeanor must be presented by indictment or information does not affect justice's jurisdiction.—Green v. Superior Court, 78 Cal. 564, 21 Pac. 307, 541.

[i] The police judge's court has no jurisdiction of the offense of obtaining money by false pretenses, as the fine may exceed one thousand dollars.—Neustadt, In re, 82 Cal. 273, 23 Pac. 124.

[j] A justice of the peace has no jurisdiction of the crime of embezzlement committed in another county.—Cook, Ex parte, 39 Pac. 16.

[k] Prosecution for obtaining property under false pretenses is not triable by police court but is within jurisdiction of superior court.—People v. Hamberg, 84 Cal. 472, 24 Pac. 298.

[l] Conviction by justice is valid if he has jurisdiction as justice, though he is acting as police judge under void appointment. Reilly, Ex parte, 85, 633, 24 Pac. 807.

[m] Statutes of 1885, page 213 (Act March 18, 1885), establishing police courts in cities of the second class, and vesting in them jurisdiction over certain public offenses, applies to the city of Los Angeles, although the precise time at which it became a city of the class does not appear.—Halsted Ex parte, 89 Cal. 471, 26 Pac. 961; Montijo, In re, 89 Cal. 471, 26 Pac. 961.

[n] The exclusive jurisdiction vested by the act of March 18, 1855, in police courts, over misdemeanors committed in cities having thirty thousand and under one hundred thousand inhabitants, depends upon the fact that the city has the specified number of inhabitants, and not upon any report or proclamation of that fact.—People v. Wong Wang, 92 Cal. 277, 28 Pac. 270.

[o] A justice of the peace has jurisdiction to try violations of a county ordinance by the sale of intoxicating liquors, under Code of Civil Procedure, section 115, providing that justices' courts shall have jurisdiction of all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both.—Noble, Ex parte, 96 Cal. 362, 31 Pac. 224.

[p] Criminal jurisdiction of a justice of the peace being limited to cases where the punishment by imprisonment cannot exceed six months, nor the fine five hundred dollars, he has not jurisdiction of a violation of the game laws, which Penal Code, section 636, declares a misdemeanor, punishable by a fine of not less than one hundred, or by imprisonment for not less than one hundred days, or by both such fine and imprisonment. Anear, Ex parte, 114 Cal. 370, 46 Pac. 172.

[q] The fact that the purported police judge was also a justice of the peace, and, as such, would have had jurisdiction of the offense and the offender, did not validate the judgment, since it was essential to its validity that the court which rendered it should have had jurisdiction.—Giambonini, Ex parte, 117 Cal. 573, 49 Pac. 732.

[r] The fact that Constitution, article 11, section 8, provides that freeholders' charter shall supersede all laws inconsistent therewith, did not authorize the city of Santa Barbara by freeholders' charter to confer exclusive jurisdiction of breaches of the peace committed therein on its police court, and thereby deprive justices' courts in such city of jurisdiction under the general law.—Dolan, Ex parte, 128 Cal. 460, 60 Pac. 1094.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 201, 204; 14 Cent. Dig., cols. 734-754, §§ 130-136.

§ 24½. Jurisdiction of Offense.

[a] City recorder has jurisdiction of assault and battery.—People v. A. L. King, 4 Cal. 307.

[b] Under Woods' Digest, section 132, organizing the court of sessions, and providing that it shall have jurisdiction of all offenses except murder, manslaughter, and arson, it has jurisdiction of an indictment for fighting a duel with fatal results, as that crime is not murder.—People v. Bartlett, 14 Cal. 651.

[c] An indictment cannot be sustained in a state court for swearing falsely before a land officer of the United States, relative to a claim or proceeding affecting the public lands, in violation of the laws of the United States. The state tribunals have no power to punish crimes against the laws of the United States, as such. The same act may, in some cases, be an offense against both governments; then it is cognizable in state courts, so far only as it is an offense against state laws. When the criminal character of the act is impressed upon it by the laws of the United States only, it is cognizable exclusively in their courts.—People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360.

[d] The district courts have jurisdiction of an action commenced, under act of March 1[illegible], 1853, to prevent extortion in office, and to enforce official duty; and the county courts have not jurisdiction of such actions.—Marks, In re, 45 Cal. 199.

[e] Increasing the capital stock of a corporation, and issuing new shares, to be sold at less than par to supply a fund actually needed by the corporation, is not a "fictitious increase of the stock," within Constitution, article 12, section 11, avoiding such increases.—Stein v. Howard, 65 Cal. 616, 4 Pac. 662.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 205-220; 14 Cent. Dig., cols. 755-801, §§ 137-191.

§ 25. Locality of Offense.

[a] When property has been stolen in one county and carried into another, jurisdiction of the offense is in either county.—People v. Robles. 29 Cal. 421.

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[b] An agent residing out of this state, of a principal who lives in this state, commits the crime of embezzlement in this state if he draws telegraphic checks, in the course of his agency, on his principal, and converts the money to his own use, with intent to embezzle the same.—Hedley, Ex parte, 31 Cal. 108.

[c] Where goods are stolen in one jurisdiction and carried into another, in legal contemplation the crime of larceny is committed in both jurisdictions, and may be punished in either; and, where stolen property is brought into this state from another state or territory, jurisdiction over the offense is conferred by the Penal Code upon any county of this state into or through which the stolen property has been brought.—People v. Staples, 91 Cal. 23, 27 Pac. 523.

[d] Under Penal Code, section 497, providing that one stealing property in another state or country, and bringing it into California, "may be convicted and punished" in the same manner as if such larceny had been committed in California, the superior court of the city and county to which the property was brought had jurisdiction of the accused and the offense.—People v. Black, 122 Cal. 73, 54 Pac. 385.

[e] Penal Code, section 789, providing that the jurisdiction of an action for stealing property in another state and bringing it into California is in any county into which it has been brought, does not apply to property stolen in Canada.—People v. Black, 122 Cal. 73, 54 Pac. 385.

[f] Where the representations on which a prosecution was based were made in letters transmitted by mail, and there was no evidence as to where any of them had been mailed or received, jurisdiction did not appear for want of proof of venue.—People v. Griffith, 122 Cal. 212, 54 Pac. 725.

[g] The legislature has power to declare that a crime committed in part within the state shall be punishable under the laws of the state.—People v. Botkin, 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286.

[h] If A, in California, prepares and sends a poisonous article to B, in Delaware, with murderous intent, and the article causes B's death in the latter state, such acts constitute the crime of murder committed in part in California, and are within the meaning of Penal Code, article 27, subdivision 1, declaring that "all persons who commit, in whole or in part, any crime within this state," are "liable to punishment under the laws of this state"; and A is triable and punishable under the laws of California, as if the crime had been committed entirely within that state.—People v. Botkin, 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286.

FOR AUTHORITIES FROM OTHER STATES:

See 19 L. R. A. 775, 28 L. R. A. 59, notes. See, also, 12 Cyc. 207-220; 16 Cyc. 543; 14 Cent. Dig., cols. 777-801, §§ 177-191.

§ 26. Jurisdiction of the Person—Indians.

[a] Superior court has jurisdiction to try Indian for murder of Indian committed within its jurisdiction.—People v. Turner, 85 Cal. 434, 24 Pac. 857.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 220, 221; 14 Cent. Dig., cols. 802-804, §§ 192-195.

§ 27. Mode of Acquiring Jurisdiction.

[a] Consent of defendant cannot confer jurisdiction on the court to try him for any other offense than that charged in indictment when it is found and returned by grand jury.—People v. Granice, 50 Cal. 447.

[b] Jurisdiction of court is not impaired by manner in which accused is brought before it. People v. Pratt, 78 Cal. 349, 20 Pac. 731.

[c] When accused is brought before court it has power to try him, and judgment is valid, regardless of validity of proceedings by which he was produced.—Clark, Ex parte, 85 Cal. 204, 24 Pac. 726.

[d] Where the grand jury submitting an indictment had no authority in the matter, the court is without jurisdiction.—(1899) Terrill v. Superior Court of Santa Clara County, 60 Pac. 38, rehearing denied (1900) 127 Cal. xviii, 60 Pac. 516.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 221, 222; 14 Cent. Dig., cols. 805, 806, §§ 196, 197.

§ 28. Transfer of Causes.

[a] Indictment may be transferred from the court of sessions to the district court, without the indorsement of the clerk of the court of sessions.—People v. Stuart, 4 Cal. 218.

[b] To enable officer to take party arrested before another magistrate for examination in case of absence or inability to act it is not essential that the warrant of arrest should contain a direction to that effect.—Branigan, Ex parte, 19 Cal. 133.

[c] The transfer of the criminal cause from one department of the superior court to another, shortly before the hour of trial, is not a violation of law, and is the exercise of a discretion which is not reviewable, where no abuse of discretion appears, and where the record does not disclose any injury suffered by the transfer.—People v. Owens, 132 Cal. 469, 64 Pac. 770.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 222-226; 14 Cent. Dig., cols. 807-825, §§ 198-205.

§ 29. Loss on Divestiture of Jurisdiction.

[a] Jurisdiction is not lost by conviction of an included offense below the jurisdiction of the court.—People v. Holland, 59 Cal. 364; People v. Fahey, 64 Cal. 342, 30 Pac. 1030; Donahue, Ex parte, 65 Cal. 474, 4 Pac. 449; Bell, Ex parte, 34 Pac. 641.

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[b] Jurisdiction of superior court over misdemeanors given by constitution (Art. 6, sec. 5), ceases when legislature confers it on inferior courts.—Green v. Superior Court, 78 Cal. 559, 562, 21 Pac. 307, 541.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 226, 227; 14 Cent. Dig., cols. 826-830, §§ 206-212.

§ 30. Jurisdiction to be Shown by Record.

[a] The police court of San Francisco is an inferior court of limited jurisdiction, and its proceedings must affirmatively show jurisdiction over the defendant and subject matter.—Kearny, Ex parte, 55 Cal. 212.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 830-833, § 213.

§ 31. Presumptions as to Jurisdiction.

[a] County courts are courts of general criminal jurisdiction, and, as such, all intendments are in favor of the regularity of their proceedings.—People v. Blackwell, 27 Cal. 65.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 227, 228; 14 Cent. Dig., cols. 832, 833, §§ 214, 215.

§ 32. Waiver of Objections.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 228; 14 Cent. Dig., cols. 833-837, §§ 216-218.

V. VENUE.

A. Place of Bringing Prosecution, §§ 33-35.
B. Change of Venue, §§ 36-40.

Degree of proof requisite to establish venue. See post, § 230.
Venue of prosecution for abduction. See Abduction, § 7.
Venue of prosecution for embezzlement. See Embezzlement, § 21.
Venue in prosecution for libel. See Libel and Slander, § 54.
Venue in civil actions. See Venue.

A. PLACE OF BRINGING PROSECUTION.

§ 33. Locality of Offense.

[a] The crime of embezzlement may be prosecuted in any county through or into which the property was taken by the accused.—(Cal. 1864) People v. Garcia, 25 Cal. 531.

[b] Where property stolen in one county is sold in another to a person who knows it to have been stolen, the courts of the county where the larceny was committed have no jurisdiction to inquire into the guilt of the receiver.—People v. Stakem, 40 Cal. 599.

[c] In prosecution for larceny, venue may be laid in any county into which stolen property may be conveyed.—People v. Mellon, 40 Cal. 648.

[d] If a person in one county is intrusted by another with personal property, to be returned to the owner, and afterward takes it to another county, and there embezzles it, he cannot be tried for the crime in the county where he received it, unless he had conceived the intent of committing the crime when he received it.—People v. Murphy, 51 Cal. 376.

[e] The venue of an indictment for obtaining property under false pretenses is properly laid in the county where the representations had final effect, although they were made in another county.—People v. Cummings, 123 Cal. 269, 55 Pac. 898.

[f] Penal Code, section 267, provides that every person who takes away any female under the age of eighteen years from her father, without his consent, for the purpose of prostitution, is punishable, etc. Held, that the gravamen of the offense was the intent with which the female was abducted, and hence, where there was sufficient evidence to warrant a finding that at the time defendant took the female from her home in B county with her father's consent it was for a proper purpose, and that defendant's intent to use her for purposes of prostitution did not arise until after she had been taken by him into A county, the court of A county had jurisdiction of the offense.—People v. Lewis, 141 Cal. 543, 75 Pac. 189.

FOR AUTHORITIES FROM OTHER STATES:

See 19 L. R. A. 775, note. See, also, 12 Cyc. 208-213; 14 Cent. Dig., cols. 841-849, §§ 220-226; cols. 851-853, § 230.

§ 34. Principals and Accessaries.

[a] The jurisdiction of the offense of an accessary, before or after the fact, is in the county where the accessorial acts were committed, although the offense of the principal was committed in another county.—People v. Hodges, 27 Cal. 340.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 238; 14 Cent. Dig., cols. 849, 850, § 228.

§ 35. Organization of New County.

[a] Where an act creating a new county out of an old one assigns it to a different judicial district, an indictment found in the old county for a crime committed in the new county after its creation, but before its organization, should be tried in the judicial district for the new county, if trial be not had until after the new county is organized.—People v. McGuire, 32 Cal. 140.

[b] Where an act creates a new county out of a portion of an old county, and provides for its organization in the future, the old

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county has jurisdiction for the purposes of indictment of all offenses committed within the new county after the passage of the law and previous to its organization.—People v. McGuire, 32 Cal. 140.

[c] Where, after a prosecution is commenced, the part of the county in which the offense was committed is organized into a new county, such new county has jurisdiction of the offense, the prosecution in the old county having been dismissed.—People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207.

B. CHANGE OF VENUE.

RIGHT TO CHANGE, JURISDICTION AND DISCRETION OF COURT, § 36.
GROUNDS FOR CHANGE AND STATUTES ALLOWING CONSTRUED, § 37.
TIME TO MOVE FOR CHANGE, § 38.
APPLICATION AND PROCEDURE, § 39.
EFFECT OF CHANGE OF VENUE AND SUBSEQUENT PROCEEDINGS, § 40.

Change of venue, as denial of right to trial by jury of peers. See Jury, § 40.

§ 36. Right to Change, Jurisdiction and Discretion of Court.

[a] The legislature, as representative of the state, who is party to the record, may consent to change of venue in a criminal case, upon the application of the accused.—People ex rel. Smith v. Judge of Twelfth District, 17 Cal. 547.

[b] An application to change the place of trial in a criminal case is addressed to the sound discretion of the court, to be disposed of in furtherance of substantial justice.—(Cal. 1872) People v. Congleton, 44 Cal. 92; (1874) People v. Perdue, 49 Cal. 425; (1889) People v. Elliott, 80 Cal. 296, 22 Pac. 207.

[c] Under Penal Code, section 1035, granting or refusing of an application for a change of venue is not a matter of mere discretion of the trial court, but must be warranted by the facts disclosed by the record. (1879) People v. Yoakum, 53 Cal. 566; (1890) Lowrey v. Hogue, 85 Cal. 600, 24 Pac. 995.

[d] Jurisdiction to change venue in a criminal case is special, and can be exercised only under section 1033 of the Penal Code.—People v. McGarvey, 56 Cal. 327.

[e] Application for change of venue is addressed to discretion of trial court.—People v. Goldenson, 76 Cal. 339, 19 Pac. 161.

[f] Change of venue in justice court is discretionary.—Lowrey v. Hogue, 85 Cal. 602, 24 Pac. 995.

[g] Justice is not ousted of jurisdiction by mere filing of affidavit of prejudice and bias. Lowrey v. Hogue, 85 Cal. 600, 24 Pac. 995; Wright, Ex parte, 119 Cal. 401, 402, 51 Pac. 639.

§ 37. Grounds for Change and Statutes Allowing Construed.

[a] Upon an application in a criminal case to change the place of trial, on the ground that a fair and impartial trial cannot be had in the county where the prisoner was indicted, it is sufficient to state in the affidavit that a jury cannot be selected from a certain portion of the county, who would give the prisoner a fair and impartial trial. People v. Baker, 1 Cal. 403.

[b] Where one hundred citizens united in employing counsel to prosecute the defendant, this was held to be a sufficient ground for a change of venue.—People v. Lee, 5 Cal. 353.

[c] The unsupported affidavit of a defendant charged with larceny that he is the victim of general prejudice in the county is not a sufficient reason for changing the venue.—People v. Mahoney, 18 Cal. 180.

[d] The fact that thirty or forty persons have, upon solicitation, contributed small sums to employ a lawyer to assist the prosecuting attorney in a criminal case does not show such a state of feeling in the whole county as to preclude the obtaining of an impartial jury, or to interfere with the impartial administration of the laws.—People v. Graham, 21 Cal. 261.

[e] Bias or prejudice of judge is not ground for change of venue.—People v. Williams, 24 Cal. 31.

[f] The fact that the trial judge made an erroneous ruling in a previous trial of the same case is no evidence that he is biased or prejudiced.—People v. Williams, 24 Cal. 31.

[g] In an application for a change of the place of trial in a criminal case, where the affidavits set forth merely that in the belief or opinion of the affiants the prisoner could not have a fair trial owing to the popular prejudice against him, and where there was no difficulty in obtaining a jury wholly free from bias or prejudice against the prisoner, it was no abuse of the discretion of the court to deny the motion.—People v. Congleton, 44 Cal. 92.

[h] If it is shown by many affidavits that extreme hostility exists throughout the county, venue should be changed.—People v. Yoakum, 53 Cal. 570.

[i] Under Code of Civil Procedure, section 71, providing a mode of securing the attendance of another judge when a trial judge is disqualified, an order changing the place of trial in a criminal case on the ground of disqualification of the judge is void.—People v. McGarvey, 56 Cal. 327.

[j] Fact that mayor presided over council, etc., held not ground for change of venue in prosecution before him as judge of city court for violating ordinance.—Guerrero, In re, 69 Cal. 101, 10 Pac. 261.

[k] Local prejudice existing shortly after commission of crime is not ground for change of venue if it has subsided at time of trial. People v. Goldenson, 76 Cal. 339, 19 Pac. 161.

[l] When, at time of trial, public mind is wrought into frenzy and press sustains enraged citizens organized to avenge crime and only superior force of police prevents mob

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execution, change of venue should be granted. People v. Goldenson, 76 Cal. 339, 19 Pac. 161.

[m] Subdivision 2, section 1033, Penal Code, so far as it authorizes change of venue on application of state without consent of accused, is void.—People v. Powell, 87 Cal. 360, 25 Pac. 481.

[n] Under statute allowing change of venue where no jury can be obtained, change should not be granted until all legal means to procure jury have been exhausted in vain.—People v. Powell, 87 Cal. 361, 25 Pac. 481.

[o] Penal Code, section 1033, directs a grant of a change of venue in a criminal case on a showing that a fair trial cannot be had or a jury cannot be obtained. Defendant, who was a man of bad repute, made an assault on a person who had filed an information against him, and fired several shots into his house. The sheriff went to the house of defendant, and was shot by him. A mob was formed, composed of persons of standing in the community, and mob violence was only prevented by prompt removal of defendant to another county. The defendant was denounced in the pulpit and by the press, and public opinion was unanimous that the death penalty should be inflicted. Sixty-eight jurymen were examined on their voir dire, and all but eight had formed an opinion as to defendant's guilt, and three of these were excused. Held, that it was error to refuse a change of venue.—People v. Suesser, 132 Cal. 631, 64 Pac. 1095.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 244, 245; 14 Cent. Dig., cols. 868-879, §§ 242-244.

§ 38. Time to Move for Change.

[a] After twelve competent trial jurors have been obtained in a criminal case, it is too late for the defendant to ask for time to prepare affidavits as the basis of an application for a change of venue, on the ground that the defendant cannot have a fair and impartial trial before the jurors passed upon and received.—People v. Cotta, 49 Cal. 166.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 247; 14 Cent. Dig., cols. 882-885, § 249.

§ 39. Application and Procedure.

[a] Affidavit for a change of venue in a criminal case, alleging that accused could not obtain a fair trial in the county where the case is pending without stating the facts or grounds on which such conclusion is based, is insufficient.—People v. McCauley, 1 Cal. 379; People v. Graham, 21 Cal. 261.

[b] An affidavit that deponent believes that a fair and impartial trial cannot be had is insufficient to support an application for a change of venue.—People v. McCauley, 1 Cal. 379; People v. Shuler, 28 Cal. 490.

[c] An accused waives any objection to the denial of his motion for a change of venue, where he is afterward given an opportunity to renew his motion, and fails to call it up or ask the court to pass on it.—People v. Plummer, 9 Cal. 298; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

[d] It is not error in court, on trial for murder, to postpone consideration of a motion on the part of the defendant for a change of venue until an attempt is made to impanel a jury.—People v. Plummer, 9 Cal. 298.

[e] Where a motion is thus postponed, and counsel for prisoner afterward declines, on the intimation of the court, to renew the motion, he cannot take advantage, on appeal, of the failure of the court to order a change of venue.—People v. Plummer, 9 Cal. 298.

[f] Where defendant, in applying for a change of venue, files an affidavit that he is the victim of general prejudice in the county, the fact that there is a failure to get a jury on the first day of the trial is not such a confirmation of the affidavit as to require the court to grant the change of venue when again requested to do so.—People v. Mahoney, 18 Cal. 180.

[g] On an application for a change of venue, an affidavit of the bias of the judge, based on facts asserted on information and belief, does not merit any consideration, when it does not give any sources of information, nor assign any motive.—People v. Williams, 24 Cal. 31.

[h] A deposition by defendant that he is informed by his counsel that the judge or the sheriff and his deputies are biased or prejudiced against him is not sufficient to support an application for a change of venue. People v. Schuler, 28 Cal. 490.

[i] Requisites of affidavits in support of application to change the place of trial of a criminal action, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending, pointed out.—People v. Yoakum, 53 Cal. 566.

[j] Application for change of venue must show in writing that defendant cannot have an impartial trial in the county.—People v. McGarvey, 56 Cal. 327.

[k] Upon an application by a defendant in a criminal case for a change of the place of trial, counter-affidavits may be filed by the prosecution controverting defendant's statements.—People v. Majors, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

[l] Party failing to renew motion for change of venue temporarily denied is not entitled to change.—People v. Goldenson, 76 Cal. 339, 340, 19 Pac. 161.

[m] An application for the issuance of subpoenas for witnesses to prove a ground for a change of venue is properly denied, where such application is supported only by the statement of defendant's attorney not made under oath, especially where it does not appear that the clerk had, on application, refused to issue the subpoenas, or that defendant could not procure the attendance of such witnesses.—People v. Elliott, 80 Cal. 296, 22 Pac. 207.

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[n] Opinion of defendant that he cannot have fair trial is insufficient to change venue. He must state facts on which he bases opinion.—Lowrey v. Hogue, 85 Cal. 602, 24 Pac. 995.

[o] Under Penal Code, section 1035, giving the court discretion to grant a change of venue when satisfied that a fair trial cannot be had because of local prejudice, the refusal of a motion, based on local prejudice, supported only by affidavits on information and belief of defendant and his counsel, though opposed by no counter-affidavits, is not an abuse of discretion, the court having already witnessed the examination of a large number of jurors.—People v. Vincent, 95 Cal. 425, 30 Pac. 581.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 246-251; 14 Cent. Dig., cols. 880-906, §§ 246-259.

§ 40. Effect of Change of Venue and Subsequent Proceedings.

[a] Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still, if the court grants the application, it has acted judicially upon a matter within its cognizance and where it was clothed with a discretion, and by the order the place of trial becomes changed.—People ex rel. Meminger v. Sexton, 24 Cal. 78.

[b] The "copy of the record, pleadings, and proceedings," required by Penal Code, section 1036, to be transmitted on change of venue, does not include a bill of exceptions taken on former trial, nor charges to jury given on such trial.—People v. Bush, 71 Cal. 602, 12 Pac. 781.

[c] Under a statute providing that, on a proper showing in a criminal action, an order must be made "transferring the action" to the court of another county, the court to which the action is transferred acquires jurisdiction on the making of the order, without regard to the transmission of the records as required by Penal Code, sections 1036, 1038.—People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

[d] Though Penal Code, section 1036, provides that, on the removal of a criminal action, the clerk must transmit to the court to which the action is transferred a certified copy of the order of removal, record, pleadings, and proceedings in the action, and contemplates the retention of the original papers in the court from which the transfer is made, yet the irregularity in transmitting the original records as required by Code of Civil Procedure, section 399, for the transfer of civil cases, is waived by failure to object thereto in the trial court.—People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

VI. LIMITATION OF PROSECUTION.

STATUTORY PROVISIONS, § 41.
LIMITATION APPLICABLE, § 42.
EXCEPTIONS AND SUSPENSION, § 43.

Limitation of prosecution for assault and battery. See Assault and Battery, § 34.

§ 41. Statutory Provisions.

[a] Article 1443 of the Criminal Practice Act (Wood's Digest, 278), providing that "if when the offense is committed the defendant be out of the state, the indictment may be found within the term limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within, the state shall be a part of the limitation," includes the case of a defendant leaving the state after the commission of the crime, as well as the case of his absence from the state at the time of its perpetration, and applies to all offenses.—People v. Montejo, 18 Cal. 38.

§ 42. Limitation Applicable.

[a] A conviction for manslaughter, though had on an indictment for murder, cannot be sustained, unless the indictment was presented within the limitation applicable to manslaughter.—People v. Miller, 12 Cal. 291.

[b] As against the crime of murder, whether of the first or second degree, there is no limitation of time within which a prosecution may be commenced. The phrase "any other felony than murder" does not mean any other felony than murder in the first degree.—People v. Haun, 44 Cal. 96.

[c] A criminal prosecution for a misdemeanor is barred in one year.—People v. Salorse, 62 Cal. 142.

[d] Penal Code, section 801, requiring indictment or information for a misdemeanor to be brought or filed within one year, applies where the information or indictment charges a felony, and defendant is convicted of a misdemeanor.—People v. Picetti, 124 Cal. 361, 57 Pac. 156.

[e] Though the crime of seduction under promise of marriage may be punished either as a felony or as a misdemeanor, when it is punished as a misdemeanor the offense must be deemed a misdemeanor for all purposes; and where the indictment was not found within one year after the commission of the offense, the criminal action is barred by the statute of limitations.—People v. Gray, 137 Cal. 267, 70 Pac. 20.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 254, 255; 14 Cent. Dig., cols. 923-927, §§ 271, 272.

§ 43. Exceptions and Suspension.

[a] Granting of continuances at request of defendant until bar of statute against information is no waiver of bar.—People v. Oyhens, 85 Cal. 89, 24 Pac. 635.

[b] All misdemeanors prosecuted under indictment or information, under which a defendant may be convicted of a misdemeanor, whether appearing on its face or not, are barred by the statute of limitations in one

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year.—People v. Picetti, 124 Cal. 361, 57 Pac. 156.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 256, 257; 14 Cent. Dig., cols. 929-933, §§ 276-280.

VII. FORMER JEOPARDY.

IN GENERAL, § 44.
NATURE AND ELEMENTS OF FORMER JEOPARDY § 45.
VOID JUDGMENT, § 46.
INDICTMENT OR INFORMATION, § 47.
PLEA, § 48.
NOLLE PROSEQUI OR DISMISSAL, § 49.
DISCHARGE OF JURY WITHOUT VERDICT, § 50.
ACQUITTAL OR DISCHARGE, § 51.
CONVICTION, REVERSAL OR NEW TRIAL, § 52
IDENTITY OF OFFENSE, § 53.

Plea of former jeopardy or former acquittal. See post, § 71.

Degree of proof requisite to establish former conviction. See post, 281.

§ 44. In General.

[a] Plea of former conviction is properly overruled where it is not supported by the evidence.—People v. Way, 11 Cal. 392.

[b] Penal Code, section 667, authorizing an increased punishment for a second offense, is not unconstitutional as placing accused twice in jeopardy for the same offense.—People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401.

[c] Sections 1112 and 1021 of Penal Code conflict with constitution, article 1, section 8, as to jeopardy.—People v. Hunckeler, 48 Cal. 334.

[d] Defendant, while on trial, ran away. Held, that he could not be heard to plead "former jeopardy" in bar of another trial. People v. Higgins, 59 Cal. 357.

[e] Where a person is charged with a previous conviction of a similar offense he is not twice put in jeopardy for the same offense within the meaning of the constitution. People v. Lewis, 64 Cal. 401, 1 Pac. 490.

[f] Sections 1021 and 1165, Penal Code, are not in conflict with provision that no person shall be twice put in jeopardy for same offense.—People v. Oreileus, 79 Cal. 181, 21 Pac. 724.

[g] Penal Code, section 1180, provides that, on grant of a new trial, all testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment. Held that, if such statute authorizes the placing such defendant on trial for the higher offense after a conviction of the lower offense has been set aside at his instance, the statute is in conflict with Constitution, article 1, section 13, which provides that "no person shall be twice put in jeopardy for the same offense." People v. Gordon, 99 Cal. 227, 33 Pac. 901.

[h] Under Constitution, article 1, section 13, declaring that "no one shall be twice put in jeopardy for the same offense," and Penal Code, section 687, providing that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted," one tried without a plea of former jeopardy cannot for the first time raise the question of former acquittal on motion for new trial, though both trials were in the same court and before the same judge.—People v. Bennett, 114 Cal. 56, 45 Pac. 1013.

[i] Even if a verdict rendered on the void direction of the court may be pleaded as former jeopardy, such plea is a personal privilege, which may or may not be availed of. People v. Stoll, 143 Cal. 689, 77 Pac. 818.

§ 45. Nature and Elements of Former Jeopardy.

[a] Waiver of examination for a felony is not a bar to further examination before another magistrate.—Walsh, Ex parte, 39 Cal. 705.

[b] Where a person is placed on trial, on a valid indictment, before a competent court, and a jury is impaneled, sworn, and charged with the case, he is then in jeopardy, within the meaning of the constitutional provision which declares that no person shall be subject to be twice put in jeopardy for the same offense.—People v. Cage, 48 Cal. 323, 17 Am. Rep. 436.

[c] When jeopardy attaches stated.—People v. Horn, 70 Cal. 18, 11 Pac. 470.

[d] Circumstances not constituting jeopardy stated.—People v. Travers, 77 Cal. 178, 19 Pac. 268.

[e] Person is in legal jeopardy when he is tried upon sufficient indictment or information and competent jury has been regularly charged with his deliverance.—People v. Travers, 77 Cal. 177, 178, 19 Pac. 268; Fenton, Ex parte, 77 Cal. 184, 19 Pac. 267.

[f] Where a defendant has once been placed on trial on a valid information before a legal jury, and in a court of competent jurisdiction, he has been placed in jeopardy, and is forever protected from a second prosecution for the same offense, unless the jury was prevented from rendering a verdict by some legal necessity.—People v. Smalling, 94 Cal. 112, 29 Pac. 421.

[g] Jeopardy attaches when party is placed upon trial before competent court and jury, upon valid indictment.—People v. Ammerman, 118 Cal. 26, 50 Pac. 15.

[h] Impaneling of jury is a part of the trial, and the defendant is on trial, and his legal jeopardy attaches, when the jury has been impaneled and sworn to try the case.—People v. Hawkins, 127 Cal. 372, 59 Pac. 697.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 261-268; 14 Cent. Dig., cols. 950-973, §§ 290-325.

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§ 46. Void Judgment.

[a] Void judgment of conviction by court without jurisdiction does not put accused in jeopardy.—People v. Woods, 84 Cal. 443, 23 Pac. 1119; People v. Hamberg, 84 Cal. 472, 24 Pac. 298.

§ 47. Indictment or Information.

[a] Where defendant is acquitted because of variance between the proof and the indictment, and the variance is such that a conviction is legally impossible, he has not been "in jeopardy" within the constitution, and cannot plead his acquittal in bar to a second indictment.—People v. McNealy, 17 Cal. 333.

[b] If a party be acquitted on the ground of immaterial variance, he cannot be again prosecuted for the same offense. The error of the court or jury, in regarding as material a variance between the allegations and proof will not render the acquittal less available and conclusive, as a bar to a subsequent prosecution; but, if the variance be material, the acquittal will not bar a subsequent prosecution.—People v. Hughes, 41 Cal. 234.

[c] Evidence of an order setting aside an indictment and submitting the case to another grand jury does not sustain a plea of former acquittal.—People v. Varnum, 53 Cal. 630.

[d] Penal Code, section 869, authorizes a proceeding by information only where a defendant has been examined and committed as provided by section 872. Held, that where defendant, proceeded against by information, was committed without the oral testimony of the witnesses having been reduced to writing, as provided by section 872, the dismissal of the information against him before trial constituted no bar to a second prosecution.—Kalloch v. San Francisco Superior Court, 56 Cal. 229.

[e] The sustaining of a demurrer to an information, no direction for a new information being given, is a bar to another prosecution; and the case is not altered by the fact that a new information was filed before the judgment on the demurrer.—People v. Jordan, 63 Cal. 219.

[f] Defendant was convicted of murder. On appeal, the conviction was set aside for defect in the information, and the case remanded for further proceedings. The court below dismissed the prosecution, under Penal Code, section 1385, which allows such dismissal when "in furtherance of justice," and allows the retention of defendant in custody for proceedings on a new information. Held, that defendant was properly proceeded against under a new information, and that his pleas of "once in jeopardy" and "former conviction" constituted no defense.—People v. Schmidt, 64 Cal. 260, 30 Pac. 814.

[g] An erroneous conviction under an information which failed to charge the defendant with the commission of any crime will not support a plea of former conviction or once in jeopardy.—People v. Clark, 67 Cal. 99, 7 Pac. 179.

[h] Conviction based on a void information is a nullity and does not put accused in jeopardy.—People v. Larson, 68 Cal. 19, 8 Pac. 517.

[i] Direction by court to district attorney to file new information when demurrer is sustained is sufficient compliance with section 1008, Penal Code.—People v. O'Leary, 77 Cal. 34, 18 Pac. 856, 22 Pac. 24.

[j] Penal Code, section 1021, provides that, if the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, it is not an acquittal of the same offense. Section 1165 provides that, if there be an acquittal for such variance as may be obviated by a new information, the court may detain the prisoner till such information is preferred. Defendant was charged with felonious assault, and the proof showed an assault on a person having an entirely different name from the one alleged in the indictment, and who had never been known by the alleged name, and a verdict of not guilty was ordered, and a new information preferred. Held, that defendant has not been once in jeopardy, notwithstanding section 956, providing that, where an offense involving the commission of a private injury is in other respects sufficiently described to identify the act, an erroneous allegation as to the person injured is not material.—People v. Oreileus, 79 Cal. 178, 21 Pac. 724.

[k] Penal Code, section 1008, providing that a judgment allowing a demurrer to an information shall bar another prosecution for the same offense, unless a new information is directed to be filed, does not apply to a case where no demurrer was interposed.—People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

[l] No jeopardy attaches when party is placed upon trial upon fatally defective indictment.—People v. Ammerman, 118 Cal. 26, 50 Pac. 15.

[m] Where former information did not charge an offense, charge that plea of former jeopardy is not sustained is proper and not charge on question of fact.—People v. Ammerman, 118 Cal. 28, 29, 50 Pac. 15.

[n] Where defendant procured a judgment, on appeal, that the indictment on which he was tried and convicted is void, he cannot rely on such conviction as a bar to a second prosecution for the same offense, since he was not in jeopardy on a valid indictment.—People v. Terrill, 133 Cal. 120, 65 Pac. 303.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 264-267; 14 Cent. Dig., cols. 961-971, §§ 312-321.

§ 48. Arraignment and Plea.

[a] Defendant pleaded guilty to an indictment, and his plea was entered on the record. Held that, in a second indictment for the same offense, this could be pleaded as a former conviction, although no judgment

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was pronounced by the court upon his plea of guilty.—People v. Goldstein, 32 Cal. 432.

[b] On a conviction of grand larceny, an order granting a new trial was, upon appeal, reversed. The trial court, however, was deceived into believing that an order denying a new trial had been reversed, and thereupon accepted a plea of guilty of petit larceny, inflicted a fine, and discharged defendant. Afterward, discovering the deceit, the court set aside the judgment, ordered the money returned, caused defendant to be rearrested, and entered judgment upon the verdict. Held, that this judgment was valid, since the plea of guilty of petit larceny was void, and defendant had never been in jeopardy thereon.—People v. Woods, 84 Cal. 441, 23 Pac. 1119.

§ 49. Nolle Prosequi or Dismissal.

[a] Section 597 of the Criminal Practice Act, which empowers the courts to set aside indictments on motion of the prosecution, is not limited to cases of defects in the instrument itself, and such a dismissal is no bar to a subsequent prosecution for the same offense when it amounts to a felony.—People v. March, 6 Cal. 543.

[b] Where defendant has been held to answer by a justice of the peace for a felony, and the grand jury then recommend that it be referred to the next grand jury, and the county court then order that defendant be discharged from custody, the order is not a bar to another prosecution by defendant for the same offense, under code, section 1387, providing that an order for the dismissal of an action is a bar to any other prosecution for the same offense if it is a misdemeanor, but that it is not a bar if the offense is a felony.—Cahill, Ex parte, 52 Cal. 463.

[c] As the dismissal, under code, section 1382, requiring the court, where an indictment has not been found against a party at the next term at which he has been held to answer, to dismiss the prosecution against him, is in the nature of a judgment of nonsuit, another prosecution does not put in second jeopardy.—Clarke, Ex parte, 54 Cal. 412.

[d] An order setting aside an indictment does not operate as an acquittal of the defendant for the offense therein charged, and is not a bar to his further prosecution for the same offense by indictment or information.—Foss, Ex parte, 102 Cal. 347, 41 Am. St. Rep. 182, 36 Pac. 669.

[e] Under Penal Code, sections 1008, 1009, a mere permissive order, sustaining a demurrer, "with leave" to file a new information, entitles defendant to a discharge.—Williams, Ex parte, 116 Cal. 512, 48 Pac. 499.

[f] Several successive dismissals of informations against one charged with a felony, and a grand jury's neglect to consider the charge after investigation, are not a bar to a further prosecution for the same offense.—Patterson v. Police Court of City and County of San Francisco, 123 Cal. 453, 56 Pac. 105.

[g] Defendant was charged with the misdemeanor of petit larceny on an information before a justice of the peace. The information was dismissed, on motion of the district attorney, pursuant to Penal Code, section 1385, and a new information was filed in the superior court, charging defendant with the same petit larceny and with a prior conviction of burglary. Held, that the dismissal was not a bar to the prosecution.—People v. Smith, 143 Cal. 597, 77 Pac. 449.

§ 50. Discharge of Jury Without Verdict.

[a] The discharge of the jury in a criminal case after the adjournment of the court, by the officer having charge of them, in accordance with an order of the court before adjournment to discharge them if they did not agree within a certain time, does not preclude a second trial of the case.—People v. Shotwell, 27 Cal. 394.

[b] If a party is once placed upon his trial, before a competent court and jury, upon a valid indictment, the "jeopardy" attaches, to which he cannot again be subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent, or in case a verdict is rendered, it be set aside at his instance.—People v. Webb, 38 Cal. 467.

[c] The discharge of the jury impaneled in a criminal case, without the consent of the defendant, because after mature deliberation they are unable to agree on a verdict, is not an acquittal of the defendant, and does not entitle him to immunity from further prosecution for the same offense.—McLaughlin, Ex parte, 41 Cal. 211, 10 Am. Rep. 272.

[d] Discharge of jury without consent of defendant appearing on minutes of court, except in cases specifically provided for, operates as an acquittal.—People v. Curtis, 76 Cal. 59, 17 Pac. 941.

[e] Discharge of jury without rendering verdict with consent of accused is not acquittal or jeopardy.—People v. Curtis, 76 Cal. 59, 17 Pac. 941.

[f] Discharge of jury after trial commenced on account of illness of juror without consent of defendant does not constitute jeopardy or acquittal.—People v. Ross, 85 Cal. 383, 24 Pac. 789.

[g] The absence of defendant at the discharge of the jury, when waived by his counsel, does not affect the question of his jeopardy.—People v. Smalling, 94 Cal. 112, 29 Pac. 421.

[h] Defendants have been placed in jeopardy where they have been tried for petit larceny, but, before verdict, the court, believing they have been guilty of a greater offense, which includes the crime charged, dismisses the case; and they cannot be rearrested and tried for the same or a higher offense involving the same facts.—People v. Ny Sam Chung, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642.

[i] On a trial for assault the court instructed the jury to return a verdict of not

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guilty, but that they were not bound by his instruction. When the jury were brought into court, and asked if they had agreed on a verdict, the foreman said that they had disagreed; that they did not wish to render a verdict, but that the court would discharge them; that, if they were discharged without a verdict, it would leave the case for the district attorney and the court to handle; and that they did not wish to be placed in the position of acting as a scapegoat. Held, that the failure of the jury to agree, and their consequent discharge, avoided a plea of once in jeopardy; Penal Code, section 1140, providing that the jury may be discharged if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."—People v. James, 97 Cal. 400, 32 Pac. 317.

[j] Where defendant was tried on an information charging assault with intent to commit murder, and was convicted of an assault with a deadly weapon, and the jury was discharged without his consent, and on appeal the verdict was set aside as a nullity, defendant was entitled, on a second trial, to his discharge on the ground that he was placed in jeopardy on the first trial.—People v. Arnett, 129 Cal. 306, 61 Pac. 930.

FOR AUTHORITIES FROM OTHER STATES:

See 44 L. R. A. 694, note. See, also, 12 Cyc. 269-273; 14 Cent. Dig., cols. 980-996, §§ 330-344.

§ 51. Acquittal or Discharge.

[a] A discharge of one of two defendants, jointly indicted under the act of 1851, for the purpose of using him as a witness against his codefendant, operates as an acquittal in legal effect, and is a bar to another prosecution.—People v. Bruzzo, 24 Cal. 41.

[b] Trial and acquittal upon charge of forging indorsement on instrument and uttering it, knowing indorsement on it to have been forged, does not necessarily make the judgment of acquittal of itself an estoppel upon any matter except the forgery of the indorsement by defendant.—People v. Frank, 28 Cal. 507.

[c] A person charged with an offense cannot, after having been once acquitted thereof by a court of competent jurisdiction, be again held to answer for the same offense at the instance of the state, regardless of the errors in the trial resulting in the acquittal, under Constitution, article 1, section 8, providing that no person shall be put in jeopardy twice for the same offense.—People v. Webb, 38 Cal. 467.

[d] If, while a jury is out deliberating upon their verdict in a criminal case, and before the expiration of the term, the judge, without calling the jury into court, adjourns the court for the term, it is equivalent to an acquittal of the defendant.—People v. Cage, 48 Cal. 323, 7 Am. Rep. 436.

[e] Discharge under indictment for manslaughter, because evidence shows a higher degree, is an acquittal.—People v. Hunckeler, 48 Cal. 331.

[f] Where court, on motion of defendant, instructed jury to acquit, whereupon they retired, and after deliberating returned and rendered verdict of not guilty, defendant had been once in jeopardy, though court had no power to instruct jury to acquit.—People v. Horn, 70 Cal. 17, 11 Pac. 470.

[g] Person is not placed in jeopardy by examination before a magistrate and discharge. Fenton, Ex parte, 77 Cal. 184, 19 Pac. 267.

[h] Acquittal on ground of variance between information and proof is not former acquittal.—People v. Oreileus, 79 Cal. 179, 21 Pac. 724.

[i] Where, after introduction of evidence by the people, a verdict of not guilty is rendered at the "command" of the court, defendant cannot be tried for the same offense, though the court was authorized only to "advise" such a verdict.—People v. Roberts, 114 Cal. 67, 45 Pac. 1016.

[j] On a trial for forgery, the court excluded the instrument claimed to be forged, on the ground of variance with the indictment, and directed a verdict for defendant; and a verdict was returned of "not guilty, on the ground of a material variance between the note set forth in the indictment and the note offered." Held, that defendant could not be again tried for the offense, since by the verdict he was acquitted, and it was immaterial what reason the jury gave for the acquittal, or that there was in fact no material variance.—People v. Terrill, 132 Cal. 497, 64 Pac. 894.

[k] On a trial for forgery, the court excluded the instrument claimed to be forged, on the ground of variance with the indictment, and directed a verdict for defendant. In fact, there was no material variance. Held, that Penal Code, section 1021, providing that if the defendant was formerly acquitted on the ground of variance between the indictment and the proof, without a judgment of acquittal, it was not an acquittal of the same offense, had no application except when there was in fact a material variance; that the variance here, being immaterial, should have been disregarded, and the case is governed by section 1023, providing that, when defendant has been once placed in jeopardy on an indictment, the jeopardy is a bar to another indictment for the same offense, or for any offense necessarily included therein of which he might have been convicted under that indictment.—People v. Terrill, 132 Cal. 497, 64 Pac. 894.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 274, 275; 14 Cent. Dig., cols. 996-1004, §§ 345-361.

§ 52. Conviction, Reversal or New Trial.

[a] A defendant convicted of a void verdict held in jeopardy, under Penal Code, section 1023, and entitled to a discharge on motion after verdict received and recorded.—People v. Small, 1 Cal. App. 320, 82 Pac. 87.

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[b] New trial of same offense for error does not place defendant twice in jeopardy.—People v. Gilmore, 4 Cal. 376.

[c] Where indictment upon which defendant was tried and convicted is set aside on ground of defects in the panel, and a new indictment is found upon which defendant is tried, trial upon the second indictment did not put the defendant twice in jeopardy.—People v. March, 6 Cal. 543.

[d] A verdict of guilty in a criminal case, set aside at the instance of accused, is no bar to a second prosecution for the same offense, since the constitutional provision prohibiting the putting of persons twice in jeopardy for the same offense is a privilege secured to accused which he may waive.—People v. Webb, 38 Cal. 467.

[e] The trial of accused under a sufficient indictment, and by a jury duly impaneled, sworn and charged, nothing having been done on his part amounting to a voluntary waiver of his rights, is a complete defense as against any future indictment for the same offense, though the judgment was arrested by the court.—Hartman, Ex parte, 44 Cal. 32.

[f] If a defendant, in a criminal case, appeals from a judgment of conviction, but does not move for a new trial, and the judgment is reversed, and a new trial ordered, the former conviction is not a bar to a new trial.—People v. Barric, 49 Cal. 342.

[g] Defendant was convicted of grand larceny, and a new trial was refused him, but granted on his appeal, and the judgment of conviction reversed. Held, that defendant could not base a plea of "once in jeopardy" on the former conviction.—People v. Hardison, 61 Cal. 378.

[h] Conviction can be by plea of guilty and in other modes mentioned in section 689, Penal Code.—Brown, Ex parte, 68 Cal. 181, 8 Pac. 829.

[i] Word "conviction" has reference to verdict of jury and not sentence of court.—Brown, Ex parte, 68 Cal. 181, 8 Pac. 829.

[j] Verdict of guilty is a conviction.—Brown, Ex parte, 68 Cal. 181, 8 Pac. 829.

[k] Conviction is verdict of guilty pronounced by jury.—Brown, Ex parte, 68 Cal. 181, 8 Pac. 829.

[l] Conviction, defined.—People v. Rodrigo, 69 Cal. 605, 11 Pac. 481.

[m] Where, on prosecution for a crime of which there are several degrees, a verdict of "guilty" fails to specify the degree, defendant is not entitled to a discharge, but merely to a new trial.—People v. Bannister, 34 Pac. 710, following People v. Travers (1887) 73 Cal. 580, 15 Pac. 293; People v. Lee Yune Chong (1892), 94 Cal. 379, 29 Pac. 776.

[n] Where a judgment in a criminal case is reversed on the ground that the verdict failed to find the degree of the crime of which the defendant was guilty the defendant is not entitled to be discharged under section 13 of article 1 of the constitution, declaring that "no person shall be twice put in jeopardy for the same offense." Upon such a reversal, the case should be remanded for a new trial.—People v. Travers, 73 Cal. 580, 15 Pac. 293.

[o] Where appellant demands reversal but instead new trial is ordered, he cannot plead former jeopardy at second trial.—People v. Travers, 77 Cal. 178, 19 Pac. 268.

[p] An arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge the defendant with any offense; but it is not necessary that the evidence should be sufficient to convict him.—People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

[q] A plea of former jeopardy is not supported by proof that a former conviction of defendant for the same offense was reversed, and the prosecution dismissed, on the ground that the information was not filed within the time prescribed by statute after defendant's commitment.—People v. Wickham, 116 Cal. 384, 48 Pac. 329.

[r] Judgment reversed upon appeal does not constitute former jeopardy or acquittal.—People v. Tucker, 117 Cal. 231, 49 Pac. 234.

[s] Defendant was convicted of arson, and appealed, and the cause was reversed and remanded for the insufficiency of the information. On a return of the remittitur the information was dismissed, and a new prosecution instituted. Held, that the defendant could not plead a former conviction, based on the theory that, as the appeal was partially from a motion in arrest, on remand the judgment should have been arrested, and that the dismissal was in effect a judgment of acquittal, under Penal Code, section 1237, providing that an arrest of judgment will operate as an acquittal, since no appeal can be taken from such a motion, and the reversal and remand leave the cause as if no trial had ever been had.—People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

[t] Though a judgment of conviction of manslaughter upon an information for murder operates as an acquittal of the murder, yet where such judgment is reversed upon appeal, and a new trial is ordered, the defendant must plead the former acquittal; and whether the prosecution then proceeds for manslaughter under the original information, without objection of the defendant, or should proceed under a new information for manslaughter, evidence of murder is admissible to sustain a conviction for manslaughter, which is necessarily included in the crime of murder.—People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48.

[u] A defendant is not entitled to interpose pleas of former jeopardy and former acquittal merely because a prior conviction has been reversed on appeal, and the trial court directed to sustain a demurrer to the information.—People v. Lee Look, 143 Cal. 216, 76 Pac. 1028.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 276, 277; 14 Cent. Dig., cols. 1005-1020, §§ 362-381.

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§ 53. Identity of Offense.

[a] Where defendant was charged with burglary and several convictions, if he admitted the convictions, such admissions should be shown in the minutes of the plea and inserted in the judgment-roll under Penal Code, section 1207.—People v. Noon, 1 Cal. App. 44, 81 Pac. 746.

[b] Conviction of manslaughter is an acquittal of murder.—People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620.

[c] The defendant was convicted of manslaughter, upon an indictment charging the crime of murder. The verdict was, on his motion, set aside. Held, that to a second trial for murder, upon the same or a different indictment, defendant can plead the former conviction of manslaughter as an acquittal of the crime of murder. Held, also, that under the same indictment the defendant may be again tried, and convicted for manslaughter. People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620.

[d] Conviction of manslaughter is acquittal for murder, and the prisoner cannot be again tried for murder.—People v. Backus, 5 Cal. 275, 278.

[e] A defendant indicted for a higher, but only convicted of a lower, offense, is acquitted of the higher, and cannot be again indicted therefor.—People v. Apgar, 35 Cal. 389.

[f] Conviction of an offense not included in that charged, is no bar to a second trial for the offense charged.—People v. Helbing, 61 Cal. 620.

[g] Murder of two persons by one act is two offenses, and conviction or acquittal in one case does not bar prosecution in the other.—People v. Majors, 65 Cal. 138, 52 Am. Rep. 295, 2 Pac. 744, 3 Pac. 597.

[h] Defendant indicted for murder and found guilty of murder of second degree, who, on his own motion, secures a new trial, may on a retrial be convicted of murder of the first degree.—People v. Keefer, 65 Cal. 232.

[i] Preliminary examination, resulting in holding to answer for manslaughter, is no bar to another examination or information on charge of murder.—People v. Barnes, 66 Cal. 594, 56 Am. Rep. 119, 6 Pac. 698.

[j] On indictment for burglary, a verdict of guilty of an attempt to commit petit larceny is a nullity, as larceny is not included in burglary, and the jury should not be discharged, but be sent back for further deliberation; but, if discharged with defendant's consent, he is not thereby put in jeopardy.—People v. Curtis, 76 Cal. 57, 17 Pac. 941.

[k] Conviction for one crime is no bar to prosecution for another merely because they are so closely related in point of time that it is impossible to separate evidence relating to them.—People v. Bentley, 77 Cal. 8, 11 Am. St. Rep. 225, 18 Pac. 799.

[l] Conviction for manslaughter under indictment for murder reversed on appeal will not sustain plea of former jeopardy and former acquittal upon new trial for murder under same indictment.—People v. Carty, 77 Cal. 216, 19 Pac. 490.

[m] Under Penal Code, section 687, providing that "no person can be subjected to a second prosecution for a public offense for which he has been prosecuted and convicted, or acquitted," an acquittal on an indictment for libel contained in a certain article, published at a certain time, in a certain paper, is a bar to a subsequent prosecution for libel contained in the same article, published at the same time, in the same paper, though the defamatory words alleged are not the same.—People v. Stephens, 79 Cal. 428, 21 Pac. 856, 4 L. R. A. 845.

[n] One tried for assault to murder and found guilty of assault with deadly weapon is acquitted of former charge.—People v. Gordon, 88 Cal. 425, 26 Pac. 502.

[o] If goods stolen from different persons are received at same time the offense is single, and a plea of former acquittal of a charge of receiving goods stolen from one of such persons is a good plea to a charge of receiving any other stolen goods at the same time.—People v. Willard, 92 Cal. 482, 28 Pac. 585.

[p] When indictment is sufficient, and proceedings thereon regular, before tribunal having jurisdiction, down to time when jeopardy attaches, there can be no second jeopardy allowed in favor of the prosecution on account of any lapse or error at a later stage; and a former conviction or acquittal of a minor offense is a bar to a prosecution for the same act charged as a higher crime, whenever the defendant on the latter might be legally convicted on the former had there been no other prosecution.—People v. Ny Sam Chung, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642.

[q] Where the same act violates a state law and a city ordinance, the person charged therewith may be tried for both offenses, without any violation of the constitutional provision that no one shall be twice put in jeopardy for the same offense.—Hong Shen, Ex parte, 98 Cal. 681, 33 Pac. 799.

[r] Where, on a trial for an assault with intent to commit murder, defendant is convicted of an assault with a deadly weapon, such conviction is an acquittal of the higher offense, and the fact that the judgment of conviction of the lower offense was set aside, and a new trial granted, at the instance of defendant, does not entitle the state to place him on trial the second time for the higher offense.—People v. Gordon, 99 Cal. 227, 33 Pac. 901.

[s] Where one offense is a necessary element in, and constitutes an essential part of, another defense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other.—People v. Defoor, 100 Cal. 150, 34 Pac. 642.

[t] The pendency of an indictment for obtaining a note executed by S. under false pretenses is no obstacle to the finding and

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trial of another indictment, charging defendant with obtaining a joint note executed by S. and another under false pretenses.—People v. Cummings, 123 Cal. 269, 55 Pac. 898.

[u] Conviction of a battery is a bar to prosecution for assault with intent to commit murder.—People v. McDaniels, 137 Cal. 192, 69 Pac. 1006.

[v] Burglary being the entering of a building with intent to commit larceny or any felony (Penal Code, section 459), and larceny being the felonious stealing or carrying away of the personal property of another (section 484), a conviction of larceny committed during the same transaction, and immediately after entering the building, is not a bar to a prosecution for burglary in entering the building with intent to commit larceny.—People v. Devlin, 143 Cal. 128, 76 Pac. 900.

FOR AUTHORITIES FROM OTHER STATES:

Former jeopardy, identity of offenses in plea of: 92 Am. St. Rep. 89, note. See, also, 12 Cyc. 280-290; 14 Cent. Dig., cols. 1021-1067, §§ 382-409.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT AND SUMMARY TRIAL.

JURISDICTION OF PRELIMINARY PROCEEDINGS, § 54.
PRELIMINARY COMPLAINT OR AFFIDAVIT, § 55.
PRELIMINARY WARRANT, § 56.
NECESSITY FOR EXAMINATION AND RIGHT TO WAIVE IT, § 57.
CONDUCT OF EXAMINATION, § 58.
POSTPONEMENT OF EXAMINATION, § 58½.
DISCHARGE OR HOLDING TO ANSWER, § 59.
ORDER OR WARRANT OF COMMITMENT AND CUSTODY OF ACCUSED, § 60.
RECORD OR CERTIFICATE AND RETURN TO PRELIMINARY EXAMINATION, § 61.
OBJECTIONS AND EXCEPTIONS, § 62.
SUMMARY TRIAL, § 63.
APPEAL AND REVIEW AND TRIAL DE NOVO, § 64.

Admissibility at trial of evidence given at preliminary examination. See post, § 266.
Complaint in prosecution for violation of liquor laws. See Intoxicating Liquors, § 26.

§ 54. Jurisdiction of Preliminary Proceedings.

[a] Judges of first instance have jurisdiction to act as examining and committing magistrates.—People v. Smith, 1 Cal. 9.

[b] Justices of supreme court and district judges, being made by the constitution of the state conservators of the peace, are, ex vi termini, empowered to act in the apprehension and commitment of offenders. (Per Bennett, J.)—People v. Smith, 1 Cal. 9.

[c] Police judge of Santa Barbara is authorized to conduct examination of one charged with manslaughter.—People v. More, 68 Cal. 503, 9 Pac. 461, 463.

[d] Defendant was arrested on a warrant issued by a justice of the peace of a certain township, on a complaint filed before him. Thereafter, and while this proceeding was pending, he was again arrested on a warrant issued by a justice of the peace of another township, and was by him committed. On this commitment the information was filed under which he was convicted. Held, that the proceeding before the first magistrate did not affect the validity of the information, nor deprive the superior court of jurisdiction.—People v. Johnson, 71 Cal. 384, 12 Pac. 261.

[e] Under Code of Civil Procedure, section 105, providing that a justice of the peace may hold the court of any other justice of the peace in the same county, where a complaint for burglary is filed with a justice of the peace, any other justice of the peace in the same county has jurisdiction to hear the preliminary examination thereon if requested so to do by the justice before whom the complaint was filed.—People v. Sansome, 98 Cal. 235, 33 Pac. 202.

[f] The police court of the city and county of San Francisco, and police judges sitting as magistrates, have jurisdiction to hold a preliminary examination of a defendant charged with the offense of criminal libel, although the police court has no jurisdiction to try that offense.—People v. Crespi, 115 Cal. 50, 46 Pac. 863.

[g] A justice of the peace, the boundaries of whose township were so changed after his appointment as to make him a nonresident thereof, but who has not been ousted and continues to act, is a justice de facto, and his right to hold a preliminary examination cannot be questioned on appeal from conviction. People v. Schorn, 116 Cal. 503, 48 Pac. 495.

[h] Justice of the peace may call in another justice for the purpose of making preliminary examination.—People v. Schorn, 116 Cal. 506, 48 Pac. 495.

[i] An order by a justice of the peace requesting another justice to act for him need not state the reason therefor, no statute requiring it to do so.—People v. Schorn, 116 Cal. 503, 48 Pac. 495.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 291; 14 Cent. Dig., cols. 1070, 1071, §§ 413, 414.

§ 55. Preliminary Complaint or Affidavit.

[a] The addition "Jr." is no part of a name proper. Its insertion in a criminal complaint is immaterial if no party is misled thereby.—City and County of San Francisco v. Randall, 54 Cal. 408.

[b] A justice of the peace is authorized to administer and certify to the oath of a complainant in a criminal prosecution.—People v. Le Roy, 65 Cal. 613, 4 Pac. 649.

[c] A complaint made before a justice of the peace charging a defendant with the crime alleged in the information under which an examination is held, and witnesses examined before such magistrate, and the defendant thereupon held to answer, is a sufficient

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ground to warrant the district attorney in filing an information.—People v. Beam, 66 Cal. 394, 5 Pac. 677.

[d] A defendant charged with crime may be held by the examining magistrate to answer, although in the complaint he was given a fictitious name.—People v. Wheeler, 73 Cal. 252, 14 Pac. 796.

[e] Stenographer appointed to take testimony given on preliminary examination need not be sworn.—People v. Riley, 75 Cal. 101, 16 Pac. 544.

[f] Complaint charging violation of city ordinance need not set out ordinance, it is sufficient to refer to it and describe offense prohibited.—Lane, Ex parte, 76 Cal. 558, 18 Pac. 677.

[g] Information required to be filed within one year in misdemeanor case is a paper required to be filed by district attorney and not a complaint.—People v. Ayhens, 85 Cal. 88, 24 Pac. 635.

[h] Failure of complaint to state time of commission of misdemeanor does not deprive police court of jurisdiction.—Ah Sing, Ex parte, 87 Cal. 423, 25 Pac. 552.

[i] The validity of a conviction on an information filed against one charged with an offense is not dependent on the regularity of the complaint on which he was arrested and brought before the committing magistrate.—People v. Dolan, 96 Cal. 315, 31 Pac. 107.

[j] Courts disregard fractions of days when necessary; and one may be accused of an offense on the very day of its commission. People v. Squires, 99 Cal. 327.

[k] Complaint must show that defendant has been builty of some designated offense; though it need not necessarily charge the offense with all the technical nicety of an indictment or information; but it must state the essential elements of the crime to a common certainty.—People v. Howard, 111 Cal. 655, 44 Pac. 342.

[l] Where complaint does not state complete offense justice has no jurisdiction.—Peterson, Ex parte, 119 Cal. 579, 51 Pac. 859.

[m] Under section 2093, Code of Civil Procedure, clerk of police court of Los Angeles is authorized to administer oath to person verifying criminal complaint.—People v. Vasalo, 120 Cal. 169, 52 Pac. 305.

[n] The misstatement of the name of an affiant in a complaint charging an offense will not invalidate subsequent proceedings based on such complaint, which was subscribed by affiant.—People v. George, 121 Cal. 492, 53 Pac. 1098.

[o] Under Penal Code, section 811, providing that, where an information of the commission of a public offense is laid before a magistrate, he must examine the informant and any witness he may produce, etc., the omission of a magistrate to indorse on a complaint for arson the fact that such complaint was filed did not deprive the magistrate of jurisdiction of the case.—People v. Hiltel, 131 Cal. 577, 63 Pac. 919.

[p] Signature to complaint by mark of complainant accompanied by signature of justice to jurat is sufficient.—People v. McDaniels, 141 Cal. 115, 74 Pac. 773.

[q] Penal Code, section 956, provides that when an offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material; and section 960 provides that no information is insufficient by reason of any defect which does not tend to prejudice a substantial right of the defendant on the merits. Held, that it was not necessary that the complaint on a prosecution for burglary should allege the ownership of the building entered, where the street number of the premises was given.—People v. Price, 143 Cal. 351, 77 Pac. 73.

[r] Where a charge has been examined by a magistrate, and the examination warrants holding accused to answer, imperfections in the complaint are cured and the commitment is legal.—People v. Warner, 147 Cal. 546, 82 Pac. 196.

[s] Where the deposition of the informer was not taken by the justice before issuing the warrant for defendant's arrest on the charge of threatening to commit an offense against the person of another, and the written information did not show the facts necessary to justify the issue of the warrant, defendant was entitled to be discharged.—Connor, Ex parte (Cal. App.), 84 Pac. 999.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 291-297; 14 Cent. Dig., cols. 1072-1089, §§ 415-434.

§ 56. Preliminary Warrant.

[a] Where a justice of the peace issues a warrant to arrest and bring before him for examination a party charged with crime, the officer making the arrest may take the party before another justice of the peace of the same county, who may make the examination and commit, in case of the absence or inability to act of the justice issuing the warrant. Branigan, Ex parte, 19 Cal. 133.

[b] When a person charged with murder is arrested and taken before a justice of the peace, and by him held for examination, and he subsequently is examined before another justice of the peace and held to answer, it is not necessary, to confer jurisdiction on such second magistrate, that another complaint be made and a second warrant issued.—Moan, Ex parte, 65 Cal. 216, 3 Pac. 644.

[c] Magistrate has no power to issue warrant without some evidence tending to show guilt of accused. Mere expression of opinion of guilt under oath is insufficient.—Dimmig, Ex parte, 74 Cal. 166, 15 Pac. 619.

[d] Where complaint is positive and direct in its allegation of every fact necessary to

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support the charge laid it is a sufficient deposition, within the meaning of sections 811, 812, and 813 of the Penal Code, to sustain a warrant of arrest issued thereon. People v. Staples, 91 Cal. 23, 27 Pac. 523.

[e] Where one charged with committing a felony is examined, and evidence adduced sufficient to justify the magistrate in holding the accused to answer the charge, an irregularity in the warrant of arrest is immaterial, since thereafter the accused is held under the commitment, which authorizes the filing of an information.—People v. Staples, 91 Cal. 23, 27 Pac. 523.

[f] A warrant can have no support in a complaint not having the date of the complaint referred to in the warrant.—Lewis, Ex parte (Cal. App.), 86 Pac. 996.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 297-304; 14 Cent. Dig., cols. 1089-1106, §§ 435-459.

§ 57. Necessity for Examination and Right to Waive It.

[a] Chapter 7 of Criminal Practice Act in effect requires that witnesses for people shall be examined, but does not contemplate a total waiver by defendant of any examination into charge made against him.—Walsh, Ex parte, 39 Cal. 705.

[b] The act of 1866, authorizing accused persons to become witnesses in their own behalf, is not applicable to preliminary examinations before committing magistrates. People v. Gibbons, 43 Cal. 557.

[c] Provisions of Penal Code in cases of felony contemplate an examination of the case by the committing magistrate, and do not authorize a waiver of examination by the defendant.—Kalloch v. Superior Court, 56 Cal. 229.

[d] The provision of Penal Code, section 995, that an information may be set aside when defendant has not been legally committed by a magistrate before its filing, does not apply in cases of indictment.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[e] When information is set aside because defendant has not been legally committed, he must be re-examined before another information can be filed.—Baker, Ex parte, 88 Cal. 85, 25 Pac. 966.

[f] Under Constitution, article 1, section 8, permitting prosecution by information "after examination and commitment by a magistrate," and Penal Code, section 1165, imposing on the court the duty of ordering the detention of the defendant, that a new information may be preferred, where he is acquitted on the ground of a variance between the charge as alleged and the proof, one who has been examined and committed on a charge of grand larceny may, after a trial and disagreement, by direction of the court, be charged by a new information with embezzlement without any new examination and commitment, if the evidence taken on the first examination justifies an information for embezzlement.—Nicholas, Ex parte, 91 Cal. 640, 28 Pac. 47.

[g] The defendant has a right to a public examination before the committing magistrate, but under the provisions of section 868 of the Penal Code, he may waive such right by requesting the exclusion of all persons except those specified in that section. People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

[h] Defendant accused of felony cannot waive preliminary examination.—People v. Cokahnour, 120 Cal. 254, 52 Pac. 505.

[i] An examination before information filed is sufficient, though no witnesses are examined, where accused makes a written confession.—People v. Cokahnour, 120 Cal. 253, 52 Pac. 505.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 308-311; 14 Cent. Dig., cols. 1118-1124, §§ 478-493.

§ 58. Conduct of Examination.

[a] The act of 1851, to regulate proceedings before committing magistrates, contains no provision authorizing or permitting an oath to be administered to the person accused. He is not to be examined generally, nor cross-examined at all. Only the five questions specified are to be put to him, and his answers thereto must be committed to writing.—People v. Gibbons, 43 Cal. 557.

[b] Examination held sufficient to authorize filing of information under section 809, Penal Code.—People v. More, 68 Cal. 503, 9 Pac. 461, 463.

[c] Failure of magistrate to allow accused time to employ counsel or to furnish one is not ground for setting aside information. People v. Elliott, 80 Cal. 300, 22 Pac. 207.

[d] The refusal of a committing magistrate to continue the hearing long enough to enable accused to employ counsel, on the ground that accused is a lawyer himself, is ground of setting aside the information. People v. Napthaly, 105 Cal. 641, 39 Pac. 29.

[e] Under Penal Code, section 808, making justices of the supreme court, judges of the superior courts, justices of the peace, and police magistrates in cities and towns, magistrates on a preliminary examination of one charged with crime before a judge of the superior court, such judge has no other or greater powers than a justice of the peace or other officer when exercising the functions of a magistrate, and the county clerk cannot legally administer oaths to witnesses; and this though there is nothing in the statute which requires the magistrate to personally swear the witnesses, or negatives his right to have the service of the clerk for such purposes.—People v. Cohen, 118 Cal. 74, 50 Pac. 20.

[f] Preliminary examination is complete without swearing witnesses when defendant confesses guilt.—People v. Cokhanour, 120 Cal. 254, 52 Pac. 505.

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[g] Defendant accused of felony may waive time to prepare for preliminary examination.—People v. Cokahnour, 120 Cal. 254, 52 Pac. 505.

[h] Statute does not confer on one jointly charged with another the right to a separate examination before the magistrate.—People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[i] Even though the statute conferred on one jointly charged with another the right to a separate examination, error in refusing it would not be jurisdictional.—People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[j] An information cannot be set aside on the ground that defendant has not been "legally committed," in that there was not evidence before the magistrate to show an offence, where evidence was heard by the magistrate.—People v. Beach, 122 Cal. 37, 54 Pac. 369.

[k] Penal Code, section 1008, providing for resubmission to the grand jury where a previous indictment has been held defective, and reciting that defendant "may be examined before a magistrate," does not compel a previous preliminary examination.—People v. Sexton, 132 Cal. 37, 64 Pac. 107.

[l] Under Penal Code, section 869, providing that the magistrate before whom an examining trial is held may appoint a shorthand reporter to take down the evidence, it is not necessary that there should be a preliminary showing as to the qualification of the person appointed, especially where the magistrate knows the person appointed to be competent, and there is no objection on the ground of incompetency.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[m] A person is not rendered incompetent as such stenographer by being an employee of the district attorney.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[n] It is not necessary that the stenographer be sworn; Code of Civil Procedure, section 270, relative to the oath to be taken by the reporter of the superior court, having no application.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[o] It is not necessary that the person appointed be the official reporter of any court. People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[p] Where there is evidence before the committing magistrate that a watch was taken from one B. when he was asleep, and when defendant and one F. were present, and it was afterward found concealed on the person of F., so as indicate that it must have been taken feloniously, a finding by the trial court that defendant had been legally committed by the magistrate will not be disturbed on appeal.—People v. Sherman, 32 Pac. 879.

[q] Evidence sufficient for a conviction held not necessary for a committing magistrate to hold one for trial.—Mitchell, In re (Cal. App.), 82 Pac. 347.

§ 58½ Postponement of Examination.

[a] Postponement of preliminary examination beyond six days does not affect jurisdiction of magistrate.—People v. Van Horn, 119 Cal. 326, 51 Pac. 538.

[b] Where a week elapsed between the first arraignment and the preliminary examination of one accused of rape, it was not error for the magistrate to refuse a further postponement, that accused might procure an attorney.—People v. Figueroa, 134 Cal. 159, 66 Pac. 202.

[c] An information will not be set aside on the ground that the examining magistrate postponed the preliminary examination for more than two days at a time witnout the consent of defendant, though Penal Code, section 861, provides that a preliminary examination cannot be so postponed.—People v. Boren, 139 Cal. 210, 72 Pac. 899.

§ 59. Discharge or Holding to Answer.

[a] If it appear on the examination of a person before a committing magistrate that the prisoner is guilty of felony, although different from that specified in the warrant of arrest, it is the duty of the officer to commit the prisoner for trial, for the offense of which he appears to be guilty.—People v. Smith, 1 Cal. 9.

[b] On finding a commitment illegal, if it appear that the party is guilty of an offense, the court will not discharge him without allowing time for his arrest by proper authority.—Crandall, Ex parte, 2 Cal. 144.

[c] On preliminary examination committing magistrate may hold defendant to answer for any offense which evidence shows him to have committed; and his power in this respect is not limited to such offenses as are embraced within crime charged in complaint.—People v. Wheeler, 73 Cal. 252, 14 Pac. 796.

[d] Committing magistrate must hold defendant to answer for offense proved regardless of offense charged.—People v. Lee Look, 143 Cal. 216, 76 Pac. 1028.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 312, 313; 14 Cent. Dig., cols. 1125-1128, §§ 494-500.

§ 60. Order or Warrant of Commitment and Custody of Accused.

[a] If an order of commitment be sufficient in substance, it will be held good on habeas corpus, although it contain more than is necessary to be stated therein. The unnecessary matter will be regarded as surplusage.—People v. Smith, 1 Cal. 9.

[b] Commitment for larceny must state of what property the larceny alleged was committed, to whom it belonged, its value, and the time when, and the place where the offense was committed.—Branigan, Ex parte, 19 Cal. 133.

[c] A justice may issue a second commitment in place of a defective one previously

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issued, provided he have any record or entry to which he can refer for guidance; but he cannot resort merely to his own recollection for the facts of the case.—Branigan, Ex parte, 19 Cal. 133.

[d] Where commitment, issued by a justice of the peace of the city and county of Sacramento, is directed to the sheriff of said city or county, the warden of the county jail thereof has authority to receive and retain in his custody the party charged.—Branigan, Ex parte, 19 Cal. 133.

[e] When a party is convicted of a criminal offense and appeals to the county court, and, pending the appeal, is released on bail, and the judgment is affirmed, a second commitment need only recite the judgment of conviction, and state that defendant appealed and the judgment was affirmed. It need not recite the judgment of the county court or that a remittitur had been issued.—Jones, Ex parte, 41 Cal. 209.

[f] Commitment by a justice of the peace holding a party to appear before a grand jury to answer upon a charge of murder must state the name of the person alleged to have been murdered. But the omission of such name is not such a defect as will entitle the accused to be discharged on habeas corpus.—Bull, Ex parte, 42 Cal. 196.

[g] Upon the examination of the defendant before the justice the order for his confinement, provided for by section 872, Penal Code, was indorsed upon the depositions taken at the examination and not upon the depositions accompanying the original information. Held, the order complied with the section referred to.—People v. Hardisson, 61 Cal. 378.

[h] Penal Code, section 872, provides that an examining magistrate shall indorse his commitment of defendant "on the deposition" taken at the examination. Held, where the deposition was taken in shorthand and written out afterward, that an indorsement of commitment on the complaint was sufficient, under section 1404, providing that departures from modes prescribed in the code shall be immaterial, unless they prejudice defendant's substantial rights.—People v. Young, 64 Cal. 212, 30 Pac. 628.

[i] Commitment by justice of the peace for manslaughter held sufficient.—Moan, Ex parte, 65 Cal. 216, 3 Pac. 644.

[j] In the order of commitment the police judge found that "the offense, as charged in the complaint, felony, to wit, attempt to commit robbery, has been committed." The complaint charged an assault with intent to commit robbery. Held, that the order should be construed as a finding that the offense charged in the complaint had been committed.—People v. Lee Ah Chuck, 66 Cal. 662.

[k] Failure of magistrate to add to commitment that defendant is admitted to bail in certain sum is not jurisdictional defect.—People v. Thompson, 84 Cal. 601, 24 Pac. 384.

[l] Warrant of commitment should show name of party injured.—Keil, Ex parte, 85 Cal. 310, 24 Pac. 742.

[m] Warrant of commitment may be amended at any time to fully and formally describe offense proved by depositions.—Keil, Ex parte, 85 Cal. 310, 24 Pac. 742.

[n] An order of commitment to answer the charge of murder is not invalid by reason of its failure to give the name of deceased, this not being required by Penal Code, section 872.—Walpole, Ex parte, 85 Cal. 362, 24 Pac. 657.

[o] A defect in the commitment in describing the offense is immaterial if it is sufficiently described in the order indorsed on the deposition.—Estrado, Ex parte, 88 Cal. 316, 26 Pac. 209.

[p] The requirement that the order holding defendant to answer on preliminary examination must be indorsed on the depositions is sufficiently complied with by an indorsement thereof on the complaint.—People v. Sehorn, 116 Cal. 503, 48 Pac. 495.

[q] The fact that defendant was committed on preliminary examination on the order holding him to answer, without a formal commitment running to the sheriff, as required by Penal Code, sections 876, 877, is material only while he is in custody thereunder, and is not ground for reversal of a conviction.—People v. Sehorn, 116 Cal. 503, 48 Pac. 495.

[r] Commitment will support information where magistrate has jurisdiction, though irregular, if irregularity does not affect substantial rights of accused.—People v. Van Horn, 119 Cal. 326, 51 Pac. 538.

[s] Commitment for violation of a municipal ordinance to city jail, which is also used as a branch county jail, should properly be to custody of the city marshal, rather than to that of the sheriff; but where the defendant was committed to the custody of the sheriff he will be remanded upon habeas corpus to the custody of the sheriff, unless he insists upon the custody of the marshal.—Murphy, In re, 128 Cal. 29, 60 Pac. 930.

[t] Penal Code, section 872, relative to the preliminary examination of an accused, provides that, if there is sufficient cause to believe defendant guilty, the magistrate must indorse on the deposition an order to the effect that it appears to him that the offense mentioned in the deposition has been committed, and that there is cause to believe defendant guilty, and ordering that he be held to answer and committed. Held, that it was proper for the magistrate to indorse the commitment on the original complaint, treating it as a deposition within the statute.—People v. Price, 143 Cal. 351, 77 Pac. 73.

§ 61. Record or Certificate and Return to Preliminary Examination.

[a] Statute contemplates that order of discharge or commitment made by the magistrate upon the completion of the examination of a party charged with crime shall be reduced to writing, and, if the magistrate has indorsed his order on the depositions and statement (Crim. Prac. Act, secs. 163, 164),

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or entered it in his docket (where there have been neither depositions nor statement), commitments may be issued until the object of the order has been accomplished.—Branigan, Ex parte, 19 Cal. 133.

[b] Reporter's notes of preliminary examination need not be transcribed and filed to give jurisdiction for information.—People v. Riley, 65 Cal. 107.

[c] A justice's commitment indorsed upon the depositions, and signed by him, and in the language of the statute as follows: "It appearing to me that the offense in the written depositions mentioned has been committed, and that there is sufficient cause to believe the within named [giving name] guilty thereof, I order that he be held to answer to the same," etc., is sufficient.—People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

[d] Stenographer's certificate to transcript of evidence given at preliminary examination held to sufficiently comply with Penal Code, section 869, subdivision 5.—People v. Riley, 75 Cal. 101, 16 Pac. 544.

[e] Absence of correct certificate to transcript of evidence given at preliminary examination cannot be supplied by parol evidence.—People v. Carty, 77 Cal. 214, 215, 19 Pac. 490.

[f] Certificate of reporter to notes taken at preliminary examination must state that transcript is correct statement of testimony and proceedings.—People v. Carty, 77 Cal. 215, 19 Pac. 490.

[g] Where commitment is defective, papers sent up by magistrate may be returned to him, and he may correct them without reexamination of facts.—People v. Thompson, 84 Cal. 600, 601, 24 Pac. 384.

[h] Provision of section 872, Penal Code, requires indorsement on deposition; yet it is essential that the order be reduced to writing, and signed by the magistrate, and entered either upon the official docket of the magistrate or upon the complaint or depositions.—People v. Wilson, 93 Cal. 377, 28 Pac. 1061.

[i] Order in writing, holding a defendant to answer upon the charge for which an information is filed, is in fact and in law made when it is entered upon the docket of the justice, and authorizes the filing of an information by the district attorney; and the failure to indorse the order upon the complaint, or the depositions taken at the preliminary examination, in no manner deprives the order of its validity, or affects any substantial right of the defendant, and neither such failure, nor the failure to reduce the testimony of the witnesses to writing, or to file a written commitment in the superior court, is sufficient ground for a motion to set aside the information for want of a legal commitment before its filing.—People v. Wallace, 94 Cal. 497, 29 Pac. 950.

[j] Penal Code, section 872, provides that if, on a preliminary examination, it appears that a public offense has been committed, and there is sufficient cause to believe defendant guilty thereof, the magistrate must make or indorse on the depositions taken on such examination an order to that effect, and that defendant be held to answer to the same. Held, that the section is sufficiently complied with where an order of commitment in due form was filed with the other papers in the case, and referred to the complaint as "the within deposition."—People v. Dolan, 96 Cal. 315, 31 Pac. 107.

[k] Code of Civil Procedure, section 105, requiring a justice acting for another to make in the docket "proper entry of the proceedings . . . . subscribed by him," requires only such entries as the original justice would have been required to make; and hence, since no statute requires any particular proceedings on preliminary examination to be entered, failure of an attending justice holding a preliminary examination to subscribe his name to the docket affects no substantial right of defendant.—People v. Sehorn, 116 Cal. 503, 48 Pac. 495.

[l] Duty imposed upon magistrate to indorse the order of discharge upon the "depositions" does not indicate that reporter's notes must be transcribed; but term "depositions" applies to testimony taken when complaint was first presented to magistrate before issuing the warrant, as well as to the testimony of witnesses taken upon examination of accused. Where accused is discharged, magistrate may properly indorse order upon former "depositions," without necessity of any transcription of the reporter's notes taken at the examination.—Mattingly v. Nichols, 133 Cal. 332, 65 Pac. 748.

§ 62. Objections and Exceptions.

[a] It is too late to raise an objection to an affidavit or warrant of arrest on a criminal charge, after the examination of the prisoner has been had and it appears that there is probable cause to suppose that he is guilty of felony, and an order of commitment has been made by the committing magistrate. So held upon an application to discharge a prisoner on habeas corpus.—People v. Smith, 1 Cal. 9.

[b] Where accused was represented by counsel at his preliminary hearing, he cannot object for the first time on the trial that the reporter appointed to take testimony before the magistrate did not possess the necessary qualifications.—People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

§ 63. Summary Trial.

[a] A judgment on a summary conviction imposing a cumulative sentence need not set out the previous judgments, but is sufficient if it directs each term "to commence at the expiration of previous sentences"; the form being the same as in courts of general jurisdiction, and the sentence being definite and certain by reference to the record.—People v. Forbes, 22 Cal. 135.

[b] A judgment of a justice that the defendant be fined three hundred dollars, and,

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"in default of the payment of said fine," be imprisoned in the county jail not exceeding three hundred days, held to comply with Penal Code, section 1205: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine."—Ellis, Ex parte, 54 Cal. 204.

[c] Where, upon a sentence being imposed by a police court upon a conviction for an offense within the jurisdiction of the court, an entry is made in the clerk's minute-book which shows the offense and sentence, it is immaterial that the formal judgment is not entered on the judgment docket for more than twenty days afterward.—Raye, Ex parte, 63 Cal. 491.

[d] Judgment of conviction failing to recite date of offense and that it was feloniously committed, is not void.—Turner, Ex parte, 75 Cal. 228, 16 Pac. 898.

[e] Code authorizes imprisonment for enforcement of fine in misdemeanor cases.—Miller, Ex parte, 82 Cal. 455, 22 Pac. 1113.

[f] Penal Code, section 1426, provides that proceedings before a justice court for a public offense must be commenced by complaint setting forth the offense with such particularity that the defendant will understand the nature of the charge; and section 960 declares that no indictment or information shall be insufficient by reason of a defect in form not prejudicial to a substantial right of the defendant on the merits. Held, that a complaint which clearly informs defendant of the nature of the charge is not defective for failure to conclude with the words, "against the form of the statute in such case made and provided," or their equivalent.—Mansfield, In re, 106 Cal. 400, 39 Pac. 775.

[g] Constitution, article II, section 8½, authorizes freeholders' charters to provide for the regulation and jurisdiction of police courts, and Santa Barbara freeholders' charter (article 6) declares that the police court of such city shall have exclusive jurisdiction of proceedings for breach of the peace in certain cases. Held, that since the constitution did not authorize the city to confer exclusive jurisdiction on its police court, and the charter would not be construed to repeal a general law by implication, vesting the same jurisdiction in justices' courts, an application for habeas corpus on the ground that a commitment issued out of a justice's court in such city was void for want of jurisdiction would be denied.—Dolan, Ex parte, 128 Cal. 460, 60 Pac. 1094.

[h] Where the tenth day after an examining trial before a magistrate was Sunday, the filing of the transcript of the shorthand notes of the testimony on the following Monday was within ten days, as required.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[i] In prosecution for a violation of county ordinance, affidavit of complaint held not required to set out title and date of passage of ordinance, notwithstanding Penal Code, section 963.—Luening, Ex parte (Cal. App.), 84 Pac. 445.

[j] Under Statutes of 1905, pages 944, 952, 956, chapter 15, sections 13, 14, 51, 95, a warrant of commitment issued by a judge of the police court of the city of San Bernardino, held sufficient, and not to entitle the prisoner to release on habeas corpus.—Baxter, Ex parte (Cal. App.), 86 Pac. 998.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 321-343; 14 Cent. Dig., cols. 1143-1213, §§ 518-609.

§ 64. Appeal and Review and Trial de Novo.

[a] The county court has the sole appellate jurisdiction of all civil and criminal cases arising in justices' courts, subject to such restriction as the legislature may impose by making the decisions of the justice final.—People v. Fowler, 9 Cal. 85.

[b] A bill of exceptions or a statement of the case is not required on appeal from the police judge's court of the city of San Francisco to the county court, but such appeal can only be heard by and through a trial de novo in the appellate court.—People v. Maguire, 26 Cal. 635.

[c] On affirmance on appeal of a judgment, a second commitment need only recite the judgment, that defendant appealed, and that the judgment was affirmed.—Jones, Ex parte, 41 Cal. 209.

[d] Where an appeal is taken from a judgment of a justice, and defendant is released from custody pending appeal, he must be recommitted to prison, upon a dismissal of the appeal, notwithstanding no certificate of probable cause was filed.—Whitty, Ex parte, 65 Cal. 168.

[e] There can be no trial of criminal case in superior court before there has been a trial in justice court, where latter court has original jurisdiction.—Brown v. Superior Court, 72 Cal. 15, 16, 13 Pac. 70.

[f] Proper course, where superior court has failed to acquire jurisdiction because no judgment was had on issues of fact, is to remand case, as prescribed in Penal Code, article 9, section 2.—Brown v. Superior Court, 72 Cal. 14, 13 Pac. 70.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 331-343; 14 Cent. Dig., cols. 1178-1213, §§ 567-609.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCES.

BENCH-WARRANT FOR DEFENDANT AFTER INDICTMENT, § 65.
NECESSITY, REQUISITES AND SUFFICIENCY OF ARRAIGNMENT AND PLEA, § 66.
WAIVER OF ARRAIGNMENT AND REFUSAL TO PLEAD, § 67.
PLEAS OF GUILTY AND NOLLO CONTENDERE, § 67½.

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WITHDRAWAL OR CHANGE OF PLEA, § 68.
PLEA TO CHARGE OF PRIOR CONVICTION, § 69.
SPECIAL PLEAS IN BAR—IN GENERAL, § 70.
PLEAS OF FORMER JEOPARDY OR FORMER ACQUITTAL OR CONVICTION, § 71.
PLEAS OF NOT GUILTY, § 72.
NOLLE PROSEQUI, § 73.
DISCONTINUANCE, § 74.

§ 65. Bench-warrant for Defendant After Indictment.

[a] Under Criminal Practice Act, sections 234, 261, permitting the court to issue a bench-warrant for the arrest of a defendant who was out on bail, the custody of the defendant under such bench-warrant is lawful. Cook, Ex parte, 35 Cal. 107.

§ 66. Necessity, Requisites and Sufficiency of Arraignment and Plea.

[a] Under provisions of statute, that "all the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is determined, shall be those prescribed by this act" (Criminal Practice Act, section 235), the bench and bar must search in the provisions of the statute for the form of an indictment, and for the rules by which its sufficiency shall be determined, rather than in the common law.—People v. Cronin, 34 Cal. 191.

[b] In a criminal case every plea must, under the Penal Code, be oral.—People v. Johnson, 47 Cal. 122.

[c] Until defendant has pleaded to indictment there is no issue to be submitted to the jury, and omission to plead is fatal to judgment, even after verdict.—People v. Gaines, 52 Cal. 479.

[d] Since the repeal of Penal Code, section 1025, prescribing the mode of arraignment where a previous conviction is charged on an information for assault with intent to commit robbery, together with a charge of prior conviction of grand larceny, an arraignment of defendant, in the mode required by Penal Code, section 988, is proper.—People v. Brooks, 65 Cal. 295, 300, 4 Pac. 7, 11.

[e] Defendant pleading without counsel may demur after counsel has been assigned.—People v. Villarino, 66 Cal. 228, 5 Pac. 154.

[f] When information charging no offense is amended to charge offense, defendant must be arraigned and plead before trial can be had.—People v. Moody, 69 Cal. 185, 10 Pac. 392.

[g] Where, upon an appeal from a judgment of conviction in a trial for manslaughter, the record shows that the defendant was regularly arraigned, that he was asked if he pleaded guilty or not guilty, and that he personally made no answer, but, in his presence, his attorney, answering, said: "We plead not guilty," whereupon the clerk of the court made an entry in the minutes of the court that the "defendant pleads not guilty of the offense charged in the information, and, by consent of all parties, the cause is set for trial on the twentieth of October, 1885," the substantial rights of the defendant were not prejudiced in that he did not personally plead to the information.—People v. McCoy, 71 Cal. 395, 12 Pac. 272.

[h] It is not necessary to validity of proceedings that accused personally plead to information.—People v. Samario, 84 Cal. 486, 24 Pac. 283.

[i] Arraignment for judgment fully complying with section 1200, Penal Code, is sufficient.—People v. Perez, 87 Cal. 123, 25 Pac. 262.

[j] On the arraignment of one informed against for burglary, it is not error for the court to ask him whether he had suffered the prior convictions charged against him in the information.—People v. McGregar, 88 Cal. 140, 26 Pac. 97.

[k] Provision of section 1011, Penal Code, for judgment where defendant declines to plead, after his demurrer is disallowed, cannot support the legality of a trial and judgment entered upon a verdict without a plea. People v. Monaghan, 102 Cal. 229, 36 Pac. 511.

[l] The granting of time to plead after the demurrer was overruled must be presumed to have been upon the application of the defendant, and raises a presumption that he was not then prepared to plead not guilty, and rebuts a presumption that it was understood that the original plea of not guilty was then to stand as his plea.—People v. Monaghan, 102 Cal. 229, 36 Pac. 511.

[m] Judgment cannot be pronounced against defendant under section 1011 of Penal Code, unless he in fact declines to plead after his demurrer is overruled, and cannot be rendered upon mere omission to plead.—People v. Monaghan, 102 Cal. 229, 36 Pac. 511.

[n] When arraigned, defendant is not entitled to have read to him a list of the witnesses examined.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[o] Under a minute entry showing that "the defendant was then asked by the court if he had secured the aid of counsel, and of his right to be represented by counsel," to which defendant replied that he did not desire the aid of counsel, it is implied that the court informed him of his right, and it is obvious that the minute entry was not intended to omit the word "informed" therefrom.—People v. Miller, 137 Cal. 642, 70 Pac. 705.

[p] Where the record of arraignment shows that the defendant pleaded guilty "in response to the court," it justifies the presumption that the plea was in response to the question whether he was guilty or not guilty. People v. Miller, 137 Cal. 642, 70 Pac. 735.

[q] Any irregularity in an arraignment, in delivering the copy of the information to the attorney for the accused, instead of the accused himself, was waived by failure to object thereto in the trial court.—People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

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[r] The clerk's failure to make the entry of a plea as fully as he ought to have done cannot prejudice defendant.—People v. O'Leary, 16 Pac. 884.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 43; 12 Cyc. 344; 14 Cent. Dig., cols. 1215-1217, §§ 612, 613.

§ 67. Waiver of Arraignment and Refusal to Plead.

[a] When a defendant in a criminal action, whose demurrer has been disallowed, refuses to plead, it is error for the court to order the entry of a plea of not guilty. Section 296 of the Criminal Practice Act should be followed, which requires that judgment should be pronounced in such case.—People v. King, 28 Cal. 265.

[b] The defendant in a criminal case does not waive an arraignment and plea by submitting to a trial, introducing witnesses on his behalf, and allowing the case to be argued on his behalf to the jury.—People v. Corbett, 28 Cal. 328.

[c] If defendant refuses to plead after his demurrer to the indictment has been overruled, the court may direct a plea of not guilty to be entered for him.—People v. Jocelyn, 29 Cal. 562.

[d] If the defendant, when arraigned, asks for and obtains time to plead, he waives any defect in the statutory detail of the proceedings which constitute an arraignment, such as a failure to deliver to him a copy of the indictment.—People v. Lightner, 49 Cal. 226.

[e] Where defendant refuses to plead, the court may direct a plea of not guilty to be entered for him.—People v. Bowman, 81 Cal. 566, 22 Pac. 917.

[f] Motion for new trial, made by counsel for defendant when called for sentence, does not constitute a waiver of arraignment required by statute, where he is sentenced upon denying the motion for new trial.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 347; 14 Cent. Dig., cols. 1217-1219, §§ 614, 615.

§ 67½. Pleas of Guilty and Nollo Contendere.

[a] In a proceeding to determine the degree of crime after a plea of guilty, the examination of witnesses need not be had at the time of, or immediately after, the plea; neither is the proceeding a plea or verdict of guilty, and so within the statutory provisions requiring the lapse of a certain time between the plea and judgment.—People v. Noll, 20 Cal. 164.

[b] Plea of defendant confessing himself to be guilty of a crime should not be entered except with his express consent, given by him personally in direct terms in open court. People v. McCrory, 41 Cal. 458.

[c] By a plea of guilty on a trial for murder the defendant waives his right of trial by jury.—People v. Lennox, 67 Cal. 113, 7 Pac. 260.

[d] Under proper advice, defendant pleaded guilty of murder. The court heard evidence, determined the crime to be murder in the first degree, and fixed the punishment at death. Immediately, and before the entry of judgment, defendant sought to withdraw his plea. Held, that this could not be done.—People v. Lennox, 67 Cal. 113, 7 Pac. 260.

[e] Accused must plead guilty personally, and could not do so through his counsel.—People v. Bowman, 81 Cal. 568, 22 Pac. 917.

FOR AUTHORITIES FROM OTHER STATES:

See 16 L. R. A. 358, note. See, also, 12 Cyc. 352, 353; 14 Cent. Dig., cols. 1230-1238, §§ 631-634.

§ 68. Withdrawal or Change of Plea.

[a] When there is reason to believe that a plea of guilty has been entered through inadvertence and without due deliberation, or ignorantly, and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the court should be indulgent in permitting the plea to be withdrawn.—People v. McCrory, 41 Cal. 458.

[b] Party should not be permitted to trifle with the court by deliberately entering a plea of guilty on one day and capriciously withdrawing it the next.—People v. McCrory, 41 Cal. 458.

[c] After plea of guilty has been withdrawn by permission of court and substituted by plea of not guilty, it becomes functus officio.—People v. Ryan, 82 Cal. 619, 23 Pac. 121.

[d] After pleading not guilty to information charging offense and previous conviction defendant may, in discretion of court, plead guilty of prior conviction.—People v. Wheatley, 88 Cal. 118, 26 Pac. 95.

[e] Defendant may withdraw plea of not guilty to charge of prior conviction and confess it at any time.—People v. Johnson, 88 Cal. 174, 25 Pac. 1116.

[f] Where a plea of not guilty in a criminal case is withdrawn, and a demurrer interposed to the indictment which was overruled, and time granted to the defendant to plead, a trial and conviction of the defendant without a new plea cannot be sustained.—People v. Monaghan, 102 Cal. 229, 36 Pac. 511.

[g] The defendant cannot be permitted to speculate upon the clemency of a judge by substituting a plea of guilty for a plea of not guilty with a right to retract if, before sentence, he finds that his expectation will not be realized.—People v. Miller, 114 Cal. 10, 45 Pac. 986.

[h] A motion to set aside a plea of not guilty and for leave to attack the indictment is within the discretion of the trial court.—People v. Staples (Cal. Sup.), 86 Pac. 886.

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[i] A second motion for leave to withdraw a plea of not guilty to move to set aside an indictment held properly denied in the absence of a showing of ignorance of the facts on which the second motion was based when the first motion was made.—People v. Staples (Cal. Sup.), 86 Pac. 886.

[j] Accused held not entitled as of right to renew a motion for leave to withdraw a plea of not guilty to attack the indictment.—People v. Staples (Cal. Sup.), 86 Pac. 886.

[k] Accused having pleaded not guilty a motion for leave to withdraw the plea to move to set aside the indictment not disclosing any ground on which such motion might be based held properly denied.—People v. Staples (Cal. Sup.), 86 Pac. 886.

[l] A defendant is entitled notwithstanding a plea of not guilty to move at any time before trial for leave to withdraw it, to demur, or move to set aside the indictment.—People v. Staples (Cal. Sup.), 86 Pac. 886.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1235-1238, § 633.

§ 69. Plea to Charge of Prior Conviction.

[a] When information charges offense and prior conviction, defendant need not plead to both charges.—People v. Wheatley, 88 Cal. 118, 26 Pac. 95.

[b] One charged with offense and prior conviction may plead not guilty to offense charged, and confess prior conviction.—People v. Wheatley, 88 Cal. 117, 26 Pac. 95.

[c] Plea of not guilty admitting prior conviction admits each and all prior convictions charged.—People v. Kelly, 120 Cal. 272, 52 Pac. 587.

§ 70. Special Pleas in Bar in General.

[a] Under a plea of not guilty in a trial for murder, the defendant may show that he was insane at the time of the alleged commission of the offense charged, although the statute provides that the question of insanity must be tried upon a special issue.—People v. Olwell, 28 Cal. 456.

[b] No plea of present insanity is required. If, at any time during the proceedings in a criminal trial, a doubt arises as to the sanity of the defendant, it is the duty of the court, of its own motion, to suspend further proceedings in the case until the question of sanity has been determined.—People v. Ah Ying, 42 Cal. 18.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 361-363; 14 Cent. Dig., cols. 1261-1265, §§ 657-665.

§ 71. Pleas of Former Jeopardy or Former Acquittal or Conviction.

[a] Evidence of a former conviction or acquittal, or former jeopardy, is admissible under the general issue.—(Cal. 1874) People v. Cage, 48 Cal. 323, 17 Am. Rep. 436.

[b] Where a juror on a murder trial becomes sick after the jury is sworn and some evidence introduced, and is discharged, and another is called in his place, defendants' request before beginning the trial de novo to have pleas of former acquittal and former jeopardy entered, should be granted.—People v. Stewart, 64 Cal. 60, 28 Pac. 112.

[c] Penal Code, section 1017, provides that pleas must be oral, and entered on the minutes in substantially the following form, if defendant plead a former conviction or acquittal: "The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of," specifying the time, place, and court. If he plead once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged," specifying the time, place, and court. Defendant's pleas, as entered on the minutes (though his counsel offered written pleas which were much fuller) were: "First, defendant pleads not guilty of the offense charged; second, a former acquittal; third, once in jeopardy." Held, that the two latter pleas were insufficient.—People v. O'Leary, 77 Cal. 30, 18 Pac. 856, 22 Pac. 24,

[d] Pleas of former acquittal and once in jeopardy must be made and entered substantially as prescribed by section 1017, Penal Code.—People v. O'Leary, 77 Cal. 33, 18 Pac. 856.

[e] The jury need not find on pleas of acquittal and former jeopardy not entered on the minutes in the form required by Penal Code, section 1017.—People v. O'Leary, 77 Cal. 30, 18 Pac. 856.

[f] Question of jeopardy can only arise after issue has been made by a plea of once in jeopardy, and it cannot be urged upon appeal from a judgment where the verdict has not fixed the degree of the crime.—People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776.

[g] On the second trial of a criminal case, the record of the first trial, showing that the jury had been discharged on their statement that they could not agree, after deliberating only six hours, will not support a plea of former jeopardy, as Penal Code, section 1140, providing that the jury may be discharged "at the expiration of such time as the court may deem proper," if "it satisfactorily appears that there is no probability that the jury can agree," does not require the record to show that it satisfactorily appeared to the judge that there was no such probability.—People v. Greene, 100 Cal. 140, 34 Pac. 630.

[h] Under Deering's Penal Code, section 1017, relating to pleas in criminal cases, a plea that defendant "has been once in jeopardy, he having on the —— day of January, 1887, been placed on trial for the offense now alleged in the information before the justice court of Cache Creek township and a jury, which court was a competent court, and which jury was a competent jury; and witnesses against defendant were sworn before said jury, and, before the final sub-

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mission of said matter to said jury, the jury was discharged, against the objection of the defendant''—is a good plea of once in jeopardy.—People v. O'Leary, 16 Pac. 884.

[i] Under Deering's Penal Code, section 1017, relating to pleas in criminal cases, a plea that defendant ''has already been acquitted of the offense charged by the judgment of this court, rendered at this courtroom on the fourteenth day of February, 1887, when defendant's demurrer to plaintiff's information was sustained by the court, and said court then and there or at any time failed to render its opinion that the objection to said demurrer could ever be cured by filing a new information,'' is a sufficient plea of former acquittal.—People v. O'Leary, 16 Pac. 884.

[j] Penal Code, section 1017, provides that pleas must be oral, and entered on the minutes in substantially the following form, if defendant plead a former conviction or acquittal: ''The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of,'' specifying the time, place and court. If he plead once in jeopardy: ''The defendant pleads that he has been once in jeopardy for the offense charged,'' specifying the time, place and court. Defendant's pleas, as entered on the minutes (though his counsel offered written pleas which were much fuller), were: ''First, defendant pleads not guilty of the offense charged; second, a former acquittal; third, once in jeopardy.'' Held, that the two latter pleas were insufficient.—People v. O'Leary, 22 Pac. 24.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 363-371; 14 Cent. Dig., cols. 1266-1286, §§ 666-683.

§ 72. Pleas of not Guilty.

[a] Statute allows plea of ''not guilty'' to be entered on the minutes of the court in the absence of the prisoner.—People v. Thompson, 4 Cal. 238.

[b] A plea of not guilty imposes on the prosecution the necessity of proving the locus delicti.—People v. Bevans, 52 Cal. 470.

[c] A defendant should be allowed to retract a plea of not guilty, if his sanity at the time he pleaded is in doubt.—People v. Scott, 59 Cal. 341.

[d] Court should not charge that plea of not guilty rests defense upon the sole ground of noncommission of killing.—People v. Ah Lee, 60 Cal. 85.

[e] Plea of not guilty puts in issue all the material averments of the indictment.—People v. Ah Lee, 60 Cal. 85.

[f] The plea of not guilty puts in issue the place of the crime as well as all other material averments.—People v. Aleck, 61 Cal. 137.

[g] It is in the court's discretion whether to allow defendant to withdraw a plea of not guilty, and interpose a demurrer and motion to set aside the information.—People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347.

[h] When defendant has been arraigned, and pleaded not guilty, it is within the court's discretion at the trial to refuse to allow him to withdraw his plea, and plead guilty to the charge of previous conviction. People v. Lewis, 64 Cal. 401, 1 Pac. 490.

[i] When prisoner is properly arraigned, plea of not guilty made through his counsel is sufficient.—People v. Bowman, 81 Cal. 568, 569, 22 Pac. 917,

[j] A plea of defense entered on the minutes, reciting that ''defendant thereupon interposes a plea of not guilty as stated in the information,'' is sufficient, under Penal Code, section 1017, which provides that such entry shall recite that ''the defendant pleads that he is not guilty of the offense charged.''—People v. Wallace, 101 Cal. 281, 35 Pac. 862.

[k] Where the record showed that defendant pleaded not guilty on arraignment, and it appeared that he was actually present, evidence that the plea was actually made by defendant's counsel, and not by defendant himself, should not be heard to impeach the record, since the same plea would have been made had he stood mute.—People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

[l] By a plea of not guilty, defendant denies every fact essential to his guilt, including his identity with the person who committed the offense.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 372, 373.

§ 73. Nolle Prosequi.

Power of prosecuting attorney to dismiss criminal case. See District and Prosecuting Attorneys, § 12.

[a] The court has no power to discharge a defendant from indictment under the statute of 1851, or common law, unless these facts concur, viz., a joint indictment, a joint trial, and an application on the part of the district attorney that the defendant be discharged, to be used as a witness for the people, before he has gone into his defense.—People v. Bruzzo, 24 Cal. 41.

[b] The discharge of a prisoner that he may be a witness against others is regulated by Penal Code, sections 1099, 1101. It must be made at the trial, before the defendant has gone into his defense, by the court, either of its own motion or upon the application of the district attorney.—People v. Peter, 48 Cal. 250.

[c] Discharge of prisoner that he may be witness against others must be made at the trial, before the defendant has gone into his defense, by the court, either of its own motion or upon the application of the district attorney.—People v. Indian Peter, 48 Cal. 250.

[d] Court alone, and not prosecuting attorney, has power to dismiss criminal case.—People v. Ward, 85 Cal. 590, 24 Pac. 785.

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[e] Justice of the peace has power to determine whether or not criminal case shall be dismissed and is not bound to obey order of district attorney.—People v. Ward, 85 Cal. 590, 24 Pac. 785.

[f] Defendant and others, as county supervisors, were indicted separately for having, corruptly and in violation of official duty, voted for the payment of a claim against the county. Other indictments were also returned charging illegal voting for the appointment and payment of certain officials. Defendant was acquitted on the latter charge, and, when the case of another supervisor on this charge was called, the district attorney moved to dismiss all such cases. No list of the cases included in the motion was made, and after the order was granted, the clerk, at the suggestion of the attorney for the defendant, entered in his rough minutes a memorandum of dismissal as to the cases in the first class as well as those in the second class. Held, that, on the discovery of the mistake before entry of the order in the regular minutes, it was within the power of the court to correct the order to make it conform to the intent of the motion, and to vacate so much thereof as applied to the cases not intended to be included.—People v. Curtis, 113 Cal. 68, 45 Pac. 180.

[g] A court has power to cause its records to correctly set forth the orders which it has actually made, as well as to set aside an order which it has made through inadvertence or mistake; and if the question of mistake or inadvertence is disputed, the decision of the judge upon any controverted fact is not open to review.—People v. Curtis, 113 Cal. 68, 45 Pac. 180.

[h] Where preliminary minutes of dismissal of a prosecution were entered by mistake, they acquired no force by the subsequent filing of a formal order, attested by the clerk, as filed on the date the prosecution was dismissed; it appearing that the docket was prepared by the procurement of the attorney for defendant after the order of dismissal had been vacated, with full knowledge of the vacation.—People v. Curtis, 113 Cal. 68, 45 Pac. 180.

[i] It is sufficient for defendant, in order to make out his case for a dismissal, to show that he has been detained without a trial for more than sixty days; and the court must dismiss it upon such showing, unless good cause for detaining the defendant is shown by the prosecution. There is no presumption, in trial court, that court has acted regularly, or that good cause in fact exists.—Begerow, In re, 133 Cal. 349, 85 Am. St. Rep. 178, 65 Pac. 828.

[j] A delay of one day beyond the thirty days allowed after the defendant has been held to answer, which was owing to a natural mistake of the district attorney caused by an error of the official reporter in stating the date of the preliminary examination, is sufficiently excused to justify the discretion of the court in denying a motion to dismiss the prosecution for the delay, where it appears that the trial of the defendant took place within sixty days from the time when the crime was alleged to have been committed.—People v. Farrington, 140 Cal. 656, 74 Pac. 288.

FOR AUTHORITIES FROM OTHER STATES:

Nolle prosequi, at what time may be entered: 36 Am. Rep. 755, note; 35 L. R. A. 701, note. See, also, 12 Cyc. 374-378; 14 Cent. Dig., cols. 1290-1300, §§ 688-697.

§ 74. Discontinuance.

[a] Penal Code, section 1385, providing that the court may, either of its own motion or on the application of the district attorney, and in furtherance of justice, order an action or indictment dismissed, authorizes the dismissal of a criminal proceeding by a justice of the peace.—People v. Smith, 143 Cal. 597, 77 Pac. 449.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 378, 379; 14 Cent. Dig., cols. 1300-1302, §§ 698, 699.

X. EVIDENCE.

A. General Rules, Presumptions and Burden of Proof, §§ 75-90.

B. Facts in Issue and Relevant to Issue and Res Gestae, §§ 91-117.

C. Other Offenses and Character of Accused, §§ 118-129.

D. Materiality and Competency in General, §§ 130-148.

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H. Documentary Evidence and Exclusion of Parol Evidence Thereby, §§ 205-217.

I. Opinion Evidence, §§ 218-244.

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K. Confession, §§ 252-265.

L. Evidence at Preliminary Examination or at Former Trial, §§ 266-273.

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Evidence in civil actions. See Evidence.

Evidence peculiar to prosecution for specific offenses. See Abduction, § 11; Abortion, §§ 1, 2; Adulteration, § 2; Arson, §§ 18-30; Assault and Battery, §§ 39-43; Bigamy, § 6; Bribery, §§ 14, 15; Burglary, §§ 26-51; Conspiracy, §§ 6,

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7; Contempt, §§ 54, 55; Counterfeiting, § 5; Embezzlement, §§ 32-34; Homicide, VI; Kidnaping, § 7; Larceny, §§ 23-37; Rape, §§ 11-24; Receiving Stolen Goods, § 6; Robbery, §§ 8-10; Seduction, § 9; Sodomy, § 5.

Production of oral testimony, competency to testify, procuring attendance of witnesses and examination, cross-examination, credibility, corroboration, contradiction and impeachment of witnesses. See Witnesses.

A. GENERAL RULES, PRESUMPTIONS AND BURDEN OF PROOF.

APPLICABILITY OF GENERAL RULES OF EVIDENCE, § 75.
STATUTES PRESCRIBING RULES OF EVIDENCE, § 76.
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— ALIBI, § 79.
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— FLIGHT, § 83.
— IDENTITY OF PERSONS FROM IDENTITY OF NAMES, § 84.
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— INTENT, § 86.
— LEGALITY OF OFFICIAL ACTS, § 87.
— SANITY OR INSANITY, § 88.
— TRUTHFULNESS OF WITNESS, § 89.
— SHIFTING OF BURDEN, § 90.

§ 75. Applicability of General Rules of Evidence.

[a] General rules of evidence are the same in both criminal and civil cases.—People v. Murphy, 45 Cal. 137.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1314-1325, §§ 718-729.

§ 76. Statutes Prescribing Rules of Evidence.

[a] Statute prescribing rules of evidence in certain cases does not change common-law rules in other cases by implication.—People v. Ah Sam, 41 Cal. 653.

§ 77. Judicial Notice.

[a] Courts will take judicial notice of the counties of the state.—People v. Thompson, 28 Cal. 219.

[b] It seems that court takes judicial notice of duration of daylight or darkness at different seasons.—People v. Stevens, 68 Cal. 116, 8 Pac. 712.

[c] Judicial notice will be taken of the population of cities as shown by the United States census.—People v. Wong Wang, 92 Cal. 277, 28 Pac. 270.

[d] The courts will take judicial notice of "whatever is established by law," and hence that Los Angeles is the county seat of Los Angeles county, and in said county.—People v. Etting, 99 Cal. 577, 34 Pac. 237.

[e] Whether or not a new county had been created and existed at the time of trial is matter of judicial notice, where act for organization of county declares that it shall be and become an organized county from and after day upon which returns of election in favor of creating it shall be ascertained and declared by the board of commissioners.—People v. Wallace, 101 Cal. 281, 35 Pac. 862.

[f] Federal jurisdiction involves question of fact as to the acquisition of property by the United States by purchase, or under proceedings to condemn it, of which the courts will not take judicial notice.—People v. Collins, 105 Cal. 504, 39 Pac. 16.

[g] Where the evidence shows that the offense was committed in the town where the trial was held, the court will take judicial notice that it is the county seat, and is situated within the county, and the venue of the offense is sufficiently proved.—People v. Faust, 113 Cal. 172, 45 Pac. 261.

[h] Court will take judicial notice of time when moon arose on particular night, and it may inform itself from any source of information.—People v. Mayes, 113 Cal. 618, 45 Pac. 860.

[i] Court will take judicial notice that there can be no employment by state without authorization by the law-making power; and as it is further chargeable with knowledge of all the public and private acts of the legislative, executive and judicial departments of the state, a complaint alleging employment by the state must be regarded as presenting to the court whatever of authority there may exist in the law for his employment to the same extent as if such authority were expressly alleged.—Mullan v. State, 114 Cal. 578, 46 Pac. 670.

[j] Court takes judicial notice of existence and legal effect of its own judgments.—People v. Durrant, 119 Cal. 207, 51 Pac. 185.

[k] Court judicially knows value of American coin.—People v. Stevens, 141 Cal. 491, 75 Pac. 62.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1303-1313, §§ 700-717.

§ 78. Presumptions and Burden of Proof.

In prosecutions for homicide. See Homicide, VI, A.

[a] In the absence of testimony taken in case every legal intendment is in favor of the action of a court of record.—People v. Quincy, 8 Cal. 89.

[b] Defendant is as much bound to produce testimony to rebut testimony for prosecution which merely tends to prove his guilt as any other testimony introduced by the prosecution.—People v. Kelly, 28 Cal. 423.

[c] In criminal cases prosecution is required to prove two things: (1) That a crime has been committed; and (2) that it was committed by the person charged, and by none other.—People v. Jones, 31 Cal. 565.

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[d] When the county judge of one county, at request of county judge of another, holds court of latter for trial of an action, and the record does not show for what cause the request was made, the existence of some one of the causes mentioned in the statute will be presumed.—People v. Mellon, 40 Cal. 648.

[e] Where record shows no objection by either party during trial to exercise of jurisdiction by judge of another county it will be presumed that parties consented to request by proper judge of county, that he should hold court.—People v. Mellon, 40 Cal. 648.

[f] Where independent facts and circumstances are relied upon to identify accused as person committing the offense charged, each essential independent fact in the chain or series of facts relied upon to create a presumption of guilt must be established to a moral certainty or beyond a reasonable doubt.—People v. Phipps, 39 Cal. 326; People v. Ah Chung, 54 Cal. 398.

[g] Right of the accused to be examined in his own behalf is one which he may exercise or not, and no presumption can be properly indulged against him for his not doing so.—People v. Anderson, 39 Cal. 703.

[h] A conviction cannot be sustained without proof that the offense was committed within the county where the venue is laid.—People v. Roach, 48 Cal. 382; People v. Tarpey, 59 Cal. 371.

[i] When indictment charges defendant by several aliases, it is sufficient if proof shows that one of them is the true name.—People v. De Cleer, 60 Cal. 382.

[j] It is a cardinal rule in criminal cases that burden of proof rests on the prosecution. It would manifestly be shifting this burden from prosecution to defendant to require latter to establish his defense by a preponderance of evidence, and would deprive him of doctrine of reasonable doubt, to the benefit of which he is justly and everywhere held entitled.—People v. Cheong Foon Ark, 61 Cal. 527.

[k] It is not presumed that a boy of 16 has a business or profession.—People v. Grundell, 75 Cal. 304, 17 Pac. 214.

[l] Prosecution must establish every element of crime beyond reasonable doubt.—People v. Cohn, 76 Cal. 386, 18 Pac. 410.

[m] Where party has proof in his power which, if produced, would render material but doubtful facts certain, law presumes against him.—People v. Lee Chuck, 78 Cal. 325, 20 Pac. 719.

[n] Rule that burden of proving justification or mitigation is on defendant is confined to murder trials.—People v. Mize, 80 Cal. 45, 22 Pac. 80.

[o] An ordinance making it "unlawful for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket," is unconstitutional, in that it places on one accused of its violation the burden of showing the innocence of his possession.—Wong Hane, In re, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693.

[p] Defendant must be presumed to know his rights and privileges as a witness.—People v. Page, 116 Cal. 392, 48 Pac. 326.

[q] It is not necessary or incumbent on a defendant to explain suspicious or incriminating circumstances, and no presumption can be indulged against him for failure to do so. People v. Streuber, 121 Cal. 431, 53 Pac. 918.

[r] It will be presumed, in the absence of a showing to the contrary, that proceedings leading up to a commitment by a magistrate were regularly conducted.—People v. Warner, 147 Cal. 546, 82 Pac. 196.

[s] The presumptions which under Code of Civil Procedure, section 1963, are declared to be disputable are in effect only inferences, which in the absence of any controverting evidence the jury is required to make.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

[t] Under Code of Civil Procedure, section 1961, held that, if evidence controverting a presumption is introduced, its effect as a presumption ceases to be conclusive, and the fact in question is to be determined by the jury.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

[u] Code of Civil Procedure, section 1959, is not to be interpreted as requiring presumptions to be made, except in cases named in section 1962, where the presumption is declared to be conclusive.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 384-390; 14 Cent. Dig., cols. 643, 644, §§ 26-28; cols. 1314-1343, §§ 718-751.

§ 79. —— Alibi.

Relevancy of evidence of. See post, § 98.
Degree of proof requisite to establish. See post, § 283.

[a] An alibi need be proven only so as to raise a reasonable doubt whether defendant was present when the crime was committed.—People v. Roberts, 122 Cal. 377, 55 Pac. 137.

§ 80. —— Cause for Delay in Prosecution.

[a] Burden is on prosecution to show good cause for delay in prosecution and court cannot presume it.—People v. Morino, 85 Cal. 517, 24 Pac. 892.

§ 81. —— Competency of Juror.

[a] Burden of establishing the incompetency of a juror is cast upon the party asserting it. The juror is presumed to be competent until his incompetence is affirmatively established.—People v. Brotherton, 47 Cal. 388.

§ 82. —— Corpus Delicti.

[a] Without some evidence tending to show that crime has been committed, the question as to the person by whom committed cannot arise.—People v. Jones, 31 Cal. 565.

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§ 83. —— Flight.

[a] Flight of the accused raises no legal presumption, but is merely evidence for the jury.—People v. Wong Ah Ngow, 54 Cal. 151.

[b] Fact that defendant is in another state when arrested does not raise presumption that he is a fugitive from justice.—People v. Page, 116 Cal. 396, 48 Pac. 326.

§ 84. —— Identity of Persons from Identity of Names.

[a] No presumption of identity arises from mere identity of Christian name.—People v. Coyodo, 40 Cal. 586.

[b] Identity of person is presumed from identity of name.—People v. Rolfe, 61 Cal. 540; Finch v. Riverside etc. Ry. Co., 87 Cal. 597, 25 Pac. 765.

[c] Identity of person is presumed from identity of name.—People v. Riley, 16 Pac. 544, 75 Cal. 100.

[d] The presumption of identity of person from identity of name cannot be invoked where it is shown that there is more than one person in the vicinity to whom the name may be applied.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

§ 85. —— Innocence.

[a] Everyone accused of crime is presumed innocent until proved guilty.—People v. Sansome, 84 Cal. 451, 24 Pac. 143.

[b] The presumption of innocence does not cease upon the submission of the cause to the jury; and it is error for the court to instruct the jury that the presumption of innocence goes with the defendant until the case is finally submitted to them.—People v. O'Brien, 106 Cal. 104, 39 Pac. 325.

[c] All disputable presumptions must give way before the presumption of the innocence of defendant, which remains until the prosecution, by convincing proof, has established his guilt; and presumption of continuance of title in person in whom it was last shown to be of record, cannot overcome presumption that a defendant accused of swearing falsely that property belonged to him is innocent of crime of perjury.—People v. Strassman, 112 Cal. 683, 45 Pac. 3.

[d] Where the prosecution claimed that certain instruments executed before the defendant as a notary were forged and fictitious, while defendant testified to their genuineness, the refusal of the court to instruct as to the presumption of genuineness arising from the defendant's certificate as notary was not erroneous, as such presumption added nothing to the positive testimony of defendant, or to the presumption of his innocence, which cast the burden of proof on the prosecution.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[e] Presumption of innocence rests with defendant until jury have arrived at a verdict. People v. Winthrop, 118 Cal. 92, 50 Pac. 390.

§ 86. —— Intent.

[a] Intent with which unlawful act was done must be proved; but when an unlawful act is proved to have been done by the accused, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant.—People v. Harris, 29 Cal. 678.

[b] Every person is presumed to intend what his acts indicate his intent to have been.—People v. Bushton, 80 Cal. 162, 22 Pac. 127, 549.

[c] Presumption of unlawful intent from unlawful act may be rebutted by evidence raising reasonable doubt as to its existence.—People v. Boling, 83 Cal. 382, 23 Pac. 421.

[d] Presumption of unlawful intent from unlawful act is rebutted by evidence creating reasonable doubt of guilt.—People v. Ah Gee Yung, 86 Cal. 147, 24 Pac. 851.

[e] When specific intent is element of offense, no presumption of law can ever arise that will decide the question of intent.—People v. Johnson, 106 Cal. 289, 39 Pac. 622.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 643, 644, §§ 26-28.

§ 87. —— Legality of Official Acts.

[a] It is presumed that officer acted lawfully.—Allen v. Napa County, 82 Cal. 190, 23 Pac. 43.

§ 88. —— Sanity or Insanity.

[a] Presumption is that all men are of sufficient capacity to be responsible for crime; therefore the prisoner must establish his insanity.—People v. Myers, 20 Cal. 518; People v. Bell, 49 Cal. 485; People v. Hamilton, 62 Cal. 377; People v. Travers, 88 Cal. 233, 26 Pac. 88; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Ward, 105 Cal. 335, 38 Pac. 945.

[b] In a criminal case, if the defendant relies upon insanity as a defense, proof beyond a reasonable doubt is not required, but the burden of proof is cast upon him, and his insanity must be established by such a preponderance of evidence that, if the single issue of the sanity or insanity of the defendant was submitted to the jury in a civil case, they would find that he was insane.—People v. Coffman, 24 Cal. 230.

[c] It is only of habitual insanity, when proved once to have existed, that the law entertains the presumption that it continues until the contrary is shown; otherwise of spasmodic or temporary mania.—People v. Francis, 38 Cal. 183.

[d] Where insanity is relied upon as a defense burden of proof is on the defendant, and insanity must be clearly established by satisfactory proof.—People v. M'Donell, 47 Cal. 134.

[e] If the question arises as to whether the supposed insanity was the result of intoxication, immediately indulged, or insanity caused by the habitual and long-continued use of ardent spirits, the burden is cast upon the

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prisoner of establishing it to be of the latter character.—People v. Bell, 49 Cal. 485.

[f] Where a defendant in a criminal prosecution interposes the defense of insanity, the burden is on him to establish it by preponderating proof, and where there is a question as to whether the alleged insanity was the result of intoxication immediately, or insanity caused by an habitual and long-continued intemperate use of intoxicants, the burden is on defendant to establish insanity arising from the latter cause.—People v. Bell, 49 Cal. 485.

[g] Whether insanity once proven is presumed to continue is determined by the nature of the disease. If it is occasional or intermittent insanity no such presumption arises; but the rule is otherwise in cases of confirmed insanity of whatever nature.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[h] To establish the basis of a presumption that insanity once shown to have existed continues to exist it must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility, or even probability, of its recurrence, as in case of temporary insanity.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[i] The burden of proof as to the defense of insanity is on the defendant; and his insanity must be established by a preponderance of evidence.—People v. Hettick, 126 Cal. 425, 58 Pac. 918.

[j] An instruction that, when temporary or spasmodic insanity was proved to have existed prior to the commission of a criminal act, there was no presumption of its continuance to the specific time of such act, was proper.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[k] In a criminal case the burden is on defendant to prove by a preponderance of the evidence the defense of insanity.—People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 386-389; 14 Cent. Dig., cols. 1333-1339, §§ 742-744.

§ 89. —— Truthfulness of Witness.

[a] Every competent witness is presumed to speak the truth.—People v. McLane, 60 Cal. 412.

§ 90. —— Shifting of Burden.

[a] Burden of proof never shifts when defendant confines defense to original transaction on which charge is founded.—People v. Rodrigo, 69 Cal. 603, 604, 11 Pac. 481.

B. FACTS IN ISSUE AND RELEVANT TO ISSUE AND RES GESTAE.

RELEVANCY IN GENERAL, § 91.
IDENTITY OF ACCUSED, § 92.
—— FOOTPRINTS, § 93.
MOTIVE, § 94.
PREPARATION, § 95.
TIME OF COMMISSION OF OFFENSE, § 96.
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EVIDENCE TENDING TO INCRIMINATE OR CLEAR OTHERS, § 99.
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—— DECLARATIONS OF INJURED PERSON, § 115.
—— ACTS AND DECLARATIONS OF THIRD PERSONS, § 116.
—— SELF-SERVING DECLARATIONS, § 117.

In prosecutions for homicide. See Homicide, VI, B.

§ 91. Relevancy in General.

[a] All the facts explaining the conduct of a party charged with crime should, as a general rule be admitted in evidence.—People v. Williams, 17 Cal. 142.

[b] Evidence of collateral facts, not affording an inference as to facts in issue, is inadmissible.—People v. Tyler, 36 Cal. 526.

[c] In a prosecution for burglary, evidence that, before the offense, defendant had gone under an alias name, is admissible.—People v. Hope, 62 Cal. 291.

[d] If a witness has testified to having been on the witness-stand before, she cannot be compelled to state for what she was called to testify, if such former testimony refers to matter entirely immaterial to the cause.—People v. De Witte, 68 Cal. 584, 10 Pac. 212.

[e] Evidence tending to prejudice jury against accused is inadmissible.—People v. Hamblin, 68 Cal. 104, 8 Pac. 687.

[f] The prosecuting witness testified that he received the money of which he was afterward robbed from a relative. On cross-examination he was asked whether his relative got the money from a safe or a trunk. Held, that the answer to the question would have had no bearing on the question whether witness did in fact receive the money from his relative.—People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

[g] Introduction of evidence tending to show that accused attempted to profit from

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his wife's shame is reversible error.—People v. Dye, 75 Cal. 112, 16 Pac. 537.

[h] Remoteness of evidence goes to its weight not its admissibility.—People v. Brown, 76 Cal. 574, 18 Pac. 678.

[i] Evidence must correspond with allegations and be confined to point in issue.—People v. Bishop, 81 Cal. 117, 22 Pac. 477.

[j] On a murder trial, where a witness for the defense has testified that a certain person, who had been tried for the same offense and acquitted, had admitted the shooting of the deceased, and that he got the pistol from a third person, it is not competent for the latter to testify in rebuttal that the pistol was not procured from him, as this does not tend to show whether the one party or the other did the killing, or to contradict the witness in testifying merely as to what was told him. People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

[k] It is proper to allow one witness to robbery to explain absence of another witness who was present at time of robbery, and not present at the trial, by showing where he was at time of the trial, and why he was absent.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

[l] Evidence is admissible as to the pursuit and capture of the defendant immediately after the commission of the homicide; and the prosecution has the right to prove the facts pertaining thereto, rather than take an admission as to them from the defendant.—People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

[m] Evidence which tends in material degree to strengthen defendant's case is competent, relevant and material.—People v. Von Tiedeman, 120 Cal. 131, 52 Pac. 155.

[n] False reasons given by the accused for being in the town where the offense was committed on the day of the offense are admissible.—People v. Cuff, 122 Cal. 589, 55 Pac. 407.

[o] In a prosecution of a witness to a will for perjury in swearing that it was duly witnessed, evidence of declarations by deceased that he intended to remember the principal beneficiary named in the will offered was properly excluded, since such declarations are not admissible on questions pertaining solely to the formal execution of the will.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[p] In a prosecution for wife murder, sustaining an objection to a question asked defendant by his attorney as to who supported the family is proper.—People v. Ochoa, 142 Cal. 268, 75 Pac. 847.

[q] In a criminal prosecution, evidence tending to show a change of theory by the prosecution from that advanced on the former trial held irrelevant.—People v. Darr (Cal. App.), 84 Pac. 457.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 390, 391; 14 Cent. Dig., cols. 1343-1347, §§ 752-758.

§ 92. Identity of Accused.

[a] Although witnesses may not positively, and beyond a doubt, identify the person of one on trial for a crime, yet, if they express the belief that he was the person they saw, their evidence is properly submitted to the jury for what it is worth.—People v. Rolfe, 61 Cal. 540.

[b] A witness in a criminal case need not be absolutely certain in his testimony as to the identification of defendant, to render such testimony competent.—People v. Young, 102 Cal. 411, 36 Pac. 770.

[c] It was incompetent to show that witness was equally as confident of identity of defendant when talking with defendant's wife, as when testifying to such identity at trial.—People v. Altmeyer, 135 Cal. 80, 66 Pac. 974.

[d] In a prosecution for homicide, evidence concerning the attire worn by defendant prior to the homicide held admissible in corroboration of a pawnbroker's identification of defendant as the person who purchased the pistol with which the crime was committed.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 42 L. R. A. 432, note. See, also, 12 Cyc. 392-394; 14 Cent. Dig., cols. 1364-1370, §§ 767-772.

§ 93. —— Footprints.

[a] Evidence of measurements of footprints about the body of the deceased, though made two weeks after the homicide, is competent. People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

§ 94. Motive.

[a] Evidence not going to the direct guilt of defendant upon the charge of larceny, may be introduced for the purpose of showing knowledge on his part in other and similar transactions, with the view of determining his motive in the transaction in issue.—People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

[b] On a trial for assault with a deadly weapon, where the prosecuting witness, on direct examination, testified that the only reason he could give for the shooting was that he had once notified the authorities that defendant was one of a number who had assaulted a person, it was error to exclude, on cross-examination, a question as to what part defendant took in such assault.—People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

FOR AUTHORITIES FROM OTHER STATES:

Motive or intent, accused, when may testify to: 21 Am. St. Rep. 318, note. See, also, 12 Cyc. 394; 14 Cent. Dig., cols. 1370-1372, §§ 773-777.

§ 95. Preparation.

[a] Where, on a prosecution for murder, the theory of the prosecution was that it had been committed in pursuance of a conspiracy

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on the part of defendant and other convicts to escape from the penitentiary, held proper to admit evidence that one of the convicts had dynamite.—People v. Murphy, 146 Cal. 502, 80 Pac. 709.

§ 96. Time of Commission of Offense.

[a] Even where time is essence of crime facts may be proved by one witness and date or time by another.—People v. Sheldon, 68 Cal. 437, 9 Pac. 457.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1383, 1384, § 786.

§ 97. Degree of Crime, Under Plea of Guilty.

[a] Authority to determine degree of crime under plea of guilty includes power to take testimony for that purpose.—People v. Chew Lan Ong, 141 Cal. 552, 553, 99 Am. St. Rep. 88, 75 Pac. 186.

§ 98. Alibi.

Burden of proving. See ante, § 79.
Degree of proof requisite to establish. See post, § 283.

[a] Evidence that defendant was found several hours after the crime, and after a warrant had been issued for him, apparently in a place of hiding, was not admissible to disprove an alibi.—People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719.

[b] Where two witnesses, claiming to be particeps criminis with defendant in the larceny of certain cattle, testified to having taken possession of the cattle with defendant on the 20th of a certain month, and other parties testified to having seen defendant in possession of the cattle a day or two later in an adjoining county, an instruction that the essence of the crime, which was charged as having been committed on or about the 20th, was the felonious stealing, and that, if this was done by defendant, although not perhaps on the day mentioned, but within a few days of that time it was sufficient to justify conviction, is not objectionable in depriving defendant of evidence introduced for the purpose of an alibi, and tending to show that on the 20th, at least, he was in a town several miles from the scene of the larceny; but the evidence as to the alibi is still entitled to consideration.—People v. French, 95 Cal. 371, 30 Pac. 567.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 404; 14 Cent. Dig., cols. 1356-1358, § 763.

§ 99. Evidence Tending to Incriminate or Clear Others.

[a] On the trial of an information for robbery, evidence having been introduced tending to show that a peculiar boot track had been traced from the scene of the robbery to the house of one of the defendants, it is error to exclude evidence offered by the defense to show that two men, other than the defendants, had been seen on the third day after the robbery within three days' foot travel of the place of the occurrence, one of whom wore a boot which left precisely similar marks to those traced to the defendant's house.—People v. Myers, 70 Cal. 582, 12 Pac. 719.

[b] The question asked a witness whether a third person lived in the same town with defendant at the time of the alleged crime is immaterial where no attempt is made to show that such person could by any possibility have been the culprit, instead of defendant.—People v. Bentley, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799.

[c] Evidence is admissible on the part of a defendant tending to show that another person committed the crime, and the fact that such other person had been tried and acquitted for the same offense does not alter the case. The judgment of acquittal of such third person is not admissible in evidence upon the prosecution of the defendant.—People v. Mitchell, 100 Cal. 328, 34 Pac. 698.

[d] In a trial for murder it appeared that deceased lived in the same house with defendant and another man, whose body, with the top of the head shot away, was found in the river along with that of deceased. Deceased was killed by a blow from an ax. Held, that evidence of the finding of blood stains, and portions of a human skull and brains, in front of the house, some distance from the river, was admissible to show that the person whose body was found with that of deceased could not have killed him.—People v. Smith, 106 Cal. 73, 39 Pac. 40.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 399, 400; 14 Cent. Dig., cols. 1384-1387, §§ 789-791.

§ 100. —— To Establish Guilt of Accused.

[a] In a prosecution for larceny, evidence as to acts of another person, committed in the presence of the defendant, and showing a connection between them, is admissible, although no conspiracy between them to steal has been shown.—People v. Wilson, 66 Cal. 370, 5 Pac. 624.

[b] Evidence of absence or flight of alleged accomplice is inadmissible.—People v. Lee Chuck, 78 Cal. 322-326, 30 Pac. 719.

[c] Where a murder was committed either by accused or another, and accused claimed on the trial that it was committed by such other, the prosecution may prove by the latter that he did not kill the deceased.—People v. Clarke, 130 Cal. 642, 63 Pac. 138.

§ 101. Evidence Explanatory of Facts in Evidence.

[a] Malice proved by preconcert, going armed, usually enters into the inquiry. To rebut this or any inference arising from the acts done defendant may show why he was armed, upon what errand he went, and the like facts.—People v. Williams, 17 Cal. 142.

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§ 102. **Explaining Facts not in Evidence.**

[a] Accused cannot account for his flight unless prosecution prove flight as tending to show his guilt.—People v. Clark, 84 Cal. 580, 24 Pac. 313; People v. Shaw, 111 Cal. 171, 43 Pac. 593.

§ 103. **Circumstances Tending to Show Guilt.**

[a] Evidence of circumstances tending to connect defendant with offense is admissible. People v. Lowrey, 70 Cal. 194, 11 Pac. 605.

[b] Where M., C., and K. were charged with robbery, evidence of the keeper of a boarding-house, at which they stopped prior to the commission of the offense, that C. and K. registered under assumed names, was admissible.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

[c] In a prosecution for robbery, evidence that defendant was booked at the police station by an assumed name was inadmissible.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

§ 104. **Subsequent Conduct of Accused.**

[a] The testimony of the officer making arrest, as to the manner and conduct of defendant when arrested, is admissible in connection with defendant's declarations.—People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347.

[b] Evidence that defendants, charged with burglary, on being allowed to go by the officer arresting them, did not return the next morning, as they promised to do, and never made claim to the goods seized by the officer, is admissible as showing that they did not obtain the goods innocently.—People v. Ashmead, 118 Cal. 508, 50 Pac. 681.

[c] Evidence of the circumstances of defendant's arrest, including his declarations at the time, and articles taken from his person, showing that he was in hiding, disguising himself, denying his identity, and preparing to escape, is admissible.—People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

[d] Where it is clear that the defendant knew that an officer, called in for the purpose of arrest, shortly after the assault, intended to arrest him, although the officer did not in words inform him of such intention, evidence that the defendant, with force and arms, resisted the arrest is admissible for the prosecution.—People v. Hawkins, 127 Cal. 372, 59 Pac. 697.

[e] Evidence of the appearance of defendant, accused of burglary, when his shoes were compared and found to correspond with certain tracks, and when brought before the prosecuting witness for identification, is admissible against him.—People v. Rowell, 133 Cal. 39, 65 Pac. 127.

[f] On a prosecution for larceny, evidence as to a conversation between the prosecuting witness, defendant, and another in regard to having a prosecution against an alleged accomplice of defendant, growing out of the robbery, dismissed, was properly received to show the defendant's solicitude in settling the matter.—People v. Ardell, 135 Cal. xix, 66 Pac. 970.

[g] Conduct of suspected party when charged with crime—e. g., flight, concealment, falsehood, breaking jail, etc.—may be proved to show consciousness of guilt and criminal intent.—People v. Cole, 141 Cal. 90, 74 Pac. 547.

[h] Deception, falsehood and fabrication as to facts of case are admissible on same theory as flight and concealment to show consciousness of guilt and criminal intent.—People v. Cole, 141 Cal. 90, 74 Pac. 547.

[i] The conduct, acts, and expressions of a person accused of crime, at the time of his arrest, are admissible against him.—People v. Abbott, 4 Pac. 769.

[j] In a prosecution for homicide, it was proper to show what defendant did or did not do on the day immediately after the tragedy as indicating that his acts were not those of an innocent person.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 394-398; 14 Cent. Dig., cols. 1371-1383, §§ 776, 778-785.

§ 105. **Flight or Attempt to Escape.**

[a] Attempt of prisoner to escape, or flight, with knowledge of accusation, is an admissible circumstance, but does not legally prove guilt.—People v. Strong, 46 Cal. 303.

[b] The flight or concealment of a person charged with crime is a circumstance which the jury may take into consideration in determining his guilt.—People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; People v. Wong Ah Ngow, 54 Cal. 151; People v. Welsh, 63 Cal. 167.

[c] On a trial for assault, a witness was permitted to testify that the wounded man pointed at defendant, who was about twenty feet off, and told the witness to arrest him, and that thereupon defendant immediately ran away. Held, that the evidence was admissible.—People v. Lock Wing, 61 Cal. 380.

[d] Evidence of flight of defendant is admissible as circumstance jury may consider.—People v. Fine, 77 Cal. 149, 19 Pac. 269.

[e] While actual flight of a defendant accused of murder is evidence of guilt, the advice or suggestion of third persons to the defendant that he should flee is not admissible against him.—People v. Lee Dick Lung, 129 Cal. 491, 62 Pac. 71.

§ 106. **Intoxication.**

[a] Evidence of drunkenness of defendant at time of alleged crime "can only be considered by the jury for the purpose of determining the degree of the crime."—People v. Soto, 63 Cal. 165.

[b] In a prosecution for forgery, evidence that defendant's intemperate habits had so far impaired his mind as to render him incapable of distinguishing between right and

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wrong is admissible.—People v. Blake, 65 Cal. 275, 4 Pac. 1.

[c] Drunkenness on the part of the defendant cannot be inquired into where the only inquiry is as to whether the crime is murder in the second degree or manslaughter. People v. Langton, 67 Cal. 427, 7 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 404; 14 Cent. Dig., cols. 1354-1356, § 761.

§ 107. Insanity.

[a] Insanity of prisoner at instant of commission of offense can only be established by evidence tending to prove that he was insane at some period before or afterward.—People v. March, 6 Cal. 543.

[b] Under an indictment for murder, the defendant is permitted to introduce evidence of insanity of his parents if there is evidence in the case tending to prove personal insanity by reason of want of apparent motive at the time of the murder.—People v. Smith, 31 Cal. 466.

[c] In proof of insanity under a plea of not guilty evidence of the insanity of the defendant, both before and after the commission of the offense, is admissible.—People v. Farrell, 31 Cal. 576.

[d] In the absence of a plea of insanity, evidence that defendant had long ago been hit on the head, and mentally and physically injured, is immaterial.—People v. Davis, 36 Pac. 96.

[e] Evidence of treatment by family as imbecile or insane is inadmissible.—People v. Pico, 62 Cal. 50.

[f] Evidence of defendant's sanity before and after commission of crime is admissible to enable jury to determine his condition at time of commission of offense.—People v. Lee Fook, 85 Cal. 301, 24 Pac. 654.

[g] Proof that a defendant, upon trial for murder, had committed the crime of incest with his daughter is admissible in rebuttal, where the claim of the defense is that the defendant had become insane through fear that the deceased was trying to debauch defendant's daughter.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[h] The record in an examination on a plea of insanity in a trial for murder, being evidence of defendant's mental condition at the time of examination, is not admissible to prove his mental condition on the date of the killing.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[i] In a case where one accused of murder defended on the ground of partial insanity and insane delusions, testimony from his neighbors and acquaintances that they did not know of his insanity and delusions is admissible, as the fact that they did not know of his delusions was some proof that no such delusions existed, or, if it is admitted that partial insanity was shown, then such evidence was admissible to show that as to all other subjects the defendant was sane.—People v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72-n., 51 Pac. 329.

[j] Proof that some months prior to the commission of the murder defendant was in such fear of his life that he insisted on the witness accompanying him home, and stated that "he was fearful they would take his life," is incompetent and immaterial on the issue of defendant's insanity, in the absence of evidence that defendant's fears partook of the character of a delusion.—People v. Ellsworth, 127 Cal. 595, 60 Pac. 161.

[jj] Evidence of the declarations of defendant, made to a witness some months prior to the commission of the murder for which defendant was on trial, and indicating that "he was in great peril of his life" at that time, is inadmissible as proof of the defense of insanity.—People v. Ellsworth, 127 Cal. 595, 60 Pac. 161.

[k] Evidence of acts and conduct of accused are admissible on issue of insanity.—People v. Manoogian, 141 Cal. 594, 75 Pac. 177.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 403; 14 Cent. Dig., cols. 1347-1354, § 760.

§ 108. Hypnosis.

[a] Evidence showing that defendant was told by her husband to kill deceased, and that she did so, does not tend to prove that defendant was hypnotized, and render admissible evidence of the effect of hypnotism on people subject to its influence.—People v. Worthington, 105 Cal. 166, 38 Pac. 689.

§ 109. Evidence in Mitigation of Punishment.

[a] Court has discretion to determine whether it will hear evidence in mitigation of punishment, and it is proper for it to refuse to hear incompetent evidence offered for that purpose.—People v. McKay, 122 Cal. 628, 55 Pac. 594.

§ 110. Corroborating Evidence.

[a] The prosecution in an action for embezzlement cannot introduce evidence in chief that the prosecuting witness has money on deposit, in order to strengthen her testimony. People v. O'Brien, 106 Cal. 104, 39 Pac. 325.

§ 111. Res Gestae—What Constitutes.

[a] In homicide certain testimony of defendant held res gestae and subject to contradiction.—People v. Lee, 1 Cal. App. 169, 81 Pac. 969.

[b] Defendant was accused of murder of one who was injuring a mining claim. Held, that evidence offered by defendant of his ownership of the claim at the time was admissible to show the condition of his mind and the character of the offense, and as part of the res gestae.—People v. Costello, 15 Cal. 350.

[c] The rule, as sometimes held, that the declarations of a party at the time of doing

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an act which is legal evidence are admissible as parts of the res gestae, cannot be so applied as to admit, as against third persons, declarations of a past act having the effect of criminating such third persons.—People v. Simonds, 19 Cal. 275.

[d] Narratives of past occurrence are not part of res gestae, and are inadmissible.—People v. Ehring, 65 Cal. 135, 3 Pac. 606.

[e] On a trial for robbery, the prosecution will not be allowed to give in evidence admissions by the prosecuting witness, made shortly after the commission of the crime, not under oath, and not in the presence of defendant, in contradiction to the testimony of the prosecuting witness himself, under oath. Such admissions are no part of the res gestae. People v. Ehring, 65 Cal. 135, 3 Pac. 606.

[f] In a prosecution for murder, the condition in which the body and clothing were found is admissible in evidence, being part of the res gestae.—People v. Majors, 65 Cal. 138, 3 Pac. 597.

[g] In a criminal prosecution evidence of incidents occurring subsequent to the day on which the offense is alleged to have been committed is admissible when such facts relate to a transaction which partly occurred on the day of the commission of the offense.—People v. Lee Ah Chuck, 66 Cal. 662.

[h] It was proper, as part of the res gestae, to admit in evidence the articles found in defendant's possession which were claimed to have belonged to deceased.—People v. Smith, 106 Cal. 73, 39 Pac. 40.

[i] On a trial of an indictment for robbery, articles produced from the house where the robbery was committed, and shown to have been used by defendant in connection with the offense, are admissible as part of the transaction.—People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

[j] On a trial for robbery, evidence of solicitations by defendant to the person robbed to visit with him the house where the robbery was committed, and of statements by defendant to a third person as to his purpose, is admissible.—People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

[k] One of the stolen purses dropped by a codefendant, containing thirty dollars, which there was evidence tending to show had been passed by the defendant to the codefendant, was admissible in evidence, as part of the res restae.—People v. Piggott, 126 Cal. 509, 59 Pac. 31.

[l] Evidence of witnesses that they were in defendant's saloon at a certain time on the night of the shooting, and saw a party who was arrested with defendant playing cards with decedent, and that an hour thereafter they were awakened by cries of murder, is admissible as a part of the res gestae.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[m] Evidence, in a prosecution for murder, of a conversation between defendant and deceased shortly before the homicide, is not inadmissible because there were prior conversations which the witness had not heard.—People v. Daily, 135 Cal. 104, 67 Pac. 16.

[n] In a prosecution for grand larceny of a watch, where a witness testified that, as he passed defendant and prosecutor, he noticed the prosecutor's watch and chain, and that two minutes later he saw defendant leave the prosecutor, his further testimony that he then noticed prosecutor's vest was unbuttoned, and the watch and chain gone, was admissible as part of the res gestae.—People v. Taylor, 136 Cal. xix, 69 Pac. 292.

[o] Where, in a prosecution for seduction under promise of marriage, alleged to have occurred November 27, 1900, there was no proof that alleged preparations for prosecutrix's marriage to defendant, made in the spring of 1901, had been brought to defendant's knowledge, such preparations constituted no part of the res gestae, and were inadmissible to corroborate prosecutrix.—People v. Tibbs, 143 Cal. 100, 76 Pac. 904.

[p] On a prosecution for murder, certain evidence held properly admitted as res gestae. People v. Woods, 147 Cal. 265, 81 Pac. 652.

FOR AUTHORITIES FROM OTHER STATES:

Res gestae, declarations, when constitute a part of: 58 Am. Rep. 184, note. See, also, 16 Cyc. 1148-1159; 14 Cent. Dig., cols. 1401-1453, §§ 804-821.

§ 112. —— Acts and Declarations at or Near Time of Offense.

[a] Where, on trial for assault with intent to commit murder, evidence had been offered tending to show that defendant was first assaulted by the party injured and several other persons, held, that what these persons said at the time they made the assault, illustrative of its object and the motive prompting it, was part of the res gestae, and admissible for defendant.—People v. Roach, 17 Cal. 297.

[b] Under an indictment for an assault with intent to commit murder, what occurred between the defendant and the party assaulted, immediately after the assault, in a shop to which such party had retreated, is admissible in evidence as part of the res gestae, at least on the question of intent.—People v. Yslas, 27 Cal. 630.

[c] Declarations, to be part of the res gestae, are not required to be precisely concurrent in point of time with the principal transaction. If they spring from it, tend to explain it, are voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they are to be regarded as contemporaneous, and are admissible.—People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49.

[d] On a trial for an assault with intent to commit murder, evidence of a conversation between the parties immediately after the assault, which is perhaps a portion of the res gestae, is admissible, but it is important, and should influence the jury, only in case the evidence with respect to the assault itself is conflicting; and if such conversation is erro-

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neously ruled out by the court, the judgment will not be disturbed, if the bill of exceptions fails to show such conflict.—People v. Swenson, 49 Cal. 388.

[e] Evidence that a person accused of an assault with intent to commit murder had a knife and pistol on his person nearly a month after the commission of the alleged assault is inadmissible; and the cross-examination of a defendant thereon, against his objection, is inexcusable, and prejudicial error.—People v. Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

[f] Facts and circumstances immediately attending homicide are part of res gestae.—People v. Glover, 141 Cal. 245, 74 Pac. 745.

[g] In a prosecution for robbery, evidence of occurrences transpiring within a very few hours before the robbery, and so intimately connected with it that a substantial statement of the facts constituting the robbery could not have been made without reference to such preceding circumstances was admissible.—People v. Linares, 142 Cal. 17, 75 Pac. 308.

§ 113. —— Acts and Declarations Before Commission of Offense.

[a] The defendant was shown to have borrowed a chisel on the day of the murder. Held, that his declarations as to what he intended to do with the chisel, not being shown to have any apparent connection with the commission of the offense charged, were not admissible as part of the res gestae.—People v. Wyman, 15 Cal. 70.

[b] In the trial of an indictment for murder, evidence of a fight which took place between the deceased and the defendant, six hours before the homicide, is not admissible in evidence, in favor of the defendant, either as a part of the res gestae, or to show a provocation for the murder.—People v. Smith, 26 Cal. 665.

[c] It seems that, in a trial for murder, evidence of declarations of the defendant, made an hour or so before the homicide, is inadmissible.—People v. Henderson, 28 Cal. 465.

[d] In a prosecution for robbery, testimony of defendant and two witnesses as to conversations between him and them, on the night of the robbery, on his way from his shop to the place where the crime was committed, is not admissible as part of the res gestae.—People v. Kalkman, 72 Cal. 212, 13 Pac. 500.

§ 114. —— Other Offenses Forming Part of Transaction.

[a] The test of the admissibility of evidence of other offenses than the one charged is the connection between the offenses in the mind of the criminal. When such a connection is shown, evidence of the others is admissible, for the purpose of establishing identity in developing the res gestae, or in making out the guilt of the defendant by a chain of circumstances connected with the crime for which he is on trial. If, however, the evidence of another offense serves in no way to identify the thing stolen, or connect the defendant with the offense for which he is on trial, it forms no part of the res gestae, and as evidence of a distinct offense, unconnected in character and purpose with the offense charged, is inadmissible.—People v. Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846.

[b] When two persons were robbed on prosecution for robbery of one, evidence of robbery of other is part of res gestae and admissible.—People v. Nelson, 85 Cal. 425, 24 Pac. 1006.

[c] During a struggle between defendant and deceased in a house to which defendant had come to arrest deceased and another person, the fatal wound was given. Held, on prosecution for the homicide, that the shooting of defendant at the other person outside the house, where such person followed defendant a few minutes after the homicide, was not part of the res gestae.—People v. Lane, 100 Cal. 379, 34 Pac. 856.

[d] In a prosecution against an agent for embezzlement of money collected by him from a debtor of his principal, after his discharge, the indictment alleging ownership in the debtor, evidence of embezzlement from the principal about the same time is admissible.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520..

[e] Upon a charge of an assault upon a person named, with intent to commit murder, evidence of an assault upon and pursuit of a third person, which was part of the same affray and of the res gestae, is admissible; and it is immaterial that such assault and pursuit was immediately subsequent to the assault charged and not prior thereto, or at the same moment therewith.—People v. Teixeria, 123 Cal. 297, 55 Pac. 988.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1407-1414, § 807.

§ 115. —— Declarations of Injured Person.

Admissibility in general. See post, § 179.

[a] Defendant was tried for killing A by stabbing him. After A was stabbed, he ran, and while running, cried murder and said defendant had stabbed him. A witness who saw him run and heard him cry was asked by the prosecuting attorney whether, "immediately after" running, A said that defendant had stabbed him. Held, inadmissible, as not referring to a declaration that was part of the res gestae.—People v. Ah Lee, 60 Cal. 85.

[b] Declarations of a person who has been shot, made a half an hour after the shooting, as to what he intends to do to the man who shot him, are not part of the res gestae of the shooting.—People v. Westlake, 62 Cal. 303.

[c] Statements of deceased, made some days after the shooting, are not admissible as part of the res gestae.—People v. Wasson, 65 Cal. 538, 4 Pac. 555.

[d] In a murder case, a statement by deceased that defendant shot him, made almost eo instanti of the firing of the fatal shot, and before defendant had gone farther than

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across the street from the place of the homicide, is admissible, though not made in the immediate presence of the defendant.—People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

[e] On a trial for murder, evidence that a few minutes after the shooting, deceased said that defendant shot her, is not admissible as part of the res gestae.—People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115, disapproving People v. Vernon (1868), 35 Cal. 49.

[f] Where defendants were charged with murdering L. while he was their prisoner on the charge of shooting V., and it was claimed that defendants conspired with V. to murder L., and that L. did not in fact shoot V., declarations of V., shortly after he was shot (the state claimed, accidentally), that he did not know who shot him, were admissible.—People v. Van Horn, 119 Cal. 323, 51 Pac. 538.

[g] Where prosecuting witness in a trial for larceny testified that, when defendant pulled his hand out of witness' pocket, he grabbed him, and, on seeing him pass something to a codefendant, grabbed him also, and shouted to a friend, "They are robbing me," such statement was a part of the res gestae, and hence admissible.—People v. Piggott, 126 Cal. 509, 59 Pac. 31.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1441-1450, §§ 819, 820.

§ 116. —— Acts and Declarations of Third Persons.

Admissibility in general. See post, § 182.

[a] On the trial of an indictment for murder, evidence of the acts and exclamations of the wife of the prisoner, made and performed at the time of the killing, and in his presence or hearing, is admissible on behalf of the prosecution.—People v. Murphy, 45 Cal. 137.

[b] Where, in a prosecution of a witness to a will, which was in the beneficiary's handwriting, for perjury in swearing at the probate thereof that it was duly witnessed, it was claimed that there was conspiracy between the beneficiary and the witnesses to defraud the estate by a false will, testimony by a witness of a conversation in which the beneficiary tried to get him to not testify before the grand jury that she had offered him five thousand dollars to sign the will as a witness, was properly admitted.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[c] On a prosecution for the larceny of cattle branded M D, evidence of what the mother of the accused, claiming cattle of the same brand, told him, in explanation of the trip he made at his mother's request to the county where the alleged theft was committed, two years later, was not a part of the res gestae, but hearsay, and too remote on the question of the accused's intention at the time of the alleged theft.—People v. Green, 143 Cal. 8, 76 Pac. 649.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 441; 16 Cyc. 1155; 14 Cent. Dig., cols. 1420-1423, § 812; col. 1430, § 815; cols. 1450-1453, § 821.

§ 117. —— Self-serving Declarations.

Admissibility of self-serving declarations. See post, § 176.

[a] Declaration of defendant in his own interest made after he was in custody of officer is no part of res gestae.—People v. Dice, 120 Cal. 201, 52 Pac. 477.

C. OTHER OFFENSES AND CHARACTER OF ACCUSED.

OTHER OFFENSE AS EVIDENCE OF CRIME CHARGED, § 118.
RELEVANT EVIDENCE ALSO TENDING TO PROVE OTHER OFFENSE, § 119.
TO SHOW GUILTY KNOWLEDGE, § 120.
TO SHOW INTENT OR MOTIVE, § 121.
TO SHOW SYSTEM OR HABIT, § 122.
CHARACTER OR REPUTATION—IN GENERAL, § 123.
—— AS EVIDENCE OF OFFENSE, § 124.
—— GOOD CHARACTER, § 125.
—— EVIDENCE ADMISSIBLE TO PROVE, § 126.
—— EVIDENCE BASED ON INFORMATION OBTAINED AFTER ARREST, § 127.
—— REBUTTAL OF EVIDENCE OF GOOD CHARACTER, § 128.
—— EFFECT OF PROOF OF GOOD CHARACTER, § 129.

§ 118. Other Offense as Evidence of Crime Charged.

[a] The prosecution in a criminal case cannot give evidence to show that the prisoner committed or attempted to commit another offense for the purpose of raising the inference that he is guilty of the crime with which he stands charged.—People v. Jones, 31 Cal. 565.

[b] On trial of a defendant charged with one crime, testimony is not admissible to show that he had been engaged in plans for the commission of other crimes.—People v. Jones, 32 Cal. 80.

[c] If a defendant, who is on trial for a larceny, becomes a witness in his own behalf, a question put to him on cross-examination, as to whether he has not been previously arrested for another larceny, is not objectionable on the ground that the defendant cannot be shown to be guilty of the offense charged by showing that he had been accused of another crime.—People v. McCauley, 45 Cal. 146.

[d] On trial for one offense evidence of other crimes is inadmissible.—People v. Riley, 75 Cal. 112, 16 Pac. 544.

[e] Evidence of facts tending to prove another distinct offense is inadmissible to raise inference that defendant committed crime in question.—People v. Bishop, 81 Cal. 117, 22 Pac. 477.

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[f] Evidence of immoral acts of accused not connected with crime charged is inadmissible. People v. Tiley, 84 Cal. 653, 24 Pac. 290.

[g] Admission of evidence of other offenses to show likelihood of defendant's guilt is reversible error.—People v. Stewart, 85 Cal. 175, 176, 24 Pac. 722.

[h] Evidence of other offenses is inadmissible for purpose of increasing likelihood that accused committed offense charged.—People v. Stewart, 85 Cal. 175, 24 Pac. 722.

[i] Defendant was prosecuted for murder, committed while attempting to arrest deceased for an assault on a third person, with whom he had quarreled. The court permitted evidence to be introduced showing that deceased and the third person had made up their quarrel before the arrest was attempted. Held, that this was error, since it was none the less defendant's duty to make the arrest. People v. Adams, 85 Cal. 231, 24 Pac. 629.

[j] Evidence of prior acts of embezzlement similar to one charged in information is admissible.—People v. Neyce, 86 Cal. 395, 24 Pac. 1091.

[k] As a general rule evidence of a distinct and substantive offense cannot be admitted to show the commission of another offense, and this rule excludes all evidence of collateral facts, or those which are incapable of affording a reasonable presumption or logical inference as to the principal fact or matter in dispute; and evidence of another offense cannot be given unless there is some clear connection between the two offenses by which it may be logically inferred that if guilty of the one the defendant is also guilty of the other.—People v. Lane, 100 Cal. 379, 34 Pac. 856.

[l] Guilt cannot be shown, nor can the weight of evidence be increased by showing that the defendant has committed other offenses; and mere proximity of time and place do not render evidence of another offense admissible.—People v. Tucker, 104 Cal. 440, 38 Pac. 195; People v. Baird, 104 Cal. 462, 38 Pac. 310.

[m] Where a defendant accused of larceny upon a certain day denies that he committed the larceny, and does not claim that he took the money from a sleeping friend to preserve it for him, evidence that on the previous day a distinct offense was committed by the defendant in taking other money from under the pillow of the same person is not admissible.—People v. Tucker, 104 Cal. 440, 38 Pac. 195.

[n] It is not competent to show that defendant has been guilty of other offenses for purpose of raising presumption, either of law or fact, of his guilt in case under consideration.—People v. Sears, 119 Cal. 271, 51 Pac. 325.

[o] Evidence of other offenses is inadmissible, e. g., that defendant tried to entice other girls to house of prostitution.—People v. Elliott, 119 Cal. 594, 51 Pac. 955.

[p] Under certain conditions prosecution is entitled to prove against a defendant an offense other than the one on which he is being tried.—People v. Searcey, 121 Cal. 4, 53 Pac. 359.

[q] A city marshal called by the state to prove the flight of accused was permitted to testify that he had been looking for accused for about two weeks before the crime in question was committed, and from other parts of his testimony it appeared that he wanted to and did arrest him for a different crime than that charged, and wholly disconnected from it. Held, that the admission of such testimony was error.—People v. Vidal, 121 Cal. 221, 53 Pac. 558.

[r] Evidence of declarations of defendant as to intention of himself and another person to commit other and distinct offenses of robbery is inadmissible.—People v. Lynch, 122 Cal. 501, 55 Pac. 248.

[s] Evidence that on a prior occasion defendant, charged with making and uttering a fictitious order for the payment of money, wrote a check under an assumed name, is not admissible.—People v. Arlington, 123 Cal. 356, 55 Pac. 1003.

[t] In a prosecution for murder, the record evidence that the deceased had been previously convicted of an assault on a third person is inadmissible.—People v. Griner, 124 Cal. 19, 56 Pac. 625.

[u] On a trial for forging a check, evidence that other checks are forgeries is not admissible to prove the corpus delicti, but only—after that has been established—to show guilty intent.—People v. Bird, 124 Cal. 32, 56 Pac. 639.

[v] Upon the trial of person accused of murder, evidence is admissible to show the condition of the body of the deceased immediately after the homicide, and that the pocket of the deceased, containing a purse with change in it, was partly turned inside out. The fact that the evidence might tend to show that the motive of the homicide was robbery does not render it inadmissible as tending to show a distinct crime.—People v. Gleason, 127 Cal. 323, 59 Pac. 592.

[w] In a prosecution for extortion, it was error to allow evidence of a conversation, held prior to the extortion charged, in which one of the defendants stated that he and the other defendant were making arrangements to blackmail persons other than the prosecuting witness, since such evidence was not connected with the crime charged, and was prejudicial to defendant.—People v. Williams, 127 Cal. 212, 59 Pac. 581.

[x] Upon a charge of crime involving sexual intercourse by consent, other incidents may be proved, not primarily to prove habitual or continuous criminality, or other offenses, but merely as tending to prove the one specific offense for the alleged commission of which the defendant is on trial.—People v. Williams, 133 Cal. 165, 65 Pac. 323.

[y] On a prosecution for subornation of perjury, it was error to permit the state to introduce evidence that the accused had advised the same witness to conceal himself to avoid the service of a subpoena, and thus

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persuaded him from attending the trial, since this act, in itself, was a misdemeanor, under Penal Code, section 136, and an indictment for one crime cannot be supported by proof of another.—People v. Carpenter, 136 Cal. 391, 68 Pac. 1027.

[z] On the trial of a convict for murder in resisting arrest after his escape, where the evidence showed that defendant, with twelve others, conspired to effect their escape, and a part of the case of the prosecution consisted of proof that the thirteen convicts had been convicted and sentenced to the state prison, and were at the time of the escape serving their sentences, it was proper for the jury to consider the evidence of such trials and convictions, including that of defendant.—People v. Wood, 145 Cal. 659, 79 Pac. 367.

FOR AUTHORITIES FROM OTHER STATES:

See 62 L. R. A. 194, note. See, also, 12 Cyc. 405, 406; 14 Cent. Dig., cols. 1454-1464, §§ 822-824.

§ 119. Relevant Evidence Also Tending to Prove Other Offense.

[a] On a prosecution for burglary, evidence that, at the time defendants were arrested they were attempting another burglary, and that there was found on their persons, at such time, part of the stolen property, is admissible to identify defendant as one of the persons who committed the burglary charged.—People v. McGilver, 67 Cal. 55, 7 Pac. 49.

[b] Evidence tending directly to prove defendant's guilt of offense charged is admissible, though it also tends to prove a distinct felony.—People v. Rogers, 71 Cal. 565, 12 Pac. 679.

[c] In the trial of a constable for murder in making an arrest, evidence of deceased's quarrel and fight with another party was properly admitted, as bearing on the question of whether deceased had committed a felony, and whether defendant had a right to arrest him without a warrant, and to kill him if necessary to effect the arrest.—People v. Adams, 85 Cal. 231, 24 Pac. 629.

[d] Upon the trial of a person charged with one offense, proof of another and distinct offense is ordinarily inadmissible when it has no tendency to establish the offense charged; yet whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, and in any case where two persons are murdered or assaulted at the same time, and as part of the same transaction, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.—People v. Walters, 98 Cal. 138, 32 Pac. 864.

[e] Testimony by a committing magistrate that a person who had been charged with an assault to murder one of the defendants was found not guilty of the charge upon the same day that the deceased, who was surety on his bond, was killed, does not necessarily tend to show the commission of another crime by such defendant.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[f] Although ordinarily evidence of another offense cannot be given, yet, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion; and where the evidence tends to establish the offense charged, the fact that it tends also to show an attempt of the defendant to commit another offense does not render it inadmissible.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1040.

§ 120. To Show Guilty Knowledge.

[a] Evidence of other offenses is admissible to show guilty knowledge and intent, if tending to connect defendant with offense charged. People v. Pool, 27 Cal. 573.

[b] In a prosecution for forgery, the state sought to introduce evidence that defendant had been prosecuted before for forging notes, and acquitted. It was objected that, since defendant had been acquitted, the state was estopped from introducing evidence of his prosecution. Held, that the estoppel extended only to the fact of the forgery itself, which was a fact necessarily found by the jury, and not to the question whether defendant was endeavoring to pass bills knowing them to be forged.—People v. Frank, 28 Cal. 507.

[c] The admissibility in evidence, on trials for forgery, of other instruments claimed to have been forged and uttered by the defendant, is to be left in a great measure to the discretion of the presiding judge.—People v. Frank, 28 Cal. 507.

[d] In a prosecution for embezzlement, previous acts of embezzlement similar to the one charged may be shown as evidence of guilty knowledge.—People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Neyce, 86 Cal. 393, 24 Pac. 1091.

[e] In a trial of a defendant charged with having forged and uttered a draft, evidence that the person whose name purported to be signed to such draft had, prior to its date, been murdered by defendant, is pertinent and material, both as tending to prove that the instrument was forged, and also the knowledge of its false character by defendant when he uttered it; and it is not rendered inadmissible by the fact that it tends to prove the commission by defendant of a separate crime. People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[f] In a prosecution for forgery, evidence of other forgeries of similar instruments about the same time was admissible to show guilty knowledge and intent.—People v. McGlade, 139 Cal. 66, 72 Pac. 600.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 408; 14 Cent. Dig., cols. 1464-1471, §§ 825-829.

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§ 121. To Show Intent or Motive.

[a] In a prosecution for the murder of an officer, committed while he was in fresh pursuit of defendant, who, with others, had committed a felony, evidence of the commission of the felony and defendant's connection therewith was admissible to show that his motive for the killing was to escape arrest. People v. Pool, 27 Cal. 572.

[b] In a prosecution for embezzlement of public money, evidence of similar acts is admissible to prove criminal intent.—People v. Gray, 66 Cal. 271, 5 Pac. 240.

[c] Prosecution may prove commission of other offenses in exceptional cases to prove intent with which act charged was done.—People v. Stewart, 85 Cal. 175, 24 Pac. 722.

[d] In a murder case, where the evidence shows that a feud existed between the families of defendant and deceased, evidence that immediately after defendant shot deceased, he fired the other barrel of his gun, and wounded deceased's mother, who was present, is admissible to show motive.—People v. Walters, 98 Cal. 138, 32 Pac. 864.

[e] Evidence tending to show a material fact or motive, although it also tends to prove the commission of another offense by the defendant, is relevant and admissible.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[f] On a trial for embezzlement, evidence that money belonging to defendant's employer, received by defendant, other than that specified in the information, was not entered on the books or accounted for, is admissible to show an intent to conceal the appropriation of the money mentioned in the information.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[g] On trial of a deputy county assessor for embezzlement, evidence that he collected other taxes than those alleged to have been embezzled, and failed to pay them over, is admissible to show guilty intent in appropriating the money alleged to have been embezzled.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[h] Where a defendant is accused of an assault with a deadly weapon with intent to murder a police officer who was endeavoring to arrest him for shooting at another person, evidence is admissible to show the circumstances of the previous shooting for the purpose of showing the motive of the defendant in the commission of the offense charged, and to prove his intent in resisting arrest and assaulting the policeman, and the fact that such evidence of motive and intent includes the proof of a distinct offense for which the arrest was sought does not render such evidence inadmissible.—People v. Wilson, 117 Cal. 688, 49 Pac. 1054.

[i] Evidence in chief that a defendant charged with making and uttering a fictitious order for the payment of money had on prior occasions gone under assumed names, and had been arrested for drunkenness, is not admissible, as tending to show intent, system, and guilty knowledge.—People v. Arlington, 123 Cal. 356, 55 Pac. 1003.

[j] Evidence that defendant, two months after the embezzlement charged in the information, embezzled another sum of money from the prosecuting witness is not admissible to show his intention in taking the first sum. People v. Hill, 34 Pac. 854.

FOR AUTHORITIES FROM OTHER STATES:

See 62 L. R. A. 199, 214, 277, notes. See, also, 1 Cyc. 158, 186; 12 Cyc. 408-410; 14 Cent. Dig., cols. 1471-1481, §§ 830-832.

§ 122. To Show System or Habit.

[a] On a trial for embezzlement, evidence that money belonging to defendant's employer, received by defendant, other than that specified in the information, was not entered on the books or accounted for, is admissible to show the system adopted by defendant to conceal the conversion of money.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[b] On a prosecution for procuring a certain person to falsely register as a voter in a precinct, others may testify that defendant also procured them to falsely register.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

[c] In a prosecution for incest, after the state has proved and elected to rely on a particular act of incestuous intercourse on a day certain, testimony of either prior or subsequent acts of incestuous intercourse or improper familiarity is admissible, not as evidence of independent offenses on which a conviction may be had, but as corroborative evidence showing the incestuous inclination of the parties.—People v. Koller, 142 Cal. 621, 76 Pac. 500.

FOR AUTHORITIES FROM OTHER STATES:

See 62 L. R. A. 199, 218, 291, note. See, also, 12 Cyc. 411; 14 Cent. Dig., cols. 1481-1485, §§ 833, 834.

§ 123. Character or Reputation—In General.

[a] Fact that defense made by woman charged with the murder of a man is rendered more formidable when considered in connection with the good character which the law presumes her to possess does not of itself open the door for the prosecution to prove that her general character for chastity is bad.—People v. Fair, 43 Cal. 137.

[b] General character for chastity of a female charged with the murder of a man is no more necessarily involved in the question of her guilt or innocence than her general character in any other respect; and on the trial of such a person the prosecution will not be allowed to introduce testimony upon the point, unless defendant initiate the inquiry.—People v. Fair, 43 Cal. 137.

[c] The presumption of a character of ordinary fairness, with which the law, for the purposes of trial, clothes a person accused of crime, is one to which he is entitled, and which cannot be put in peril unless he, by introducing testimony in reference thereto,

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elects to put it distinctly in issue.—People v. Fair, 43 Cal. 137.

[d] Where the defendant's good reputation has been fully established, and the prosecution has offered no evidence to impeach it, an objection to questions as to defendant's reputation is properly sustained.—People v. Moan, 65 Cal. 532, 4 Pac. 545.

[e] Since, in a criminal prosecution, the defendant cannot prove particular acts of his good conduct, neither can the state in rebuttal prove particular acts of his bad conduct, but proof of general character is alone admissible.—People v. Bezy, 67 Cal. 223, 7 Pac. 643; People v. Bishop, 81 Cal. 113, 22 Pac. 477.

[f] It is not error to exclude evidence of the good disposition of defendant, other than his general good reputation.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[g] Evidence as to the character of defendant must be confined to his general reputation. People v. Gordon, 103 Cal. 568, 37 Pac. 534.

[h] On a trial for larceny it was not error to exclude testimony of defendant's habits as to steadiness, drinking, or anything of that sort.—People v. Chrisman, 135 Cal. 282, 67 Pac. 136.

[i] Where, on a prosecution for murder, the theory of the state was that defendant and other convicts had conspired to escape from the state prison, and that the crime was committed in pursuance thereof, held not error to sustain an objection to the question whether defendant was a good prisoner.—People v. Murphy, 146 Cal. 502, 80 Pac. 709.

FOR AUTHORITIES FROM OTHER STATES:

Good character of the accused or defendant, when admissible: 41 Am. Rep. 120, note.

Reputation of an accused, or of a witness, whether admissible: 50 Am. Rep. 98, note.

Good character of the accused, admissibility and effect of evidence of in criminal prosecutions; 103 Am. St. Rep. 889, note; 20 L. R. A. 609, note. See, also, 3 Cyc. 1056; 12 Cyc. 412-418; 14 Cent. Dig., cols. 1487-1504, §§ 836-846.

§ 124. —— As Evidence of Offense.

[a] It is not the policy of the law to allow proof of bad character of defendant accused of crime, as a step in proof of guilt.—People v. Whiteman, 114 Cal. 338, 46 Pac. 99.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 413-415; 14 Cent. Dig., cols. 1488-1490, § 839.

§ 125. —— Good Character.

[a] Evidence of character can only be considered in relation to particular crime charged in cases where the guilt of the accused is doubtful.—People v. Roberts, 6 Cal. 214.

[b] Evidence of good character as defense in criminal cases should be restricted to the trait of character which is in issue.—People v. Josephs, 7 Cal. 129; People v. Fair, 43 Cal. 137.

[c] Evidence of the character of a defendant on trial for murder must be confined to testimony of his character for peace and quietude.—People v. Stewart, 28 Cal. 395; People v. Bezy, 67 Cal. 223, 7 Pac. 643.

[d] The defendant has the right to support the presumption of innocence by evidence that his personal character in respect to the trait involved in the charge has previously been good.—People v. Ashe, 44 Cal. 288.

[e] In trials for criminal offenses, the defendant may introduce evidence of his previous good character and conduct for the purpose of repelling the charge made against him.—(Cal. 1875) People v. Shepardson, 49 Cal. 629.

[f] Court instructed jury, with reference to the evidence of good character, that "such evidence is to be considered and applied by the jury in the case in this way: as a circumstance tending to throw some light upon the principal question involved: Did or did not the defendant fire this shot? Did or did not he commit the offense? Held, not error. People v. Soto, 63 Cal. 165.

[g] On a trial for murder it is proper to exclude testimony as to the reputation for "truth, honesty, and integrity" of defendant, who was a witness in his own behalf, where those traits of character were not questioned by the prosecution.—People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

[h] Evidence of good character is not admissible in mitigation of the penalty, where defendant pleads guilty.—People v. Miller, 114 Cal. 10, 45 Pac. 986.

§ 126. —— Evidence Admissible to Prove.

[a] Witness should be asked if he lived in county and knew defendant's reputation therein before he is asked what it is.—People v. Rodrigo, 69 Cal. 603, 11 Pac. 481.

[b] Before witness can be asked as to defendant's reputation, it must be shown that he knows it.—People v. Marseiler, 70 Cal. 100, 11 Pac. 503.

[c] In prosecution for burglary a certificate of the discharge of defendant from the United States army, certifying to his good character, is not admissible as evidence of his good character.—People v. Eckman, 72 Cal. 582, 14 Pac. 359.

[d] Testimony that a letter found in the possession of defendant at the time of his arrest, and advising his change of residence to evade the officers of the law, was written by a highbinder society, or "tong," which could be "hired for murder, or blackmail, or anything you want, for money," is inadmissible, on a trial for homicide, for the purpose of showing the character of defendant, when it is not shown that defendant is a member of

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such society.—People v. Lee Dick Lung, 129 Cal. 491, 62 Pac. 71.

[e] Testimony of a witness that he knows the general reputation of defendant, and that it is good, as far as he knows, is evidence of good character.—People v. Hoagland, 137 Cal. 218, 69 Pac. 1063.

[f] Where a defendant is permitted to prove his character for peace and quiet, it must be done by proving general reputation in the community or communities where he has lived.—People v. Murphy, 146 Cal. 502, 80 Pac. 709.

§ 127. —— Evidence Based on Information Obtained After Arrest.

[a] Testimony of witness that he had learned since arrest of defendant that his reputation before arrest was bad is inadmissible. People v. Fong Ching, 78 Cal. 175, 20 Pac. 396; People v. McSweeney, 38 Pac. 743.

§ 128. —— Rebuttal of Evidence of Good Character.

[a] Where defendant in a criminal case showed that his general reputation for truth and veracity was good in the place where he resided, rebuttal evidence that his reputation in that respect was bad in a town twelve miles distant, where he had lived two and one-half years before, was properly admitted. People v. Nunley, 142 Cal. 441, 76 Pac. 45.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1493, 1494, § 842.

§ 129. —— Effect of Proof of Good Character.

[a] Evidence of character can only be considered in reference to whole case; not to any isolated fact.—People v. Milgate, 5 Cal. 127.

[b] Evidence of good character is to be considered with other evidence on the question of guilt or innocence.—People v. Raina, 45 Cal. 292.

[c] Good character must be considered with all other evidence in the case, and if the jury have reasonable doubt of guilt they must acquit.—People v. Bowman, 81 Cal. 570, 22 Pac. 917.

[d] Good character of a defendant is of itself a sufficient fact from which a reasonable doubt of guilt may arise, which will entitle him to an acquittal.—People v. Lee, 8 Pac. 685.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 417; 16 Cyc. 1283; 14 Cent. Dig., cols. 1501-1504, § 846.

D. MATERIALITY AND COMPETENCY IN GENERAL.

MATERIALITY AND COMPETENCY DISTINGUISHED, § 130.
MATERIALITY IN GENERAL, § 131.
COMPETENCY IN GENERAL, § 132.
POSITIVENESS AND CERTAINTY OF EVIDENCE, § 133.
REMOTENESS OF EVIDENCE, § 134.
EVIDENCE DESIGNED TO APPEAL TO COMPASSION, § 135.
NEGATIVE TESTIMONY, § 136.
EVIDENCE PROCURED BY DISSEMBLANCE OR PLOT TO ENTRAP, § 137.
EVIDENCE PROCURED BY EAVESDROPPING, § 138.
PROOF OF MOTIVE, § 139.
INTOXICATION, § 140.
EVIDENCE OF PART OF CONVERSATION, § 141.
ACCOUNTING FOR ABSENCE OF WITNESS, § 142.
ARTICLES TAKEN FROM PRISONER, § 143.
ARTICLES TAKEN FROM PLACE WHERE CRIME WAS COMMITTED, § 144.
COMPELLING ACCUSED TO STAND FOR IDENTIFICATION, § 145.
EXPERIMENTS, § 146.
——BY HYPNOTIST, § 147.
EVIDENCE ADMISSIBLE BECAUSE OF PRIOR ADMISSION OF SIMILAR EVIDENCE, § 148.

§ 130. Materiality and Competency Distinguished.

[a] There is a wide distinction between immaterial and incompetent evidence. Evidence may be material and tend to prove an issue, but incompetent under the rules of law for that purpose.—People v. Manning, 48 Cal. 335.

§ 131. Materiality in General.

[a] Testimony proffered by the defendants in reference to the disappearance and whereabouts of the daughter of the prosecuting witness, on the day of the robbery, is properly excluded as not pertinent to any issue in the case.—People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080.

[b] Where one accused of arson testified positively that he had nothing to do with the burning, and knew nothing about it, he was not prejudiced by a refusal to permit him to testify that on his preliminary examination he had so stated.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 390; 14 Cent. Dig., cols. 1505-1522, §§ 847-864.

§ 132. Competency in General.

[a] It is competent for prosecution to prove that property was stolen in another county before it was brought into that in which venue is laid.—People v. Mellon, 40 Cal. 648.

[b] When explanation of reason of an act is material, what was said by another to induce such action is competent.—People v. Hodgden, 55 Cal. 78, 36 Am. Rep. 30.

[c] Where, on the trial of an indictment containing two counts, one of which is defective, evidence pertinent to both is received under a ruling that both are good, a verdict will not be sustained because the evidence is sufficient

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to sustain a conviction on the count which is good.—People v. Smith, 103 Cal. 563, 37 Pac. 516.

[d] On the trial of one charged with forgery, the testimony of an accomplice, to whom was submitted a writing of defendant for the purpose of proving his handwriting, that the writing was a memorandum of extracts from the Bankers' Almanac, containing a list of towns, and that witness and accused were picking out the towns, was incompetent, in so far as it authorized an inference that accused was thus engaged in an attempt to commit a similar offense to the one charged. People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 390, 405; 14 Cent. Dig., cols. 1523-1534, §§ 865-878.

§ 133. Positiveness and Certainty of Evidence.

[a] A witness, in stating facts within his knowledge or personal observation, is not required to testify with that certainty which excludes all doubt, and the use of the word "presume" by the witness is not ground for striking out his evidence, when, as used by him, it evidently meant nothing more than a statement of his best recollection as to particulars of a fact observed.—People v. Soap, 127 Cal. 408, 59 Pac. 771.

[b] Where an officer, in testifying to stains on defendant's coat when arrested, said that they were "moss stains" made by green moss such as grows on the bark of trees, an objection that the witness, under Code of Civil Procedure, section 1845, could testify "of those facts only which he knows of his own knowledge; that is, which are derived from his own perception," was untenable.—People v. Nunley, 142 Cal. 105, 441, 75 Pac. 676.

§ 134. Remoteness of Evidence.

[a] Where defendant is accused of robbing several Chinamen, who were partners and cotenants in the cultivation of land, evidence that other parties than the defendant had learned prior to the robbery that a payment of rent was about to become due, and was to be made by the Chinamen, is not admissible, such knowledge not being proved to have been brought home to the defendant prior to the robbery.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

FOR AUTHORITIES FROM OTHER STATES:

12 Cyc. 390; 14 Cent. Dig., cols. 1505, 1506, § 848.

§ 135. Evidence Designed to Appeal to Compassion.

[a] Evidence of tender age of children of accused designed only to move jury to compassion is properly excluded.—People v. Dice, 120 Cal. 201, 52 Pac. 477.

§ 136. Negative Testimony.

[a] Where a defendant charged with homicide introduced evidence that deceased had been seen on several occasions with a pistol, it was proper to allow the state to show in rebuttal that an intimate acquaintance, who had lived in the same house with deceased for a considerable time, had never seen deceased with a pistol.—People v. Grimes, 132 Cal. 30, 64 Pac. 101.

[b] In a prosecution under Penal Code, section 476, for uttering a fictitious instrument, evidence that a person's name did not appear in the directory is competent as tending to show that there was no such person in the county.—People v. Terrill, 133 Cal. 120, 65 Pac. 303.

[c] It is not error to admit negative testimony of witnesses who state that they had never heard the reputation of the deceased for peace and quiet discussed, and to refuse to strike out such testimony.—People v. Adams, 137 Cal. 580, 70 Pac. 662.

[d] Where, in a prosecution for robbery, a witness had testified that he was city electrician, and that he knew of the electric lights at the intersection of certain streets in the city, and that no report came in from there on January 14, 1902, he was entitled to testify that reports were not made unless a light went out, to show the ordinary course of business of the city with regard to its lights and their general or usual condition.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

§ 137. Evidence Procured by Dissemblance or Plot to Entrap.

[a] On a trial for bribery, certain evidence held admissible under the rule justifying dissemblance in order to procure evidence of guilt.—People v. Bunkers (Cal. App.), 84 Pac. 364.

[b] On a trial of a state senator for receiving a bribe in violation of Penal Code, section 86, the testimony of witnesses, plotting to entrap accused, is not inadmissible as contrary to public policy.—People v. Bunkers (Cal. App.), 84 Pac. 364.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 401, 402; 14 Cent. Dig., cols. 1529, 1530, § 876.

§ 138. Evidence Procured by Eavesdropping.

[a] Where a witness in a criminal prosecution is called by the state to prove a confession made by accused, it is not a valid objection to the testimony that the witness was eavesdropping when he heard the defendant make the statements.—People v. Cotta, 49 Cal. 166.

§ 139. Proof of Motive.

[a] In every criminal case proof of motive is competent.—People v. Durrant, 116 Cal. 208, 48 Pac. 75.

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§ 140. Intoxication.

[a] Where intent is not an element of offense, evidence as to whether defendant was drunk or sober at time of its commission is immaterial.—People v. Marseiler, 70 Cal. 100, 11 Pac. 503.

§ 141. Evidence of Part of Conversation.

See, also, post, § 164.

[a] On a trial for murder it was not error to permit a witness to testify to a part of a material conversation, though he did not profess to be able to testify to the entire conversation.—People v. Rader, 136 Cal. 253, 68 Pac. 707.

§ 142. Accounting for Absence of Witness.

[a] The state may show why a person who was present at a robbery had gone away, as otherwise he should have been called as a witness.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., col. 1508, § 852.

§ 143. Articles Taken from Prisoner.

[a] Various articles taken from defendant's person at time of his arrest are admissible when tending to establish guilt.—People v. Winthrop, 118 Cal. 91, 50 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

See 59 L. R. A. 466, note. See, also, 12 Cyc. 402; 14 Cent. Dig., cols. 1530, 1531, § 877.

§ 144. Articles Taken from Place Where Crime was Committed.

[a] Exhibits of articles taken from house where crime was committed, identified by victim and shown to have been used by accused in connection with crime, are admissible as part of transaction and as tending to corroborate prosecuting witness.—People v. Winthrop, 118 Cal. 91, 50 Pac. 390.

§ 145. Compelling Accused to Stand for Identification.

[a] To order defendant to stand up for identification by a witness is not compelling him to become a witness against himself, within the meaning of the constitutional provision that "no person shall be compelled, in any criminal case, to be a witness against himself."—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

§ 146. Experiments.

[a] Expert evidence is admissible to show farthest distance at which clothing would be powder-marked with rifle where it is material to determine distance between parties where shooting occurred.—People v. Clark, 84 Cal. 578, 24 Pac. 313.

[b] Evidence of result of experiments in chemistry, toxology, use of firearms, etc., is admissible.—People v. Levine, 85 Cal. 43, 22 Pac. 969, 24 Pac. 631.

[c] If one experiment is permitted, others made by opposite party and relating to same subject must also be permitted.—People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

[d] Admission of proof of experiments rests in sound discretion of trial court.—People v. Woon Tuck Wo, 120 Cal. 296, 52 Pac. 833.

[e] Rule that evidence of experiments may be used in proper cases is sustained by weight of authority.—People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

[f] Evidence of experiments is only admissible when proved to have been made under conditions essentially the same as those that existed in the case on trial.—People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

[g] Evidence of experiments which would tend to confuse and mislead, rather than enlighten, jury, is properly excluded.—People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

[h] Experiments for the prosecution made for the purpose of contradicting defendant's witnesses as to the hearing of certain sounds in the night-time in the vicinity of defendant's cabin, are admissible, though made in the daytime, if the principal conditions were the same. The jury can weigh the evidence, and make allowances for any difference in atmospheric conditions between the daytime and the night-time.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[i] In a prosecution for murder, where defendant and deceased were alone at the time of the killing, and the defendant, as a witness, had testified in detail as to the occurrences connected therewith, stating that deceased was shot as he was trying to pull a rifle away from defendant, with which defendant was protecting himself while trying to escape after a personal encounter, diagrams, shown to be correct, showing the angle defined by the course of the bullet which killed deceased, and testimony as to the result of experiments in firing bullets into woolen cloth, such as worn by deceased, at about the distance which accused testified deceased was from the gun when shot, were properly admitted in rebuttal.—People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014.

[j] In a prosecution for homicide, certain bullets fired by an expert from the pistol alleged to have been used by accused held not objectionable on the ground that they were not fired under the same conditions as those existing at the time of the homicide.—People v. Weber (Cal. Sup.), 86 Pac. 671.

§ 147 —— By Hypnotist.

[a] In a trial for murder, testimony of an alleged hypnotist that defendant, while hypnotized, denied his guilt, was properly excluded.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

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§ 148. Evidence Admissible Because of Prior Admission of Similar Evidence.

[a] Introduction of irrelevant evidence by one side does not justify similar evidence by the other.—People v. Dye, 75 Cal. 110, 16 Pac. 537.

[b] In a criminal case, where defendants introduced a part of the written testimony of a certain witness, taken at the preliminary examination, it was proper for the prosecution to explain such testimony by introducing the preceding part thereof, which related to substantially the same subject.—People v. Arthur, 93 Cal. 536, 29 Pac. 126.

[c] Where, in a prosecution for murder, the defense has shown threats by decedent against accused, it is proper to allow the state, in rebuttal, to give evidence of threats and ill-feeling by accused against decedent; it not having touched that matter in its opening.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1514-1522, §§ 861, 862.

E. BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE.

NECESSITY FOR BEST EVIDENCE, § 149.
RECORD AS BEST EVIDENCE, § 150.
ADMISSIBILITY OF SECONDARY EVIDENCE, § 151.
—— LAYING FOUNDATION, § 152.
DEMONSTRATIVE EVIDENCE, § 153.
—— EXPERIMENTS IN COURT, § 154.
—— HANDWRITING FOR COMPARISON, § 155.
—— DRESSMAKER'S FRAME OR MODEL, § 156.
CLOTHING OF VICTIM OF MURDER, § 157.
—— IDENTIFICATION, § 158.

§ 149. Necessity for Best Evidence.

[a] Rule that the best evidence must always be offered does not entitle the prosecution to insist that accused shall testify as to matters peculiarly within his knowledge. The fact that his evidence is entitled to less weight than the testimony of a disinterested person is sufficient reason for desiring to establish his defense, so far as possible, by other testimony.—People v. Anderson, 39 Cal. 703.

[b] Facts must be shown by best evidence of which the case admits.—People v. Urquidas, 96 Cal. 239, 31 Pac. 52.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1353-1538, §§ 879-881.

§ 150. Record as Best Evidence.

[a] Record is best evidence of previous conviction.—People v. Reinhart, 39 Cal. 449; People v. Melvane, 39 Cal. 614; People v. McDonald, 39 Cal. 697.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1538-1548, §§ 882 886.

§ 151. Admissibility of Secondary Evidence.

[a] Witness may be asked if he was not arrested for a given offense, and objection that record is the best evidence does not lie. People v. Manning, 48 Cal. 335.

[b] Parol evidence as to the aggregate of insurance policies on a building which accused was charged with firing to obtain the insurance is admissible over objection of not being the best evidence, where it was shown the policies had been canceled, and were without the court's jurisdiction.—People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

[c] Where, on a trial for burglary, based on accused's entering a building with intent to commit arson, the motive assigned was a purpose to secure insurance on the loss of the goods by the fire, the fact that the property was insured was provable by parol.—People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

§ 152. —— Laying Foundation.

[a] Where a contract is stated in an indictment, and it appears by the evidence on the trial to have been in writing, secondary proof of its contents cannot be made, unless it is shown that it could not be produced.—People v. Hust, 49 Cal. 653.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1548-1552, §§ 887, 888.

§ 153. Demonstrative Evidence.

[a] In a prosecution for forgery by altering a check, where a certain chemical is found in defendant's possession, similar checks to that forged in which this chemical has been used as an experiment are admissible in evidence.—People v. Brotherton, 47 Cal. 388.

[b] Box of sand containing impression of defendant's shoe, proved to be similar to tracks found in vicinity of homicide, is admissible.—People v. Searcey, 121 Cal. 5, 6, 53 Pac. 359.

[c] In a trial for murder alleged to have been committed with a rifle which defendant borrowed, it is not error to admit the rifle in evidence, when properly identified.—People v. Sullivan, 129 Cal. 557, 62 Pac. 101.

[d] Where a witness arrived at the place a few minutes after a homicide, and while the body of deceased was still lying where it fell, it was not error to permit such witness to illustrate to the jury, by a diagram, the location of the surrounding objects when he arrived.—People v. Shears, 133 Cal. 154, 65 Pac. 395.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1552-1561, §§ 891-893.

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§ 154. —— Experiments in Court.

[a] Witness having testified to his former experiment may be made to repeat it before the jury on cross-examination or in rebuttal. People v. Durrant, 116 Cal. 218, 48 Pac. 75.

[b] In a prosecution for homicide, it was not error for the court to permit the attorney general to arrange certain bullets in a particular order and after having placed them in juxtaposition submit them to the jury.—People v. Weber (Cal. Sup.), 86 Pac. 671.

§ 155. —— Handwriting for Comparison.

[a] In a prosecution for forging a money order other instruments of the same general character, proven in defendant's handwriting, are admissible before the jury for the purpose of comparison, and also, it would seem, for the purpose of showing his guilty knowledge in passing the said order.—People v. Bibby, 91 Cal. 470, 27 Pac. 781.

[b] Under Code of Civil Procedure, section 1944, requiring the judge to be satisfied that a writing, shown a witness for the purpose of establishing proof of handwriting, was genuine, before he could admit it for that purpose, it was improper to show the circumstances under which it was written.—People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

§ 156. —— Dressmaker's Frame or Model.

[a] The use of a dressmaker's frame in court for convenience in exhibiting the clothing of a murdered woman, which was introduced in evidence, and in regard to which much testimony was taken, was not prejudicial to the defendant, no claim being made that the frame represented the height, size or figure of the deceased.—People v. Durrant, 116 Cal. 179, 48 Pac. 75.

[b] Under Penal Code, section 1102, a model held admissible in evidence on the trial of a criminal case.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

§ 157. Clothing of Victim of Murder.

[a] Clothing worn by deceased is admissible to show violence of blow and direction of incision.—People v. Knapp, 71 Cal. 3, 11 Pac. 793.

[b] Under Code of Civil Procedure, section 1954, there was no abuse of discretion in admitting in evidence in a murder trial shirts and cuffs with the deceased's laundry mark thereon, found in the possession of the accused, together with other articles admitted to belong to the deceased.—People v. Westlake, 134 Cal. 505, 66 Pac. 731.

§ 158. —— Identification.

[a] Where a witness testified that he saw deceased's vest when it was removed from the body, after it had lain in the grave over five months, and that it was then in the same condition as when he examined and brushed it just after deceased's death, held, that it was not error to admit the vest in evidence.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[b] On a prosecution for murder, two shirts and two pairs of cuffs found in the possession of the accused, and alleged to belong to the deceased, were admitted in evidence. The articles bore a certain laundry mark, and the proprietor, bookkeeper and driver of the delivery wagon of a laundry all testified that deceased had once sent laundry to their office, and that it bore the same mark as on the articles received in evidence; that it was the only mark of the kind received in the laundry, and was recorded in the laundry books. One of the cuffs had on it the initials of the deceased. Held, that the articles were sufficiently identified as the property of the deceased to be admissible in evidence.—People v. Westlake, 134 Cal. 505, 66 Pac. 731.

F. DECLARATIONS, ADMISSIONS AND HEARSAY.

1. Admissions of Accused, §§ 159-175.
2. Self-serving Declarations and Acts, §§ 176-178.
3. Acts and Declarations of Persons Injured, §§ 179-181½.
4. Declarations of Third Persons, §§ 182-186.
5. Hearsay, §§ 187-192.

1. Admissions by Accused.

ADMISSIBILITY IN GENERAL, § 159.
ADMISSIBILITY DEPENDENT ON MODE OF MAKING, § 160.
DECLARATION WHILE DRUNK, § 161.
DECLARATIONS MADE UNDER DURESS, § 162.
STATEMENTS MADE UNDER EXPECTATION OF IMMUNITY FROM PROSECUTION, § 163.
SCRAP OF CONVERSATION, § 164.
ADMISSION OF PART OF CONVERSATION AS MAKING WHOLE ADMISSIBLE, § 165.
SOMNILOQUY, § 166.
CONFLICTING STATEMENTS, § 167.
REFUSAL TO ANSWER QUESTIONS OR REFUTE ACCUSATION, § 168.
FACTS PROVABLE BY ADMISSIONS, § 169.
ADMISSIONS BY COUNSEL, § 170.
STATEMENTS BEFORE GRAND JURY, § 171.
PLEA OF GUILTY, § 172.
STATEMENTS MADE IN CRIMINAL PROSECUTIONS, § 173.
STATEMENTS MADE IN CIVIL PROCEEDINGS, § 174.
LAYING FOUNDATION, § 175.

§ 159. Admissibility in General.

[a] Extrajudicial statements of a prisoner, unaccompanied with other facts or circumstances, are not sufficient proof of the corpus delicti, and will not justify a conviction.—People v. Jones, 31 Cal. 565.

[b] Where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence. (Sharpstein and Thornton, JJ.)—People v. Ah Lee, 60 Cal. 85.

[c] In criminal prosecution evidence of a declaration made by the defendant after his arrest to the sheriff, to the effect that he

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would plead guilty voluntarily, is admissible when no attempt was made by the sheriff to coerce the defendant, and the only inducement held out to him was the probability that if he was guilty, and so pleaded, he would get a shorter sentence.—People v. Eckman, 72 Cal. 582, 14 Pac. 359.

[d] Upon prosecution for grand larceny, evidence of a witness tending to show that the defendant persuaded and induced him to leave the country is admissible in so far as it shows the acts and declarations of the defendant.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[e] Declarations of the defendant, so far as referring to his connection with a distinct offense of horse-stealing, are incompetent, but his declarations, so far as referring to a general scheme or plan of horse-stealing, or horse-stealing as a business, are competent, and admissible against him.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[f] It is not error to admit evidence as to what defendant said as to the shooting immediately after it occurred, where the statement was entirely voluntary.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[g] Testimony of policeman as to conversation occurring between a Chinese witness and one of the Chinese defendants and himself is admissible, where it appears that defendant was sufficiently acquainted with the English language to understand all that was said, and did understand it.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[h] Conversations between accused and another, wherein accused urged him to go in with him in a scheme to kidnap a wealthy man, are relevant and material in prosecution for enticing victim to lonely house, robbing him and endeavoring to extort money from him by keeping him bound and confined there.—People v. Winthrop, 118 Cal. 90, 50 Pac. 390.

[i] Evidence of circumstances attending defendant's arrest including his declarations at the time is admissible.—People v. Winthrop, 118 Cal. 91, 50 Pac. 390.

[j] In a prosecution for burglary evidence is admissible that on account of statements made to the arresting officer by defendants, which if true tended to show their innocence, he released them upon their promise to return the next morning, the goods being left in his custody, but that they did not return then or at all, and that they were rearrested, after considerable search, several days later.—People v. Ashmead, 118 Cal. 508, 50 Pac. 681.

[k] Written confession is not best evidence of anything but its own contents, and does not preclude admission of evidence of other declarations and statements.—People v. Cokahnour, 120 Cal. 254, 52 Pac. 505.

[l] Upon the trial of a charge of criminal libel, the oral admissions of the defendant as to his ownership of the paper which published the libel, and also a lease to him and another person jointly, designated as publishers thereof, and signed by the defendant, are admissible, as tending to prove his ownership in whole or in part.—People v. Miller, 122 Cal. 84, 54 Pac. 523.

[m] In a prosecution for the larceny of a gray horse, defendant asked a witness if, at a certain time and place, "defendant and another person did not have some conversation in regard to a gray horse, and where this defendant could find that gray horse." Held, that it was not error to reject the question as too general, though it would have been admissible if it had been explicitly directed to a conversation, which defendant afterward testified to as having been had at said time and place, wherein he was told by the other person that he had a gray horse, which he would turn into defendant's pasture, and which defendant might sell, and on his return to his home that night he found the gray horse in his pasture.—People v. Schell, 123 Cal. 358, 55 Pac. 1006.

[n] Subsequent declarations of the defendant, made on evening of offense, which clearly identify transaction spoken of by him as crime with which he is charged, were admissible against him, upon a sufficient showing of time, place and circumstances of declaration.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[o] Declarations of defendant, on trial for rape, which clearly referred to the crime in question, and which were properly described as to time, place and circumstances, were admissible in evidence against him.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[p] Where defendant was on trial for murder, it was not error to permit a witness to testify that some hours after the killing defendant said, "I am sorry I got into this trouble, but, as for killing W., I don't care any more for that than I do for killing a jack rabbit."—People v. Shears, 133 Cal. 154, 65 Pac. 296.

[q] On the day of and prior to commission of the alleged rape defendant had said to a stable-keeper that he was procuring a conveyance to have carnal knowledge of a "little girl," without giving any idea as to who the girl was. Other evidence showed that he enticed prosecutrix into the conveyance, and drove to the place where the crime was committed. Held, no error in admitting defendant's declaration to the stable-keeper.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[r] Where on trial for larceny the taking and ownership are undisputed, but defendant claims he bought the bees of a person who cannot be found, all his statements concerning such person are admissible, as substantive evidence of his guilt.—People v. Chrisman, 135 Cal. 282, 67 Pac. 136.

[s] Where, on a prosecution for assault with intent to commit rape, the theory of the state was that defendant had enticed prosecutrix into his barber-shop, and there committed the assault, it was proper to admit the testimony of the father of the prosecutrix that when he reached the shop, shortly after the alleged assault, he asked defendant if prosecutrix had

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been there, and that defendant said that she had, such evidence being competent proof, as an admission by defendant of a material fact in the case.—People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

[t] In prosecution for larceny of horse, testimony as to statements by accused, in response to accusatory statements in his presence, held admissible.—People v. Melandrez (Cal. App.), 88 Pac. 372.

§ 160. Admissibility Dependent on Mode of Making.

[a] Where an attending physician took notes of the declarant's statements as he made them, and then retired to another room and wrote them out, after which he read the writing, sentence by sentence, to declarant, who affirmed it as being what he wished to say, the writing is shown to be the declarant's declaration, although the words used are not in all cases the same as those employed in the oral relation.—People v. Bemmerly, 87 Cal. 117, 25 Pac. 266.

§ 161. Declarations While Drunk.

[a] A prejudicial statement of accused while drunk is admissible, it appearing that he himself claimed to be "straight," and the statement indicating that he was not so much intoxicated as to be unconscious of the meaning and effect thereof.—People v. Farrington, 140 Cal. 656, 74 Pac. 288.

§ 162. Declarations Made Under Duress.

[a] Declarations of accused which are not confessions of guilt cannot be objected to as obtained under duress.—People v. Knowlton, 122 Cal. 357, 55 Pac. 141.

§ 163. Statements Made Under Expectation of Immunity from Prosecution.

[a] A statement made by defendant after his arrest to the prosecuting attorney, which contains no confession of guilt, is admissible, though it was induced by the expectation that he would be discharged without trial, and he denies its truthfulness as a witness.—People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

§ 164. Scrap of Conversation.

See, also, ante, § 141.

[a] Evidence of scrap of conversation is inadmissible.—People v. Irwin, 77 Cal. 506, 20 Pac. 56.

§ 165. Admission of Part of Conversation as Making Whole Admissible.

[a] Where, on a criminal trial, a portion of a conversation has been offered in evidence, tending to establish material admissions on the part of the accused, he is entitled to have the exact words constituting the admission stated, if possible, and also to give in evidence the whole conversation relating to the same subject matter.—People v. Murphy, 39 Cal. 52.

[b] A witness testifying to threats made by deceased against defendant should be allowed to state what was said by himself during the conversation, if necessary to show the significance of what was said by deceased.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

§ 166. Somniloquy.

[a] In a criminal case words uttered by defendant while sleeping are not admissible in evidence against him.—People v. Robinson, 19 Cal. 40.

§ 167. Conflicting Statements.

[a] On a prosecution for assault with intent to commit rape, where the state claimed that the crime was committed by defendant in his barber-shop on a certain evening, a witness, who accompanied the mother of prosecutrix to defendant's shop shortly after the alleged assault, testified that defendant stated to the mother of prosecutrix that prosecutrix had not been in his shop that evening; and the father of prosecutrix testified that when he reached the shop, very shortly afterward, defendant admitted that prosecutrix had been there. Held, that the testimony of the father was properly received, as tending to show that defendant, at two different interviews held about the same time, had made conflicting statements as to the presence of prosecutrix at the shop. People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

§ 168. Refusal to Answer Questions or Refute Accusation.

[a] Admissions and confessions of guilt may be implied from the acquiescence of the party in the statements of others made in his presence.—People v. McCrea, 32 Cal. 98.

[b] An accusation of crime, not replied to, to be admissible, must be made under such circumstances as to afford the accused person an opportunity to act or speak with freedom, and the statement must be one naturally calling for some action or a reply. In this state, an accusation of crime calls for a reply, even from a person under arrest, where the circumstances surrounding him indicate that he was entirely free to reply, if he had chosen to do so.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[c] An arrested defendant is not called upon to make any reply to any question or statement directly from the arresting officer; but the fact that he was under arrest, and that an incriminating statement was made by the deceased in presence of the arresting officer, does not make the failure to reply thereto inadmissible evidence, though the importance thereof is to be determined by the jury, in view of all the surrounding conditions. (Per McFarland, J., concurring specially.)—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[d] Defendant and another were arrested within an hour or two after decedent was

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shot, and brought to the latter's bedside, where he, in the presence of several other persons, in response to questions by the officers, pointed at and identified defendant as the man who shot him. Defendant fully understood the accusation, but made no reply or denial. Held that, though defendant was under arrest, evidence of such failure was admissible.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[e] The fact that a prisoner refused to answer questions as to his possession of stolen goods is not admissible in evidence to prove that he stole them.—People v. Elster, 3 Pac. 884.

[f] That accused was under arrest, and had been refused permission to secretly confer with his companion who was charged with the same offense, held no excuse for defendant's failure to reply to deceased's accusatory statements made in defendant's presence.—People v. Sullivan (Cal. App.), 86 Pac. 834.

[g] Statements of deceased in defendant's presence, accusing him of inflicting the wounds from which deceased subsequently died, held admissible to show that defendant's silence indicated an acquiescence in their truth.—People v. Sullivan (Cal. App.), 86 Pac. 834.

§ 169. Facts Provable by Admissions.

[a] Statements acquiesced in by party to whom they are made are admitted in evidence, not as themselves evidence of the truth of the facts stated, but to show the conduct of the defendant under the circumstances.—People v. McCrea, 32 Cal. 98.

[b] Statements made to the accused are admissible to show his conduct when they were made, but not to prove their truth.—People v. Ah Yute, 53 Cal. 613.

§ 170. Admissions by Counsel.

[a] The record of an admission of a fact, made for the purpose of a trial on an indictment, by the prisoner's counsel in open court, in his presence, may be read in evidence to the jury.—People v. Garcia, 25 Cal. 531.

§ 171. Statements Before Grand Jury.

[a] Statements made by defendant before grand jury, not amounting to a confession, may be proved against him, and no question of duress or menace is involved in proof thereof.—People v. Sexton, 132 Cal. 37, 64 Pac. 107.

§ 172. Plea of Guilty.

[a] Plea of guilty withdrawn by permission of court, cannot be introduced in evidence.—People v. Ryan, 82 Cal. 619, 23 Pac. 121.

§ 173. Statements Made in Criminal Prosecutions.

[a] Testimony of witness in criminal proceeding is considered voluntary, unless the questions are objected to, and the witness forced, nevertheless, to testify. The mere fact that he was duly sworn to answer questions, and was compelled to answer or admit that his answers might criminate himself, does not render his testimony involuntary.—People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

[b] In a criminal prosecution voluntary statements or admissions of the defendant, made while testifying as a witness upon the trial of another person charged with the same offense as defendant upon a different information, are competent evidence against him.—People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

§ 174. Statements Made in Civil Proceedings.

[a] The fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him; and an admission made by him in such proceeding is voluntary, and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense, when he made such admission.—People v. Weiger, 100 Cal. 352, 34 Pac. 826.

§ 175. Laying Foundation.

[a] Proof of the corpus delicti, to authorize proof of admissions by defendant, need not connect him with the commission of the offense.—People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

[b] Admissions which, when connected with other facts, tend to establish guilt, are competent without preliminary proof.—People v. Ammerman, 118 Cal. 32, 50 Pac. 15.

[c] On a trial for burglary, after evidence has been offered showing that, on the night of the burglary, the defendants were arrested with the property stolen in their possession, statements then made by them to the arresting officer, relating to their movements on the night in question, and to the goods in their possession, which, if true, tended to show their innocence, are admissible without preliminary proof that such statements were freely and voluntarily made.—People v. Ashmead, 118 Cal. 508, 50 Pac. 681.

[d] An officer accosted defendant at night with stolen malt in his possession, and asked him what he was doing with that; whereupon defendant replied that he was no chicken, and was not going to tell. Held, that such statement was a mere declaration of the defendant against interest, and not a confession, and was therefore admissible without a foundation showing that the statements were voluntary.—People v. Joy, 135 Cal. xix, 68 Pac. 964.

[e] In a prosecution for homicide, evidence of the corpus delicti held sufficient to warrant the admission of defendant's statements made immediately after the shooting that he had shot his wife.—People v. Fallon (Cal. Sup.), 86 Pac. 689.

[f] A statement made by accused to the sheriff and district attorney held admissible

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without preliminary proof that it was voluntary, where the statement contained no admission or confession of guilt.—People v. Weber (Cal. Sup.), 96 Cal. 671.

2. Self-serving Declarations and Acts.

Self-serving declarations as part of res gestae. See ante, § 117.

§ 176. Admissibility in General.

[a] Declarations of party in his own favor are inadmissible.—People v. Kalkman, 72 Cal. 215, 13 Pac. 500; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; People v. Prather, 120 Cal. 660, 53 Pac. 259.

[d] Code of Civil Procedure, section 1870, authorizing the admission of the "opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," refers to cases where opinion evidence may be given, and in no way curtails the right of a defendant in a criminal case to show his acts, declarations, etc., in proof of the defense of insanity.—People v. Ellsworth, 127 Cal. 595, 60 Pac. 161.

[c] In a prosecution of a witness to a will for perjury in swearing that it was duly witnessed, it was proper to sustain an objection to defendant's answering a question as to whether he stated, after testator's death, that there was such a will, and when and where he made such statements, since they were self-serving declarations.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 426-429; 14 Cent. Dig., cols. 1593-1607, §§ 928-936.

§ 177. To Explain Matters Proved by Prosecution.

[a] When evidence has been introduced by the government, in a criminal case, to prove declarations of the defendant, he may prove by cross-examination, or by his own witnesses, what he said at the time referred to.—People v. Strong, 30 Cal. 151.

[b] It is error to refuse to permit defendant to testify as to what he said in a conversation testified to by a witness for the prosecution, and to explain its meaning, the rule that the intent must be inferred from the acts and words of the party having been modified by the abrogation of the common-law rule excluding parties from testifying in their own behalf.—People v. Farrell, 31 Cal. 576.

[c] When statements made after the commission of a crime, in the presence of one charged with it, as to the circumstances attending its commission, are called for by the attorney for the prosecution, the statement made by the defendant on trial, at the same time, is also admissible in evidence, in order that the jury may compare the two.—People v. Estrado, 49 Cal. 171.

§ 178. Refusal to Escape.

[a] Evidence that the accused, while confined in jail, had an opportunity to escape and declined to do so, is not admissible.—People v. Montgomery, 53 Cal. 576.

3. Acts and Declarations of Persons Injured.

ADMISSIBILITY IN GENERAL, § 179.
DESCRIPTION OF ACCUSED, § 180.
STATEMENTS EXCULPATING ACCUSED, § 181.
STATEMENTS IN PRESENCE OF ACCUSED, § 181½.

As part of res gestae. See ante, § 115.
Dying declaration of victim of murder as evidence. See Homicide, §§ 116-131.

§ 179. Admissibility in General.

[a] Declarations of deceased not part of res gestae and not in extremis are inadmissible. People v. Bealoba, 17 Cal. 389.

[b] Declarations of deceased against the character of defendant's sister not communicated to defendant are inadmissible.—People v. Travis, 56 Cal. 254.

[c] Declarations of injured person contemporaneous with, and illustrative of, main facts are admissible.—People v. Wong Ah Foo, 69 Cal. 182, 10 Pac. 375.

[d] Declarations of deceased that he was going to leave the country, as he was afraid P. would kill him; that P. and others were engaged in a conspiracy to take his life; and that he had nothing against defendant, but that the latter would be induced by P. to kill him—are not admissible, even to show the existence of a conspiracy.—People v. Irwin, 77 Cal. 494, 20 Pac. 56.

[e] Witness for prosecution cannot testify to a conversation had with a chief of police. People v. McNamara, 94 Cal. 509, 29 Pac. 953.

[f] Upon a trial for murder, declarations of the deceased are made in extremis, as dying declarations having reference to the circumstances of the death, and not constituting any part of the res gestae, are hearsay and admissible in evidence.—People v. Gress, 107 Cal. 461, 40 Pac. 752.

[g] Upon the trial of a defendant accused of murder, a conversation between the mother of the deceased and the deceased, more than three days before the homicide, after he had received a letter from the defendant, which conversation did not occur at the time of the receipt of the letter, and had no reference to it, is not part of the res gestae, and is purely hearsay and inadmissible.—People v. Shattuck, 109 Cal. 673, 42 Pac. 315.

[h] Evidence in a murder trial as to an accusation made by deceased prior to his death, which accusation was at the time denied by defendant, was hearsay and superfluous when substantially repeated in a dying declaration given in evidence, and should have been stricken out on defendant's motion.—People v. Teshara, 134 Cal. 542, 66 Pac. 798.

FOR AUTHORITIES FROM OTHER STATES:

See 1 Cyc. 161; 12 Cyc. 429-432; 14 Cent. Dig., cols. 1608-1619, §§ 937-949.

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§ 180. Description of Accused.

[a] Statements of a person who has been robbed, made to a third party, as to the description of the parties committing the crime, are hearsay, and are not admissible on the part of the defendant to show that he was not the person thus described.—People v. McCrea, 32 Cal. 98.

[b] It was error to allow an officer to testify as to a description of defendant furnished by the prosecuting witness before arrest.—People v. Johnson, 91 Cal. 265, 27 Pac. 663; People v. McNamara, 94 Cal. 509, 29 Pac. 953.

§ 181. Statements Exculpating Accused.

[a] An accused indicted for murder cannot introduce in his own behalf statements of deceased, concerning the circumstances attending the difficulty in which he is wounded, made three days thereafter, but when he was in his right mind and did not expect to die.—People v. McLaughlin, 44 Cal. 435.

[b] Statements by deceased that she considered defendant insane, being merely hearsay, are inadmissible.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

§ 181½. Statements in Presence of Accused.

[a] When statements made after the commission of a crime, in the presence of one charged with it, as to the circumstances attending its commission, are called for by the attorney for the prosecution, their admission in evidence is not objectionable as irrelevant or incompetent, but counsel may ask for instructions to the jury limiting their effect.—People v. Estrado, 49 Cal. 171.

[b] Declarations of the prosecuting witness in reference to the fact of robbery by the defendant and a codefendant, made at the time of the taking of purses of money from him, and while he had hold of both of them, in their presence and hearing, are admissible against the defendant.—People v. Piggott, 126 Cal. 509, 59 Pac. 31.

[c] The general rule that the statements of persons not witnesses are not admissible, merely because they were made in the presence of the accused, does not preclude the admission of such declarations solely for the purpose of explaining the conduct of the defendant and statements made by him in reply thereto.—People v. Philbon, 138 Cal. 530, 71 Pac. 650.

[d] Declaration made in defendant's presence that he was the robber held not admissible, he having at once flatly denied the charge.—People v. Turner (Cal. App.), 82 Pac. 397.

4. Declarations of Third Persons.

ADMISSIBILITY IN GENERAL, § 182.
WIFE'S DECLARATIONS, § 183.
LETTERS WRITTEN TO ACCUSED, § 184.
NEWSPAPER ACCOUNTS OF CRIME, § 185.
DECLARATIONS IN PRESENCE OF ACCUSED, § 186.

As part of res gestae. See ante, § 116.

§ 182. Admissibility in General.

[a] In the absence of evidence of a conspiracy, statements or conversations by third persons out of the defendant's presence, and not part of the res gestae, are inadmissible against him.—People v. Griffin, 52 Cal. 616; People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

[b] Where an accomplice, in testifying to an admission by defendant, cannot remember the date, the evidence of an officer whom he had told what defendant said is admissible for the purpose of fixing the date.—People v. Zimmerman, 65 Cal. 307, 4 Pac. 20.

[c] Conversations between witness and third persons not brought home to accused are inadmissible.—People v. Powell, 87 Cal. 363, 25 Pac. 481.

[d] A witness cannot testify to the acts and declarations of third parties, in the absence of defendant, and unauthorized by him, in attempting to influence the witness to leave the country so as to avoid testifying in the case.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[e] When a witness has testified that before the homicide he considered defendant insane, it is not error to refuse to permit him to testify that he had told deceased that defendant was insane.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[f] Where, on trial of a mother for the murder of her daughter's seducer, the defense is insanity, caused by discovery of the fact of the seduction, and the prosecution claim that defendant knew from the beginning that the relation was immoral, correspondence between deceased and the daughter, of which defendant had no knowledge, is inadmissible.—People v. Shattuck, 109 Cal. 673, 42 Pac. 315.

[g] In a criminal prosecution, conversations and statements of third parties, not made in defendant's presence or hearing, are incompetent.—People v. Warren, 134 Cal. 202, 66 Pac. 212.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 432; 14 Cent. Dig., cols. 1620-1624, § 950.

§ 183. Wife's Declarations.

[a] At a trial for murder, defendant's wife was shown to have had an interview with him alone for half an hour, at which he gave her some money, at the house of one L., from which she came directly to the house of H. Held, that testimony by H. of the wife's declarations that her husband gave her the money, etc., was not admissible.—People v. Simonds, 19 Cal. 275.

§ 184. Letters Written to Accused.

Letters as evidence in general. See post, § 212.

[a] A letter found on the person of defendant when arrested for robbery, containing

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damaging statements and warnings to keep out of reach of the officers, and identified by a witness as having been written by him to defendant, is inadmissible in the absence of evidence that defendant answered it or acted on the information contained therein.—People v. Colburn, 105 Cal. 648, 38 Pac. 1105.

§ 185. Newspaper Accounts of Crime.

[a] Newspaper accounts of crime are not competent evidence of any material fact.—People v. Chun Heong, 86 Cal. 331, 24 Pac. 1021.

§ 186. Declarations in Presence of Accused.

[a] Declarations in the presence of accused are not inadmissible because made by persons incompetent to testify.—People v. McCrea, 32 Cal. 98.

[b] Statements made after the commission of a crime, in the presence of one charged with it, as to the circumstances attending its commission, do not of themselves prove the circumstances narrated, but are evidence only to the extent that they are admitted by the person charged, either by his express assent or by his silence.—People v. Estrado, 49 Cal. 171.

[c] Statements made to accused in respect to his connection with the alleged offense are admissible to show his conduct when the statements were made, but not as evidence of the truth of the statements.—People v. Ah Yute, 53 Cal. 613.

[d] In a criminal case, statements of third persons, made in presence of the defendant, are admissible against him only to the extent they are admitted by him to be correct, either by his words or conduct; and the conduct of the defendant is the gist of the inquiry, and the only matter to be considered by the jury. Such statements are therefore inadmissible, unless accompanied with proof of defendant's statements or conduct in response thereto.—People v. Ah Yute, 54 Cal. 89.

[e] On a trial for assault with intent to commit murder, evidence of a conversation between defendant's brother and another, on the day before the alleged assault, was properly admitted, where the evidence showed that the subject of the conversation was again brought up by defendant's brother just before the fight in which the assault was made, and that the other party to the conversation participated in the fight.—People v. Madden, 76 Cal. 521, 18 Pac. 402.

[f] The declarations made by the boss Chinaman at the washhouse where the defendant was arrested are not admissible in favor of the defendant, though made in the presence of the defendant.—People v. Louie Foo, 112 Cal. 17, 44 Pac. 453.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1630-1634, §§ 968-972.

5. Hearsay.

WHAT CONSTITUTES, § 187.
MATTERS PROVABLE BY HEARSAY—NAME OF ACCUSED, § 188.
—— PLACE OF COMMISSION OF CRIME, § 189.
—— INSANITY, § 190.
—— MOTIVE OF ACCUSED, § 191.
—— CORPORATE EXISTENCE, § 192.

§ 187. What Constitutes.

[a] Declarations of another, not in presence of defendant, are hearsay.—People v. Griffin, 52 Cal. 616.

[b] Evidence of declarations descriptive of homicide made in the absence of the defendant, by a person who was present at the killing, is hearsay.—People v. Gonzales, 71 Cal. 569, 12 Pac. 679.

[c] In a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declaration is mere hearsay evidence, and is always excluded, whether the party making it be dead or not.—People v. Hall, 94 Cal. 595, 30 Pac. 7.

[d] Statements made by a third person in presence of defendant, and to which defendant replied, are not hearsay, and are admissible against him.—People v. Mayes, 113 Cal. 618, 45 Pac. 860.

[e] Deceased's wife testified that she saw defendant and deceased in conversation, and soon after was attracted by the loud voice of her husband, and saw him lying on the ground, and defendant standing over him with an uplifted club, but was unable to designate the point where she saw her husband lying, nor to point it out on a diagram. Some days after the homicide, she pointed out the place to a witness, who was permitted, after defendant's objection, to testify to that fact, and to point out the place on the diagram. Held, that the evidence was hearsay, and its admission prejudicial error, since it permitted the jury to determine the place of the conflict from evidence based on the unsworn information of another.—People v. Hill, 123 Cal. 571, 56 Pac. 443.

[f] Declarations of defendant's confederate, made subsequent to the killing with which defendant is charged, and not in the presence of defendant, are hearsay and inadmissible.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[g] In a criminal case, a question of one witness as to declarations of another, who was not himself questioned in relation thereto, was properly stricken out.—People v. Machado, 130 Cal. xviii, 63 Pac. 66.

[h] On a prosecution for the forgery of a note, evidence of the declarations of the alleged maker concerning defendant and his character, made without the presence or hearing of defendant, and not forming a part of the transaction which was itself in dispute, or evidence of the fact within Code of Civil Procedure, section 1850, is mere hearsay and inadmissible.—People v. Landis, 139 Cal. 426, 73 Pac. 153.

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[i] Testimony that witness had learned from conversation with another that defendant was one of the robbers held hearsay.—People v. Turner (Cal. App.), 82 Pac. 397.

[j] Certain evidence held inadmissible as hearsay.—People v. Smith (Cal. App.), 84 Pac. 449.

[k] In a prosecution for homicide, the admission of a declaration made by deceased to witness in defendant's presence that defendant was mean to deceased, and that she was afraid to ask him to do anything for her, etc., held error.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1634-1650, §§ 973-983.

§ 188. Matters Provable by Hearsay—Name of Accused.

[a] Where the prosecuting witness positively identified defendant as one of the active participants in the robbery, the fact that the witness was allowed to state defendant's name, as given him subsequently by another person, is not ground for reversal.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

§ 189. —— Place of Commission of Crime.

[a] In order to show the locus delicti was in the county where the indictment was brought, evidence is admissible to show that it was generally reputed to be within that county.—People v. McLane, 19 Cal. 131.

[b] To prove that an offense was committed within a certain county, hearsay evidence of the boundary line is admissible, it being matter of common interest.—People v. Velarde, 59 Cal. 457.

§ 190. —— Insanity.

[a] Insanity cannot be proven by general reputation or hearsay.—People v. Pico, 62 Cal. 50.

§ 191. —— Motive of Accused.

[a] Prosecuting witness may testify to information received as to what defendant had said, to explain his motive in being armed. People v. Shea, 8 Cal. 538.

§ 192. —— Corporate Existence.

[a] In a prosecution for injuring the property of a corporation, it is sufficient proof of the incorporation to show that it was known and recognized as such.—People v. Ah Sam, 41 Cal. 645.

G. ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

ADMISSIBILITY IN GENERAL, § 193.
FURTHERANCE OF COMMON PURPOSE, § 194.
BEFORE CONSPIRACY, § 195.
BEFORE ACCOMPLISHMENT OF OBJECT, § 196.
AFTER ACCOMPLISHMENT OF OBJECT, § 197.
—— IN PRESENCE OF CODEFENDANT, § 198.
—— IN ABSENCE OF CODEFENDANT, § 199.
—— DYING CONFESSIONS, § 200.
STATEMENTS AS TO PAST ACTS, § 201.
FLIGHT OF CODEFENDANT, § 202.
CONVICTION OF CODEFENDANT, § 203.
REFUSAL OF CONSPIRATOR TO TESTIFY, § 204.
LAYING FOUNDATION, § 204½.

§ 193. Admissibility in General.

[a] If evidence tends to show a conspiracy, declaration or act of one co-conspirator before the offense is admissible as the declaration or act of all.—People v. Murphy, 39 Cal. 52.

[b] When testimony has established the complicity of a third person, not on trial, in the perpetration of the criminal act, evidence of the conduct of that person is admissible against the accused.—People v. Murphy, 39 Cal. 52.

[c] The conspiracy to commit a crime being proved on the separate trial of one of the conspirators, the jury are to give the same weight to the declarations of the co-conspirator not on trial as they would give to them if made by the one on trial.—People v. Geiger, 49 Cal. 643.

[d] Statements made by accomplice to arresting officer, respecting the knife with which the murder was committed, are admissible, notwithstanding the defendant on trial was not immediately connected therewith.—People v. Garcia, 63 Cal. 19.

[e] Admissions made by one defendant in conversation with third person are competent evidence against him on the trial of two defendants jointly for murder.—People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347.

[f] Declarations and acts of conspirator before commission of crime are admissible to prove conspiracy.—People v. Bentley, 75 Cal. 409, 410, 17 Pac. 436.

[g] Where there is evidence of joint preparations by defendant and another to kill deceased, evidence of the acts and declarations of such other person is competent.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[h] The declarations of a co-conspirator not prosecuted are equally admissible with those of one under indictment and prosecution.—People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

[i] Conspiracy being established, all statements, acts and declarations of parties pending commission of crime, looking toward its consummation, are competent evidence against each and every conspirator.—People v. Lovren, 119 Cal. 91, 51 Pac. 22.

[j] Declaration of co-conspirator, made in absence of defendant, showing every inception of conspiracy is admissible.—People v. Gregory, 120 Cal. 20, 52 Pac. 41.

[k] District attorney has the right to call to the witness-stand another accused person, over whom was pending an information for same offense, as being a competent witness.

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notwithstanding such person may avail himself of the privilege to decline to answer questions put to him, on the ground that his answers would tend to criminate him; and the calling of such accused person as a witness is not error, whatever may have been the resulting consequences in tending to prejudice defendant's case before the jury.—People v. Plyler, 121 Cal. 160, 53 Pac. 553.

[l] The declaration of codefendant as to other proposed offenses, entirely distinct from offense in controversy, is inadmissible.—People v. Williams, 127 Cal. 212, 59 Pac. 581.

[m] Where two defendants were tried jointly, evidence by third parties of a statement made by one defendant tending to inculpate both, but inadmissible as to the maker because not voluntary, is hearsay as to the other.—People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 435-438; 14 Cent. Dig., cols. 1651-1654, §§ 984-988.

§ 194. Furtherance of Common Purpose.

[a] If several persons conspire together to commit a robbery, and to resist arrest even to the taking of life, and, after the robbery is committed, take the life of an officer in resisting an arrest, whatever is said or done by any one of them in furtherance of the common design is a part of the res gestae and the act of all.—People v. Pool, 27 Cal. 572.

[b] Where evidence of a conspiracy to burn an insured building with intent to defraud the insurer has been submitted, the demand made by one conspirator upon the insurer for a settlement is competent evidence against the other in a trial of him alone on an indictment for the offense.—People v. Trim, 39 Cal. 75.

[c] The acts of an accomplice are not evidence against the accused, unless they constitute a portion of the res gestae, and occur during the pendency of the criminal enterprise, and are in furtherance of its objects.—People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401.

[d] Only declarations of conspirator made during pendency of conspiracy and in furtherance of its objects can be used against co-conspirator.—People v. Irwin, 77 Cal. 504, 20 Pac. 56.

[e] When a conspiracy is proved, all acts and declarations in furtherance thereof, by any of the conspirators, to advance the common cause, are evidence against all, though not done or made in the presence of each other.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[f] The declarations of a co-conspirator in furtherance of the conspiracy are not inadmissible because he was not indicted.—People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

[g] Upon the trial of a defendant charged with grand larceny, which appears to have been committed by aiding and abetting another person in taking the stolen property from the person of the prosecuting witness, it is necessary for the prosecution to show that the two were co-conspirators in the commission of the crime; and evidence that they were seen frequently together is not irrelevant to that issue.—People v. Childs, 127 Cal. 363, 59 Pac. 768.

[h] Where a will had not been signed by witnesses until after testator's death, in a prosecution of defendant for perjury in swearing that the will was duly witnessed by him it was proper to admit in evidence the testimony of the beneficiary of the will and the other subscribing witness as to its being duly witnessed, given at the hearing of the probate matter, since such acts and declarations, in connection with defendant's acts and declarations, tended to show that the three were each working to accomplish one criminal purpose which tended to establish a conspiracy to rob testator's estate.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[i] A statement made by one of six men, who were standing together before a house, and who almost immediately afterward shot and killed another man, who came out of the house, to the effect that, if such person came out, "we will shoot at him," is admissible against one charged with the murder, and who was one of the six in whose hearing the statement was made.—People v. Sing Yow, 145 Cal. 1, 78 Pac. 235.

§ 195. Before Conspiracy.

[a] On a trial for murder committed in a highway robbery perpetrated in pursuance of a conspiracy, the declarations of one of the conspirators, who procured the gun with which the murder was committed by defendant, made before the robbery, and showing the objects of the conspiracy, namely, the business of robbing stages, are admissible.—People v. Collins, 64 Cal. 293, 30 Pac. 847.

[b] A conspiracy not having been formed until after the burning of one of the conspirators' buildings, his declarations before the burning, that if his buildings were burned he should know whom to go after, coupled with threats against deceased, are not admissible against defendant.—People v. Irwin, 77 Cal. 494, 20 Pac. 56.

[c] Declarations by deceased as to the disposition of his farm on leaving the country, and as to a conspirator's motive for commencing a lawsuit against him, having been made before the conspiracy existed, are not admissible against defendant.—People v. Irwin, 77 Cal. 494, 20 Pac. 56.

§ 196. Before Accomplishment of Object.

[a] If two jointly indicted for murder are tried separately, and on trial of one there is testimony tending to show a conspiracy between them, the declarations of the one not on trial, made before the killing, may be received in evidence.—People v. Geiger, 49 Cal. 643.

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FOR AUTHORITIES FROM OTHER STATES:

See 1 Cyc. 161; 12 Cyc. 438; 14 Cent. Dig., cols. 1654-1668, §§ 989-1001.

§ 197. After Accomplishment of Object.

[a] Evidence of acts, declarations, or confessions of one conspirator or codefendant, after object of conspiracy has been accomplished, is not admissible against his co-conspirators or codefendants.—People v. English, 52 Cal. 212; People v. Aleck, 61 Cal. 137.

[b] No falsehood, evasion, or silence of conspirator after offense is committed is admissible.—People v. Irwin, 77 Cal. 506, 20 Pac. 56.

[c] Confession by a conspirator made after the deed is not competent against co-conspirator.—People v. Collum, 122 Cal. 186, 54 Pac. 589.

[d] Evidence as to appearance, conduct, and declarations of a co-conspirator after the conspiracy is accomplished is inadmissible as against a conspirator.—People v. Opie, 123 Cal. 294, 55 Pac. 989.

[e] In a prosecution for attempting to obtain a bounty on squirrels by having certain parties present the squirrel tails to the board of supervisors, and fraudulently pretend that the squirrels were killed in the county, the admission of testimony as to conversations between defendant and his accomplices, after the claim for bounty had been filed, relating to filing more tails at a future time, and also of a sack containing squirrel tails, found on the premises of an accomplice after the commission of the offense, was not erroneous.—People v. Howard, 135 Cal. 266, 67 Pac. 148.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 439-441; 14 Cent. Dig., cols. 1668-1682, §§ 1002-1011.

§ 198. —— In Presence of Codefendant.

[a] If two are jointly indicted for murder, and, on the separate trial of one, there is evidence tending to show a conspiracy between them, evidence of declarations of the other, made in the presence of the defendant, are admissible on behalf of the prosecution.—People v. Cotta, 49 Cal. 166; People v. Estrado, 49 Cal. 171.

[b] It is not error to admit evidence of statements made by a person indicted with the defendant on trial, and who has pleaded guilty, in the presence of defendant, where it shows that the conduct of defendant was at the time, and that he did not deny the statements.—People v. Mallon, 103 Cal. 513, 37 Pac. 512, distinguishing People v. Ah Yute (1880), 54 Cal. 89.

§ 199. —— In Absence of Codefendant.

[a] Statements of an accomplice not made in presence of defendant, or in furtherance of the enterprise are inadmissible.—People v. Moore, 45 Cal. 19.

[b] In a prosecution for murder, where it appeared that the deceased suspected defendant of being his mother's paramour, and that he was killed by defendant in an affray resulting from an attempt by deceased to eject defendant from the mother's house, held, that the mother conspired with defendant to kill her son, yet her declarations regarding the homicide, made subsequent thereto, in the absence of defendant, were not admissible against defendant.—People v. Gonzales, 71 Cal. 569, 12 Pac. 783.

[c] Declarations and confessions of an alleged co-conspirator or accomplice, made in the absence of defendant, and after the consummation of the conspiracy of commission of the crime, are not admissible against defendant.—People v. Dilwood, 94 Cal. 89, 29 Pac. 420; People v. Oldham, 111 Cal. 648, 44 Pac. 312.

[d] Where defendant, in the presence of witness, by arrangement with his partner in crime, agreed that the witness should accompany his partner, who should tell witness where the stolen property was, and that witness should get it, and turn it over to defendant's partner, statements made to witness by such partner, in defendant's absence, as to where the property may be found, are admissible against defendant.—People v. Brady, 36 Pac. 949.

§ 200. —— Dying Confessions.

[a] Code of Civil Procedure, section 1870, subdivision 4, which provides that "the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death," may be given in evidence in a criminal action, applies only where the death of deceased is the subject of the trial, and does not make the dying confession of an accomplice in a burglary admissible on a trial for that offense.—People v. Hall, 94 Cal. 595, 30 Pac. 7.

§ 201. Statements as to Past Acts.

[a] Declarations of co-conspirator showing past acts or expressing merely opinion or desire are only binding on conspirator and co-conspirators in whose presence they are made.—People v. Irwin, 77 Cal. 504, 20 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1668-1682, §§ 1002-1011.

§ 202. Flight of Codefendant.

[a] The flight of a person suspected of crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight, according to the circumstances of the particular case. Such evidence is received, not as a part of the res gestae of the criminal act itself, but as indicative of a guilty mind. The rule extends only to the person fleeing, and cannot be extended to a case where a conspiracy to commit a crime has been entered into between two or more,

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and the flight of a co-conspirator is sought to be proved against another on his separate trial.—People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401.

[b] Evidence of flight of accomplice is admissible to show that he might have disposed of goods robbed.—People v. Collins, 48 Cal. 277.

§ 203. Conviction of Codefendant.

[a] The record of the conviction of one who struck the fatal blow is not admissible on the trial of another charged with standing by and abetting.—People v. Bearss, 10 Cal. 68.

§ 204. Refusal of Conspirator to Testify.

[a] Refusal of conspirator to testify should not be considered by jury against accused.—People v. Irwin, 77 Cal. 507, 20 Pac. 56.

§ 204½. Laying Foundation.

[a] Combination or conspiracy must be established before acts, declarations, or confessions of one alleged conspirator can be given in evidence against another.—People v. Trim, 39 Cal. 75; People v. Cotta, 49 Cal. 166; People v. Geiger, 49 Cal. 643; People v. Dixon, 94 Cal. 255, 29 Pac. 504; People v. Lane, 101 Cal. 513, 36 Pac. 16.

[b] When two are jointly indicted, the prosecution may, on the trial, prove the declarations and acts of one made and done in the absence of the other before proving the conspiracy between the defendants, provided proof of such conspiracy is afterward made. People v. Brotherton, 47 Cal. 388.

[c] The fact that, when A entered a store to sell goods similar to stolen goods, B stood outside, looking in the window, and, when the storekeeper saw him, ran away, does not tend to prove a conspiracy, and is insufficient as a foundation for other evidence on the subject.—People v. Stevens, 68 Cal. 113, 8 Pac. 712.

[d] The acts and declarations of a third person, tending to show a conspiracy between him and defendant to commit the crime, are admissible as part of the res gestae.—People v. Bentley, 75 Cal. 407, 17 Pac. 436; People v. Bentley, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799.

[e] On a trial for larceny it appeared that defendant conducted an employment agency, and C., in response to his advertisement for a collector, was taken by him to the office of another, jointly indicted with him, by whom he was employed for three months, and required to deposit one hundred dollars as security for his good conduct. A few days thereafter defendant informed C. that his employer did not need his services any longer, and tried to get possession of the note given for the deposit, while at the same time he attempted to get another person to take C.'s place, and deposit one hundred and fifty dollars. A part of these negotiations between such person and C. were made in defendant's presence. Held sufficient evidence of a conspiracy between defendant and the person employing C. to render the declarations of the latter admissible against defendant.—People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

[f] On trial for conspiring to falsely move and maintain a suit, a conversation with one of the defendants in regard to what was done as to the suit after its commencement may be admitted before the conspiracy is established, if the conspiracy is subsequently proved.—People v. Daniels, 105 Cal. 262, 38 Pac. 720.

[g] Order of evidence prescribed by subdivision 6 of section 1870, Code of Civil Procedure, that acts or declarations of a co-conspirator may be received after proof of the conspiracy, is not mandatory; but that section presents the proper order of proof, and it is only in exceptional cases that the court should exercise its discretion to allow a departure therefrom, when the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to present the evidence in intelligible form without first admitting the testimony of the accomplice.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[h] On trial for perjury, it having been shown that the will had been written by the beneficiary, and that defendant had been endeavoring by improper means to secure a certain party as a witness to the will after the death of testator, the conversation of the beneficiary with the party wherein she attempted to persuade him to subscribe the will of the already deceased testator for five thousand dollars, was properly admitted in evidence, since there was sufficient proof of conspiracy between defendant and the beneficiary to make her acts in carrying out the common criminal purpose competent against him.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[i] Where there is no evidence that defendant entered into a conspiracy with others relative to the crime with which he is charged, conversations of such other persons, in the absence of defendant, are inadmissible.—People v. Kelly, 133 Cal. 1, 64 Pac. 1091.

[j] In order to lay foundation for admission of the declarations of the defendant, it was proper to ask the prosecuting witness whether prior to the statement he made any threats or promise of reward, or advised or offered any inducements, in regard to the defendant's statement. Such questions called for facts, and not for conclusions of the witness; and when such questions were answered in the negative, the testimony was a clear statement of the absence of any threat or inducement.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

[k] Though as general rule no testimony of the acts of alleged conspirators can be shown until the conspiracy has been first established, it is not error to admit evidence of the acts of the alleged conspirators before the conspiracy is established.—People v. Donnolly, 143 Cal. 394, 77 Pac. 177.

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[l] The commission of acts as a part of a common plan or design to rob certain bank messengers, for which defendant was being tried, held not objectionable, though the evidence tended to show the commission of other offenses.—People v. Zimmerman (Cal. App.), 84 Pac. 446.

[m] Evidence of a conspirator as to the forming of a conspiracy to rob certain bank messengers, and of acts done in furtherance of the conspiracy, held not objectionable as hearsay.—People v. Zimmerman (Cal. App.), 84 Pac. 446.

[n] The admission of evidence of conversations between accused and a witness held not error in the view of the subsequent evidence, showing a conspiracy between them. People v. Bunkers (Cal. App.), 84 Pac. 364.

H. DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE THEREBY.

IN GENERAL, § 205.
REFUSAL TO PRODUCE DOCUMENT, § 205½.
AFFIDAVIT OF PUBLICATION, § 206.
ASSESSOR'S MEMORANDUM-BOOK, § 207.
CITY DIRECTORY AND GREAT REGISTER, § 208.
ENGROSSED COPY OF LEGISLATIVE ACT, § 209.
FAMILY BIBLE, § 210.
JUDGMENT-ROLL AND RECORDS, § 211.
LETTERS, § 212.
MEMORANDUM MADE BY WITNESS, § 213.
PHOTOGRAPHS AND MAPS, § 214.
SUBPOENA AND RETURN THEREON, § 215.
TRAIN REGISTER, § 216.
LAYING FOUNDATION, § 217.

§ 205. In General.

[a] Where a verdict of coroner's jury is presented to a witness, and he is asked if he signed that verdict, it is not proving the contents of a written record by parol.—People v. Donovan, 43 Cal. 162.

§ 205½. Refusal to Produce Document.

[a] Where attorney for defendant having possession of contract of insurance and ordered to produce it at certain time refused to do so on sole ground that he had statutory right to more time, secondary evidence of its contents is admissible.—People v. Vasalo, 120 Cal. 169, 170, 52 Pac. 305.

§ 206. Affidavit of Publication.

[a] In a prosecution for perjury in proving a will, the affidavit of the publication of notice of hearing the petition for probate and letters were properly admitted in evidence as part of the record of the matter in which the perjury was charged to have been committed, and was competent evidence of the matter therein stated, under Code of Civil Procedure, sections 2010, 2011, providing that evidence of publishing of a notice required by law may be given by the printer's affidavit, which shall be prima facie evidence of the facts stated therein.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

§ 207. Assessor's Memorandum-book.

[a] Defendant was sued for perjury for having sworn to a false list of property, under the revenue act of 1857, The assessor's memorandum-book, having been identified, and in which were pencil notes, by the assessor, of the property handed in by the defendant, was offered in evidence. Held, that it was not competent evidence to prove that the property therein was that given in by defendant, that it was all that was given in by him, or that he swore to it as a correct list.—People v. Quinn, 18 Cal. 122.

§ 208. City Directory and Great Register.

[a] On trial for making a fictitious instrument in writing, under Penal Code, section 476, a city directory may be admitted to show that there was no person in the city of the name signed to the instrument.—People v. Eppinger, 105 Cal. 36, 38 Pac. 538.

[b] City directory and great register of county are competent to show existence of person and his residence.—People v. Laird, 118 Cal. 294, 50 Pac. 431.

§ 209. Engrossed Copy of Legislative Act.

[a] An engrossed copy of legislative acts, passed prior to 1862, is not a public record, within section 87 of the act relating to crimes and punishments.—Corryell, In re, 22 Cal. 178.

§ 210. Family Bible.

[a] Family Bible is competent evidence of age of child shown from entry of birth therein.—People v. Slater, 119 Cal. 623, 51 Pac. 957.

§ 211. Judgment-roll and Records.

[a] Whole record and not simply judgment is admissible to sustain plea of former conviction.—Turner, Ex parte, 75 Cal. 228, 16 Pac. 898.

[b] Judgment-roll in prior civil action is admissible to show guilty knowledge of accused.—People v. Hamberg, 84 Cal. 473, 24 Pac. 298.

[c] The parties being Chinese, and the prosecuting witness having testified that the crime took place on a certain Chinese date, and that she knew nothing of the American dates, but that it was the day before she made complaint, the district attorney, in order to fix the date, may put in evidence the complaint.—People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 531; 14 Cent. Dig., cols. 1694-1698, §§ 1018-1020.

§ 212. Letters.

Letters written to accused as evidence. See ante, § 184.

[a] Letters addressed by one secret society to another, directing the latter to inform de-

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fendant that the friends of one whom he had killed and the officers of the law were upon his track, in order that he might change his residence, and which were found in the possession of defendant at the time of his arrest, are not admissible on the trial of defendant for homicide, where it does not appear that defendant was in any way connected with the sender of the letters, nor that he acted upon their contents.—People v. Lee Dick Lung, 129 Cal. 491, 62 Pac. 71.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1699-1701, § 1022.

§ 213. Memorandum Made by Witness.

[a] Proof of statements made by defendant must be by witness himself, and not by a written memorandum made by him at the time, which he says is correct.—People v. Elyea, 14 Cal. 144.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1701-1703, § 1023.

§ 214. Photographs and Maps.

[a] Photographs of persons, things or places shown to be faithful presentation of what they purport to reproduce, are admissible in evidence.—People v. Durrant, 116 Cal. 213, 48 Pac. 75.

[b] Where the prosecution claims that defendant lay in wait for deceased, evidence, consisting of maps and photographs, showing the topography of the place of the homicide, is admissible.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[c] Like any other diagrams, the value of the photographs must be determined by the jury from all the evidence; and they are not inadmissible hearsay merely because the places marked were pointed out by witnesses if they testify that they were correctly pointed out, and the correctness of the marking is proved.—People v. Crandall, 125 Cal. 129, 57 Pac. 785.

[d] Photographs of handwriting are admissible in a criminal case in which the identification of handwriting is in issue.—People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

[e] On a trial for homicide, photographs held admissible in evidence.—People v. Mahatch (Cal. Sup.), 82 Pac. 779.

[f] On a trial for homicide, the admission in evidence of a photograph held error.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1703-1705, § 1024.

§ 215. Subpoena and Return Thereon.

[a] The issuance of a subpoena, and return by the sheriff thereon as not found after diligent search, is not competent evidence in a criminal proceeding of the nonexistence of the person subpoenaed in the county to which the subpoena issued since the question whether such person had an existence in the county is not one which the officer was required to officially ascertain or declare.—People v. Lee, 128 Cal. 330, 60 Pac. 854.

§ 216. Train Register.

[a] A train register is not competent, on a criminal prosecution, to prove the time of the arrival and departure of a train at a certain station on the night of the crime, where the conductor who made the register is not called as a witness, and the agents of the railroad who are called have no actual knowledge of the time, but are only able to testify that the rules of the company required the conductor to register.—People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

§ 217. Laying Foundation.

[a] If an indictment for embezzlement contains what purports to be a copy of an agreement made between the defendant and the prosecutor, a copy of the same is not admissible in evidence on the trial without proof of the execution of the instrument by the defendant.—People v. Hurst, 49 Cal. 653.

[b] Refusal to admit in evidence paper claimed by counsel for defendant to be testimony taken at the coroner's inquest is not error, when there is nothing to show that the paper was such testimony, except the statement of the counsel offering it, and the record fails to show what it contained.—People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

[c] Books of the collectors for the corporation, and of a bank in which deposits were made, not proven to be correct by those who kept them, are inadmissible against the secretary of the corporation, who is charged with embezzlement; and, if offered to show that the defendant did not keep correct books, the presumption of correctness is destroyed, and they cannot be received as admissions without proof of his knowledge and complicity in falsifying the books.—People v. Blackman, 127 Cal. 248, 59 Pac. 573.

I. OPINION EVIDENCE.

NONEXPERT EVIDENCE IN GENERAL, § 218.
WHAT CONSTITUTES OPINION EVIDENCE, § 219.
INFERENCES FROM FACTS, § 220.
UNDERSTANDING OR MEANING OF WORDS USED BY OTHERS, § 221.
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—— MENTAL CONDITION OR CAPACITY, § 235.
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—— RIGHT OF WITNESS TO STATE GROUNDS OF OPINION, § 242.
—— CROSS-EXAMINATION, § 243.
EFFECT OF EVIDENCE, § 244.

§ 218. Nonexpert Evidence in General.

[a] In a prosecution for forgery by altering a check, a witness who is not an expert may testify as to the chemical effect which a powder found in the possession of defendant had on writing in a check similar to that forged.—People v. Bretherton, 47 Cal. 388.

[b] On trial for murder, it appeared that deceased was about to drive his cattle onto a range claimed by accused, and to thus mix the herds, which accused attempted to prevent. A quarrel ensued, during which accused shot and killed deceased. Held, that a witness could not testify whether the mingling of herds in such a way was likely to induce trouble.—People v. Clark, 84 Cal. 573, 24 Pac. 313.

[c] Opinion evidence is inadmissible; witness must state facts within his knowledge.—People v. Ah Own, 85 Cal. 584, 24 Pac. 780.

[d] Witness for the defendants, who testified that he saw the prosecuting witness on the day of the alleged robbery about the place of the alleged assault, without fixing any time of day, and that he did not see the defendants there, or see anyone doing any thing to the prosecuting witness, cannot be asked whether anybody could have done anything to the prosecuting witness without his seeing it.—People v. Carroll, 92 Cal. 568, 28 Pac. 600.

[e] On a trial for mayhem, it appeared that the prosecuting witness, who was friendly to defendant, was injured by the latter while interfering in a fight between him and a third party. Held, that the court properly disallowed a question to a witness by defendant, asking his opinion as to whether the interference of the prosecuting witness was such as to induce the defendant to think it was friendly, or likely to mislead defendant as to its object, such matter being within the peculiar province of the jury to determine.—People v. Wright, 93 Cal. 564, 29 Pac. 240.

[f] On a trial for embezzlement, a witness for the people cannot, on cross-examination, state his conclusion, from the manner in which defendant conducted his employer's business, as to whether defendant was the manager thereof.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[g] Whether third person would have seen an object in a particular situation, assumed in a question asked a witness, is not a matter that can be determined by the opinion of the witness.—People v. Worden, 113 Cal. 569, 55 Pac. 844.

§ 219. What Constitutes Opinion Evidence.

[a] Evidence by a police officer, witness for the prosecution, in a trial for murder, that he telephoned "to have the harbor police arrest any of the race-track boys that tried to cross the ferry, particularly Richard Ward" (defendant), not being an expression of opinion by witness that defendant is guilty, is competent.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[b] In a prosecution for libel, evidence that a witness knew that the defendant was innocent, and that she did not write the letter complained of, is incompetent, as mere opinion.—People v. Storke, 60 Pac. 420, order reversed (1900), 128 Cal. 486, 60 Pac. 1090.

[c] Testimony of a person that he did not make any threat and did not offer any inducement before one accused of crime made a statement is not mere opinion evidence.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

[d] In a prosecution for homicide, a physician who performed the autopsy on deceased's body held entitled to testify from a diagram as to the point of entrance and exit of the bullet as a physical fact, independent of expert knowledge.—People v. Weber (Cal. Sup.), 86 Pac. 671.

§ 220. Inference from Facts.

[a] On an issue as to whether certain shots were fired from inside or outside of a building, the testimony of a witness, who was near the scene, that the shots sounded as though fired from inside, and that they sounded like a drum, is not objectionable as the expression of his opinion.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[b] Testimony of witness as to what he judged from what he saw is inadmissible.—People v. Elliott, 119 Cal. 594, 51 Pac. 955.

[c] Where a witness states that he could distinguish by the sound the difference between shots fired with a shotgun and those fired with a rifle, and that he heard the shots which killed deceased, on a trial for the murder he may state that the shots sounded like those from a shotgun.—People v. Clarke, 130 Cal. 642, 63 Pac. 138.

[d] On a trial for murder alleged to have been committed in a house, a witness who heard the shots may be asked if he could tell from the sound of the shots whether they were in the house or out of it.—People v. Clarke, 130 Cal. 642, 63 Pac. 138.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1723-1730, §§ 1040-1043½.

§ 221. Understanding or Meaning of Words Used by Others.

[a] The opinion of a witness as to what was meant by a certain statement of one of

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the witnesses, which statement was not matter for expert testimony, was inadmissible.—People v. Moan, 65 Cal. 532, 4 Pac. 545.

[b] Witness cannot testify to his understanding of words used by another, or inferences drawn by him as to feeling existing between persons.—People v. French, 69 Cal. 173, 10 Pac. 378.

[c] A witness cannot testify as to his understanding of words used by another or inferences drawn by him from circumstances, as to the question of feeling between the parties.—People v. French, 7 Pac. 822.

§ 222. Bodily Appearance or Condition.

[a] Evidence of a witness, though not an expert, is admissible to describe a wound inflicted by a knife on the hand of the deceased, and which he saw.—People v. Hong Ah Duck, 61 Cal. 387.

[b] One who is shown to have had experience in the observation and treatment of gunshot and other wounds on the frontier, against the Indians, and in the territories, although not a medical witness, may be permitted to testify as to the character of a wound found upon the body of the deceased, and the description of the wound by such witness is admissible as the statement of a fact.—People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[c] On a prosecution for an assault on a boy with intent to commit the infamous crime against nature, the boy's mother was competent to testify as to what the substance found on his clothing was, though she was not shown to be an expert.—People v. Swist, 136 Cal. 520, 69 Pac. 223.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1730, 1731, § 1044.

§ 223. Size of Bullet Inflicting Wound.

[a] A surgeon experienced in examining gunshot wounds and extracting bullets therefrom may testify to his opinion of the size of the bullet that made the wound in question.—People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

§ 224. Sanity or Insanity.

[a] The opinion of a witness not an expert is competent upon the question of the prisoner's sanity, where such opinion is formed upon facts within the personal knowledge of the witness, and sworn to by him before the jury.—(Cal. 1872) People v. Sandford, 43 Cal. 29.

[b] One not an expert, when detailing a conversation between himself and another, may state his opinion as to the sanity of such person at the time.—People v. Wreden, 59 Cal. 392.

[c] Whether witnesses are sufficiently acquainted with defendant to give opinions as to sanity is matter in discretion of court to determine.—People v. Pico, 62 Cal. 50.

[d] In a prosecution for an assault with intent to murder, a witness who was present at the time of the alleged assault may testify as to whether the defendant appeared rational or irrational at that time, notwithstanding he has not first shown himself to be an intimate acquaintance of the defendant.—People v. Lavelle, 71 Cal. 351, 12 Pac. 226.

[e] The admission of evidence as to the sanity of the accused objected to on the ground that the witnesses were not his "intimate acquaintances," as required by Code of Civil Procedure, section 1870, subdivision 10, which authorizes as evidence the "opinion of intimate acquaintances as to the sanity of the accused, the reason for the opinion being given," will not be disturbed on appeal, unless it appear that the court abused the discretion vested in it as to such a matter. People v. Fine, 77 Cal. 147, 19 Pac. 269.

[f] Action of trial court in permitting witnesses to give their opinion as to the mental condition of a defendant on trial on a criminal charge cannot be said to have been erroneous where it was shown that the witnesses were acquainted with the defendant, and had more or less opportunity for acquiring knowledge on which to base an opinion. In such matters a very large discretion must be conceded to the trial court.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[g] The question of the mere manner or appearance of a person at a particular time does not fall within the requirement that the witness must be an "intimate acquaintance" in order to be a competent witness on the issue of the person's sanity.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[h] A jailer who had an excellent opportunity to study defendant's manner and mental condition for several months, during which he had charge of him, may testify, on the question of insanity, to his manner or appearance when he was committed.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[i] A jailer may testify to the conduct of defendant while in jail, and to the apparent condition of his mind during that time, in rebuttal of a showing of a general and permanent state of dementia and diseased condition of mind in defendant.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[j] The competency of a nonexpert witness under the statute, as an "intimate acquaintance," to express an opinion of defendant's sanity, is in the discretion of the trial judge. People v. Hill, 116 Cal. 562, 48 Pac. 711.

[k] Nonexpert witnesses who are intimate acquaintances of accused may testify as to his sanity.—People v. Barthleman, 120 Cal. 14, 52 Pac. 112.

[l] Opinion as to sanity of accused can only be given by an "intimate acquaintance" or an expert.—People v. Manoogian, 141 Cal. 597, 75 Pac. 177.

[m] Witness may testify as to acts or conduct of accused in respect to his sanity, though not an "intimate acquaintance" or

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an expert.—People v. Manoogian, 141 Cal. 595-598, 75 Pac. 177.

FOR AUTHORITIES FROM OTHER STATES:

See 36 L. R. A. 64, 38 L. R. A. 721, notes. See, also, 14 Cent. Dig., cols. 1731, 1735, §§ 1045, 1046.

§ 225. Sobriety.

[a] Nonexpert witness may testify as to apparent condition of defendant as to sobriety.—People v. Monteith, 73 Cal. 9, 14 Pac. 373.

§ 226. Handwriting.

[a] The testimony of a witness in relation to certain receipts purporting to have been signed by the defendant, to the effect that he was familiar with his handwriting, and that he thought it was his handwriting, but that he did not see him sign them, and would not swear that it was his handwriting, is sufficient to permit the receipts to be put in evidence.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., col. 1735, § 1047.

§ 227. Distance.

[a] It is not necessary that a witness, testifying that the spot where a murder was committed was within five hundred yards of the boundary line of the county in which the defendant was indicted, should have measured the distance.—People v. Alviso, 55 Cal. 230.

§ 228. Blood Stains.

[a] If, on trial for murder, the prosecution introduces testimony showing that colored spots were found on the prisoner's clothes and person, which it claims were blood, it is not obliged to show by scientific analysis that such spots were blood, but may rely on the opinions of witnesses who saw the spots.—People v. Bell, 49 Cal. 485.

[b] Where, on a trial for robbery, it is conceded that there was blood upon defendant's coat, a witness who saw him shortly after the alleged robbery is competent to testify that such blood was fresh, although he is not an expert.—People v. Loui Tung, 90 Cal. 377, 27 Pac. 295.

§ 229. Texture and Quality of Cloth.

[a] Whether two pieces of cloth are same texture and quality is proper subject for expert testimony of persons with special knowledge.—People v. Lovren, 119 Cal. 91, 51 Pac. 22.

§ 230. Cause and Effect.

[a] A physician, as such, and without showing experience with gunshot wounds, is not competent to give expert testimony as to what caused a bullet to deflect from its course after passing into the body of a person.—People v. Yokum, 118 Cal. 437, 50 Pac. 686.

[b] A witness who testifies that he has had experience with wounds and is able to tell from seeing them what they were made with, though not a professional expert, may testify as to whether, in his opinion, a wound was inflicted with a dull or sharp instrument.—People v. Sullivan, 8 Pac. 520.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1739, 1740, § 1052.

§ 231. Examination of Witness Giving Opinion.

[a] Where a witness has testified to matters of opinion, it is proper to ask him if he expressed a different opinion on another occasion, as tending to test the value of such opinion.—People v. Donovan, 43 Cal. 162.

[b] In a prosecution for larceny of a cow a witness had testified to finding on the premises of accused a "slunk" calf—that is, one that had been taken from its mother—and that it had been taken from the stolen cow, to which no objection nor motion to strike out was made. Held, that a question asking for the appearance of the calf as to when it had been taken from its mother, and the answer giving the facts on which his conclusion was based, were not objectionable as assuming that the calf had been taken from "a" cow; not "the" cow—that is, from the stolen cow.—People v. Machado, 130 Cal. xviii, 63 Pac. 66.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1743-1745, §§ 1056, 1057.

§ 232. Rebuttal of Opinion Evidence.

[a] Where, to establish an accused's mental unsoundness, it is shown that he consulted a boilermaker as to the feasibility of constructing a boiler so light by using aluminum that he could carry it on his back, the prosecution may show by an expert that the accused's idea was not so chimerical as to indicate mental unsoundness.—People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

§ 233. Subjects of Expert Testimony.

[a] The testimony of medical experts in a trial for rape, as to the effect of indecent liberties upon the mind of the female, is inadmissible.—People v. Royal, 53 Cal. 62.

[b] Expert testimony is not admissible, on a murder trial, as to whether a certain cartridge had marks upon it which would indicate that it had once been in the chamber of a pistol, or whether a ball taken from a certain pistol was similar to one which had been fired at the deceased, as such matters are matters of common knowledge.—People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

[c] The expressed "thought" of an expert, e. g., "I think," is clearly his "judgment."—People v. Durrant, 116 Cal. 210, 48 Pac. 75.

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[d] On trial for forgery of a check, where it was claimed that certain writing thereon had been removed and other writing substituted, testimony of an expert was admissible to prove that writing may be removed from paper by means of a certain fluid, without first showing that the writing in question had been so removed, or that defendant was conversant with the use of such fluid. Judgment (1898) 51 Pac. 945, reversed.—People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[e] On a prosecution for rape, it was proper to sustain an objection to a question put to a physician as to whether, having knowledge of the physical development of a man and woman, he thought it possible for a man to forcibly have intercourse with a well-developed girl weighing one hundred and thirty-eight pounds without her consent, since the inquiry was not one for expert opinion.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[f] Where, on a trial of a prosecution for rape, a physician testified that, in his opinion, a man, however strong, could not ravish a vigorous, well-developed woman, struggling against him, it was proper to strike such answer as not proper opinion evidence.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1746-1755, §§ 1059-1063; col. 1776, § 1079.

§ 234. —— Matters Involving Professional, Scientific or Technical Skill.

[a] Expert can only testify where there is question of professional, scientific or technical skill or knowledge.—People v. Durrant, 116 Cal. 217, 48 Pac. 75.

[b] Under Code of Civil Procedure, section 1863, providing that, when the characters in which an instrument is written are difficult to decipher, expert evidence is admissible to declare them, on a trial for forging a check on which, under the forged name, was an irregular character, expert testimony was inadmissible to show that it was a certain letter, when it did not appear that the characters in which the check was written were difficult to decipher, or that it had been executed by defendant as agent, or that the letter was an initial of his name.—People v. King, 125 Cal. 369, 58 Pac. 19.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1746-1749, § 1059

§ 235. —— Mental Condition or Capacity.

[a] An expert in insanity may testify that certain symptoms could not all be present in the same individual at the same time.—People v. Sowell, 145 Cal. 292, 78 Pac. 717.

[b] Upon trial of an indictment for preparing a false affidavit, it was proper to ask medical experts whether the person making the affidavit, who was ill at the date thereof, was at the time able to make such a statement as appeared in the affidavit.—People v. Brown, 13 Pac. 222.

FOR AUTHORITIES FROM OTHER STATES:

See 38 L. R. A. 733, 39 L. R. A. 305, notes. See, also, 14 Cent. Dig., cols. 1750, 1751, § 1061.

§ 236. —— Relative Position of Parties When Wound was Inflicted.

[a] Opinion of physician as to relative position of parties to a shooting is inadmissible.—People v. Westlake, 62 Cal. 303.

[b] Upon the trial of a defendant charged with murder, where the defendant contended that he acted in self-defense, and did not shoot until after he himself was wounded, and the position of his wound was shown and also the course taken by the bullet, the question as to his position at the time he was shot is not one in relation to which the opinion of an expert can be properly received, but is for the jury to determine.—People v. Smith, 93 Cal. 445, 29 Pac. 64.

[c] Where the only proof as to the competency of a witness as an expert was his statement that he was a physician, and had some experience during the last two years in gunshot wounds, it was error, on a trial for murder, to allow him to testify, from examination of deceased, that he thought "the pistol [at the time of the discharge that caused deceased's death] was about four feet . . . . from the wounded man; . . . " a physician not being, as such, an expert in such matters.—People v. Lemperle, 94 Cal. 45, 29 Pac. 709.

[d] The relative positions of defendant and deceased at the time of the shooting, as indicated by the location of the wound, is not a subject for expert testimony.—People v. Hill, 116 Cal. 562, 48 Pac. 711.

[e] The opinion of a physician who examined the wounds of the deceased is inadmissible to show that the person shooting deceased was either above or below him when he fired, since such a matter is not the subject of expert evidence, and no one could tell merely from the course of a bullet the position of the one who was shot and the one who did the shooting. People v. Milner, 122 Cal. 171, 54 Pac. 833.

[f] Where the defense to a prosecution for homicide was that it was committed in self-defense while deceased was attacking accused with a knife, and it appears that the shot causing the death passed through deceased's upper arm and body near the shoulder, it is error to admit expert medical testimony on the part of the people that the arm through which the bullet passed must have been hanging down at the time; the matter not being a subject for expert evidence.—People v. Farley, 124 Cal. 159, 57 Pac. 571.

[g] Expert medical evidence that when deceased was shot he could not have been standing erect is inadmissible on the part of the people, that fact not being the subject of expert testimony.—People v. Farley, 124 Cal. 594, 57 Pac. 571.

§ 237. Competency of Experts—Medical Experts.

[a] In a murder case, a physician of seventeen years' practice testified that he had had

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such experience as would enable him to say at what distance powder marks would be noticeable on the flesh from the firing of an S. & W. pistol of a certain caliber; that he had seen a great many gunshot wounds and powder marks and powder burns in connection therewith, and knew, of his own knowledge, the distance between the discharged weapons and the bodies fired on. Held, that it was not error to permit such witness to testify, as an expert, as to the distance at which the pistol carried by defendant at the time of the homicide would produce powder marks.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[b] Proof that a witness is a practicing physician and surgeon, and that he performed an autopsy on the body of a dead person, qualifies him to give an opinion as to the means used to produce death, it being conceded that the question is a proper one for expert testimony.—People v. Durrant, 116 Cal. 179, 48 Pac. 75.

[c] A physician who has taken a course of lectures on medical jurisprudence, studied the standard authorities on gunshot wounds, read army surgeons' reports, and concluded the autopsy in the case at bar, is competent to testify as to the entrance and exit of the bullet, though in his fifteen years' practice he has had but one case of gunshot wound, and that was only one of entrance.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1755-1764, §§ 1064-1070.

§ 238. —— To Testify to Comparative Powers of Eyesight.

[a] Physician cannot testify as to comparative power of eyesight of two persons without first examining their eyes.—People v. Marseiler, 70 Cal. 101, 11 Pac. 503.

§ 239. Examination of Experts—In General.

[a] Upon the trial of a woman accused of murder, her family physician, called by the defendant to prove insanity, may be asked whether, from his treatment of her for her ailments and all he knew of her, she was of ordinary good mind, or was what he would ordinarily call a weak-minded woman.—People v. Worthington, 105 Cal. 166, 38 Pac. 689.

[b] Where, on a trial for murder, insanity is relied on as a defense, an expert may testify to statements made to him by the defendant of previous sufferings, which formed the basis of, and are declared by him to be necessary to, his diagnosis of the case.—People v. Shattuck, 109 Cal. 673, 42 Pac. 315.

[c] On a criminal prosecution, questions put to an expert witness held not improper, as calling for the opinion of the witness as to whether defendant was insane at the time of the crime.—People v. Griffith, 146 Cal. 339, 30 Pac. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1764-1776, §§ 1071-1079.

§ 240. —— Hypothetical Questions.

[a] Entire testimony given cannot be read to expert as hypothetical question. Counsel should assume certain facts and put usual hypothetical question.—People v. Goldenson, 76 Cal. 356, 18 Pac. 161.

[b] Hypothetical question must be based on facts proved.—People v. Dunne, 80 Cal. 37, 21 Pac. 1130.

[c] Hypothetical question need not embrace all facts in evidence, or even be limited to facts proved. It must be based upon facts in evidence, but may be addressed to any theory which may be taken of them.—People v. Durrant, 116 Cal. 216, 48 Pac. 75.

[d] A hypothetical question need not embrace all the evidence on the subject involved, but may be based on any facts within the range of the evidence.—People v. Hill, 116 Cal. 562, 48 Pac. 711.

[e] If theory upon which hypothetical question proceeds does not accord with that of opposing counsel, he may on cross-examination ask question formulated on his theory, leaving to jury to decide which theory is warranted by evidence.—People v. Hill, 116 Cal. 567, 48 Pac. 711.

[f] Where the state's theory is that the death was caused by poisoning, it is admissible to ask expert witnesses the cause of the death when there is some evidence to support the facts hypothetically stated in the questions.—People v. Bowers, 18 Pac. 660.

FOR AUTHORITIES FROM OTHER STATES:

Hypothetical questions which may be put to expert: 53 Am. Rep. 307, note. See, also, 14 Cent. Dig., cols. 1768-1771, §§ 1073, 1074.

§ 241. —— Use of Medical Works.

[a] A medical expert, testifying in a criminal trial, was asked whether "Maudsley's Responsibility in Mental Diseases" was a standard work. The question was asked for the purpose of showing the familiarity of witness with authors upon that subject. Held, that the question was properly excluded, on the ground that the opinion of the witness as to the merits and standing of the work would not tend to prove such familiarity.—People v. Sutton, 73 Cal. 243, 15 Pac. 86.

[b] Medical treatises, whether proved to be standard or not, are only admissible to discredit witness basing testimony on them.—People v. Goldenson, 76 Cal. 348, 19 Pac. 161.

[c] That part of a question asked of a medical expert in a prosecution for homicide was read from a medical book by the district attorney did not constitute error.—People v. Bowers (Cal. App.), 82 Pac. 553.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1773, 1774, § 1077.

§ 242. —— Right of Witness to State Grounds of Opinion.

[a] A witness may be permitted to state the grounds of an opinion to which he has testified;

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and such statement is not objectionable as being necessarily argumentative.—People v. Bird, 124 Cal. 32, 56 Pac. 639.

[b] A handwriting expert examined as a witness in a criminal case may testify as to the reasons for his opinion.—People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1772, 1773, § 1076.

§ 243. —— Cross-Examination.

[a] On a prosecution for rape, a physician who testified for the prosecution that a penetration would produce the conditions of the parts discovered by his examination, could be cross-examined as to whether all such conditions could not have been caused by other things, though he had stated that a certain instrument would cause certain of the conditions.—People v. Knight, 43 Pac. 6.

[b] A medical expert, on cross-examination, may be asked hypothetical questions bearing upon the sanity of defendant, and based on a portion of the evidence, for the purpose of testing his competency as an expert.—People v. Sutton, 73 Cal. 243, 15 Pac. 86.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1774, 1775, § 1078.

§ 244. Effect of Evidence.

[a] On a prosecution for an assault on a boy with intent to commit the infamous crime against nature, the testimony of a physician, who examined the clothing after it was dry, that he was unable to determine positively what the substance was, might have tended to weaken the mother's testimony as to what the substance found on the boy's clothing was, but did not render it incompetent.—People v. Swist, 136 Cal. 520, 69 Pac. 223.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1745, 1746, § 1058; cols. 1777-1779, § 1081.

J. TESTIMONY OF ACCOMPLICES AND CODEFENDANTS.

WHO ARE ACCOMPLICES WITHIN RULE REQUIRING CORROBORATION, § 245.
—— VICTIM OF ABORTION, § 246.
—— PERSONS COERCED TO ASSIST IN CRIME, § 247.
—— DETECTIVE OR FEIGNED ACCOMPLICE, § 248.
COMPETENCY AND EFFECT OF TESTIMONY, § 249.
CORROBORATION—NECESSITY, § 250.
—— SUFFICIENCY, § 251.

§ 245. Who are Accomplices Within Rule Requiring Corroboration.

[a] The testimony of a feigned accomplice does not require corroboration in order to convict a defendant of a criminal offense.—(1866) People v. Farrell, 30 Cal. 316; (1886) People v. Bolanger, 71 Cal. 17, 11 Pac. 799.

[b] One who did not know of the larceny until after it was committed, but who purchased the stolen property under directions of an officer, with money furnished by the officer, with a view of detecting the thief, is not an accomplice whose testimony requires corroboration in order to convict the defendant, under section 4 of the Penal Code.—People v. Barric, 49 Cal. 342.

[c] Where the evidence was that deceased had been murdered in accordance with a conspiracy; that prior to the murder the witness B. had conversed freely with accused about the details of the proposed murder, learning all about it; that they asked and expected him to participate, but he did not, though he accepted buckshot from them to be used on the occasion, and did not discourage the killing, nor give warning to deceased—it was error to charge that there was no evidence tending to show that B. was an accomplice.—People v. Curlee, 53 Cal. 604.

[d] One paying to procure another's influence on court to sway its decision is accomplice, whose testimony must be corroborated, under Penal Code, section 1111.—Buckley, In re, 69 Cal. 12, 13, 10 Pac. 69.

[e] Testimony of an accomplice that he did not consider another witness guilty of the crime for which accused was being tried is not competent, as showing that such witness was not also an accomplice.—People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

[f] Testimony, in a trial for forgery, of a witness claimed to be an accomplice, that he was acquitted of the same offense, is not competent, as showing that he was not an accomplice.—People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

[g] Uncorroborated evidence of an accessory after the fact is sufficient to sustain a conviction. Such an accessory is not an accomplice who aids, abets and assists in the commission of the crime, or who had advised and encouraged its commission.—People v. Collum, 122 Cal. 186, 54 Pac. 589.

[h] An intimate friend of a pregnant woman, who accompanies her to the house where an abortion is performed, but attempts to dissuade her from undergoing the operation, and does not in any way assist therein, is not an accomplice, within the rule requiring corroboration of an accomplice's testimony.—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017.

[i] Witnesses on a trial for bribery in violation of Penal Code, section 86, held, not accomplices as a matter of law under section 20.—People v. Bunkers (Cal. App.), 84 Pac. 364.

[j] Witnesses on a trial for bribery in violation of Penal Code, section 86, held guilty, if at all, of violating section 85, as principals under section 31 and not principals of the crime punished by section 86.—People v. Bunkers (Cal. App.), 84 Pac. 364.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 445-449; 14 Cent. Dig., cols. 1779-1791, §§ 1082-1098.

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§ 246. —— Victim of Abortion.

[a] Where the only evidence is the testimony of the woman on whom the attempt to produce an abortion was made it must be corroborated in respect to some of the material facts which constitute a necessary element of the crime.—People v. Josselyn, 39 Cal. 393.

§ 247. —— Persons Coerced to Assist in Crime.

[a] A thirteen-year-old boy, who, under threats and coercion of another, takes part in the commission of a felony, is not an accomplice, and his testimony is sufficient to sustain a conviction without corroboration.—People v. Miller, 66 Cal. 468, 6 Pac. 99.

§ 248. —— Detective or Feigned Accomplice.

[a] Discredit of accomplice does not attach to a feigned accomplice or detective.—People v. Bolanger, 71 Cal. 20, 11 Pac. 799.

§ 249. Competency and Effect of Testimony.

[a] When accomplice or codefendant elects to be tried separately he is a competent witness for the other defendants charged with the same offense, the credibility of his testimony being left to the jury.—People v. Labra, 5 Cal. 183; People v. Newberry, 20 Cal. 439.

[b] Objection that witness is accomplice goes to effect of evidence, not to its admissibility.—People v. Grundell, 75 Cal. 305, 17 Pac. 214.

[c] The testimony of an accomplice should be received with caution.—People v. Bonney, 98 Cal. 278, 33 Pac. 98.

[d] Where the finding by the jury that a codefendant was an accomplice must be vacated by reason of the admission of incompetent evidence, the admissions of the alleged accomplice, made, as to accused, out of the latter's hearing, ceased to be competent against him.—People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

[e] On trial for robbery, testimony as to a certain conversation between defendant and his accomplices, on the night before such robbery, was erroneously admitted, where such conversation related to collateral transactions, which were incapable of affording any reasonable inference as to the matter in issue.—People v. Lynch, 122 Cal. 501, 55 Pac. 248.

For Authorities from Other States:

See 12 Cyc. 449-453; 14 Cent. Dig., cols. 1791-1808, §§ 1099-1123.

§ 250. Corroboration—Necessity.

Corroboration of prosecutrix in prosecution for incest. See Incest, § 9.

[a] Under Criminal Practice Act, section 375, the testimony of an accomplice must, in order to secure conviction, be corroborated by other evidence, which of itself in some degree tends to connect the accused with the commission of the offense.—People v. Ames, 39 Cal. 403; People v. Melvane, 39 Cal. 614.

[b] Under Penal Code, section 1111, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence, which of itself tends to connect defendant with the offense, and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, a conviction of murder cannot be sustained, where there is no evidence aside from that of the accomplice on which even a well-grounded suspicion of defendant's guilt can be founded.—People v. Smith, 98 Cal. 218, 33 Pac. 58.

[c] Defendant accused of robbery cannot be convicted upon uncorroborated testimony of an accomplice.—People v. Main, 114 Cal. 632, 46 Pac. 612.

[d] An instruction, in a trial for robbery, that, if the jury believe, beyond a reasonable doubt, from the testimony of an accomplice who testified for the people, that defendant is guilty of the offense charged, and if they believe, from the evidence, "outside of that which tends to connect the defendant with the commission of the offense, other than shown in the commission of the offense itself and the circumstances thereof," they should find defendant guilty, failed to state with sufficient clearness the rule that testimony of an accomplice is insufficient of itself to justify conviction, and the degree of proof sufficient to corroborate such testimony.—People v. Lynch, 122 Cal. 501, 55 Pac. 248.

[e] One could not maintain that he was convicted on the uncorroborated testimony of an accomplice where, though the only direct evidence of his connection with the crime charged was such testimony, there was other evidence which, without the aid of such testimony, tended to connect him with the commission of such offense.—People v. Lynch, 122 Cal. 501, 55 Pac. 248.

[f] Before a defendant accused of forgery can be convicted upon the testimony of an accomplice, showing a conspiracy between himself and the defendant and several other persons, by means of the alleged forgery, to defraud the corporation named, the testimony of the accomplice must be corroborated by evidence independent of that of the accomplice, showing the existence of the conspiracy to defraud, and the fact that the defendant was a member of that conspiracy.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[g] Penal Code, section 1111, enacts that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself tends to connect defendant with the crime, and that the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. Held, that testimony apart from that of the accomplice which is merely sufficient to raise a suspicion of guilt is not the corroboration requisite to justify conviction.—People v. Hoagland, 138 Cal. 338, 71 Pac. 359.

[h] On a prosecution for larceny, held, that the evidence, apart from the testimony of one who was an accomplice, if any crime had been committed, was not even sufficient to arouse a well-founded suspicion of guilt.—People v. Hoagland, 138 Cal. 338, 71 Pac. 359.

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FOR AUTHORITIES FROM OTHER STATES:

Whether conviction may be based upon the uncorroborated testimony of accomplices; 71 Am. Dec. 671, note. See, also, 1 Cyc. 191; 12 Cyc. 453; 14 Cent. Dig., cols. 1808-1813, §§ 1124-1126.

§ 251. —— Sufficiency.

[a] It is necessary that evidence corroborating an accomplice, in order to convict, should tend to connect the defendant with the commission of the offense, and not merely to show its commission or the circumstances of it.—People v. Eckert, 16 Cal. 110; People v. Ames, 39 Cal. 403; (1870) People v. Melvane, 39 Cal. 614.

[b] It is not error to refuse to discharge the defendant, in a criminal case, at the close of the testimony for the prosecution, which is principally the evidence of an accomplice, when it is corroborated by other evidence which at least tends to connect the defendant with the commission of the offense charged.—People v. Garnett, 29 Cal. 622.

[c] Fact that one robber was addressed by same Christian name as defendant will not sustain testimony of accomplice.—People v. Ames, 39 Cal. 403.

[d] Proof that part of stolen property was found on next day after theft on person accused is such corroborating evidence as may warrant a conviction upon the further testimony of an accomplice.—People v. Melvane, 39 Cal. 614.

[e] Admissions made by a prisoner, which tend strongly to connect him with the larceny for which he is on trial, are a sufficient corroboration of the testimony of an accomplice, introduced by the prosecution, to sustain a conviction.—People v. Cleveland, 49 Cal. 577.

[f] On a trial for stealing a horse, if the prosecution prove the larceny by an accomplice, further proof that the next morning after the horse was stolen the prisoner received him from the person who took the horse from the owner, and immediately removed him to another place for pasturage, and gave an assumed name to the person with whom he left the horse for pasturage, is a sufficient corroboration of the testimony of the accomplice to sustain a conviction.—People v. Cleveland, 49 Cal. 577.

[g] Evidence corroborating testimony of an accomplice need not tend to establish precise facts testified to by accomplice. It is sufficient if it tends to connect the defendant with the commission of the crime.—People v. Cloonan, 50 Cal. 449; People v. Clough, 73 Cal. 348, 15 Pac. 5.

[h] Corroborating evidence required to convict a defendant, in addition to that of an accomplice, is not sufficient if it merely tends to raise a suspicion of the guilt of the accused.—People v. Thompson, 50 Cal. 480.

[i] Testimony of accomplice is corroborated by evidence of admission made by defendant connecting himself with the crime.—People v. Zimmerman, 65 Cal. 307, 4 Pac. 20.

[j] The rule prohibiting a conviction upon the uncorroborated testimony of an accomplice does not require that every fact testified to by the accomplice shall be specifically corroborated in order to warrant a conviction.—People v. Kunz, 73 Cal. 313, 14 Pac. 836.

[k] Evidence held to sufficiently corroborate testimony of accomplice.—People v. Grundell, 75 Cal. 305, 17 Pac. 214.

[l] Evidence of condition in which accomplice was found is admissible.—People v. Ward, 77 Cal. 114, 19 Pac. 373.

[m] Corroboration of accomplice is sufficient if it, of itself, connects accused with crime though it be slight.—People v. McLean, 84 Cal. 482, 24 Pac. 32.

[n] Testimony of witness is corroborated when it corresponds with representations of other witnesses or comports with facts otherwise known or established.—People v. Hong Tong, 85 Cal. 173, 24 Pac. 738.

[o] Under section 1111, Penal Code, corroboration of the evidence of an accomplice must be by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the act, and testimony, which at most only raises a bare suspicion of the defendant's guilt, falls short of such corroboration as can be relied upon to support a conviction.—People v. Koenig, 99 Cal. 574, 34 Pac. 238.

[p] Testimony of one that defendant procured him to falsely register as a voter in a precinct is corroborated by evidence that defendant was present when such person made his false affidavit, afterward stated that he anticipated trouble because of his connection with such registration, and tried to suppress such person's testimony, paying him money to go away.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

[q] The evidence reviewed and shown to be sufficiently corroborative of the testimony of an accomplice to the guilt of the defendant, to warrant a verdict of conviction.—People v. Armstrong, 114 Cal. 570, 46 Pac. 611.

[r] The testimony of an accomplice to a robbery committed by the defendant is sufficiently corroborated by other proof tending to identify defendant as one of the assailants, and that he was seen in the company of the accomplice, in the near vicinity of the scene of the robbery a very few minutes prior to the commission of the offense.—People v. Barker, 114 Cal. 617, 46 Pac. 601.

[s] Evidence tending, independently of that of accomplice, to connect defendant with commission of the offense is all that is required, even though if it stood alone it would be entitled to but little weight; nor need it extend to every fact and detail covered by the statements of the accomplice.—People v. Barker, 114 Cal. 617, 46 Pac. 601.

[t] Testimony of accomplice whose testimony was sought to be corroborated that he did not consider that corroborating witness

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was guilty of forgery charges, is incompetent, and should be stricken out.—People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

[u] A corroboration of an accomplice which tends to connect accused with the crime only by being considered in connection with the accomplice's testimony is insufficient, under Penal Code, section 1111, requiring the corroboration to be by evidence which, without the aid of the accomplice's testimony, tends to connect accused with the commission of the offense.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[v] Under Penal Code, section 1111, requiring corroboration of the testimony of an accomplice, evidence in a prosecution for receiving stolen goods that defendant placed the goods in the back room of a saloon, saying that he had loaned money on them, and offering no explanation why they were put there, is sufficient to corroborate the testimony of the accomplice.—People v. Solomon, 125 Cal. xix, 58 Pac. 55.

[w] Under Penal Code, section 1111, requiring corroboration of the testimony of an accomplice, it is not necessary that corroborative evidence should go so far as to establish by itself, and without the aid of the testimony of the accomplice, that defendant in a prosecution for receiving stolen goods possessed the requisite guilty knowledge.—People v. Solomon, 125 Cal. xix, 58 Pac. 55.

[x] On a prosecution for arson the defense claimed that a witness for the state was an accomplice. Defendant admitted that he and the witness were present when the fire started, though he testified that they tried to extinguish it. When he heard of the arrest of the witness he said, "That means trouble for me; I will skip out"; and in his conversation with another witness defendant said, "How did you know I burnt the barn?" Held that, even if the witness was an accomplice, he was sufficiently corroborated.—People v. Davis, 135 Cal. 162, 67 Pac. 59.

[y] On a prosecution for the larceny of two hundred and eighty dollars it appeared that the defendant knew of the money being in the pocket of the prosecuting witness, and that he, with others, drank with the defendant, and then went with him to a dance hall, where the money was taken by a woman. On the prosecuting witness making complaint, defendant told him he would try to get back the money, and he got the witness out of town that night. When the prosecuting witness returned, and had the woman arrested, defendant gave him forty dollars, and induced the witness to attempt to have the prosecution dismissed, which the witness did not succeed in doing, and defendant again sent witness out of town. Defendant then fled from the state, and when found was living under an assumed name. Held, that the circumstances were sufficient to corroboate the testimony of an accomplice as to defendant's guilt.—People v. Ardell, 135 Cal. xix, 66 Pac. 970.

[z] Mere proof of opportunity of defendant to participate in robbery charged is not sufficient corroboration of the testimony of the accomplice, especially where others had the like opportunity.—People v. Morton, 139 Cal. 719, 73 Pac. 609.

[aa] Where the only evidence to convict defendant of a robbery is that of an accomplice, who testifies that defendant planned the robbery, and received part of the proceeds, and that of two witnesses, that they had seen defendant and the accomplice together on two occasions before the robbery, there is no such corroboration of the evidence of the accomplice, as required by Penal Code, section 1111, as to justify conviction.—People v. Larsen, 34 Pac. 514.

[bb] Where the only direct evidence against defendant was that of an alleged accomplice, and the only corroborative evidence that of his wife, it was error to refuse to charge that, if the jury found the direct witness to be an accomplice, and did not believe the evidence of his wife, then there was no corroborating evidence of the accomplice, and it was their duty to acquit.—People v. Strybe, 36 Pac. 3.

[cc] Before a conviction for crime can be set aside for want of evidence corroborating the testimony of an accomplice, as required by Penal Code, section 1111, the witnesses who gave corroborative evidence must be shown to have been accomplices.—People v. Bunkers (Cal. App.), 84 Pac. 364.

[dd] Evidence sufficient to corroborate an accomplice held sufficient when connecting defendant with the crime charged.—People v. Bunkers (Cal. App.), 84 Pac. 364.

[ee] On a trial for bribery, evidence held to sufficiently corroborate the testimony of an accomplice so as to warrant a conviction.—People v. Bunkers (Cal. App.), 84 Pac. 364.

FOR AUTHORITIES FROM OTHER STATES:

See 1 Cyc. 192; 12 Cyc. 455-459; 14 Cent. Dig., cols. 1814-1816, § 1128.

K. CONFESSIONS.

WHAT CONSTITUTES CONFESSION, § 252.
ADMISSIBILITY AND EFFECT, § 253.
—— TO PROVE CORPUS DELICTI, § 254.
VOLUNTARY CHARACTER, § 255.
PROMISES, INDUCEMENTS OR ADVICE OF OFFICER, § 256.
THREATS, HOPE AND FEAR, § 257.
MENTAL INCAPACITY — EXCITEMENT OR PAIN, § 258.
—— INTOXICATION, § 259.
INVOLUNTARY CONFESSION RESULTING IN DISCOVERY OF PHYSICAL FACTS, § 260.
CORROBORATION, § 261.
LAYING FOUNDATION—PROVING CORPUS DELICTI, § 262.
—— VOLUNTARY CHARACTER, § 263.
WRITTEN CONFESSIONS, § 264.
JUDICIAL CONFESSION, § 265.

§ 252. What Constitutes Confession.

[a] Confession, in criminal law, is voluntary declaration made by person who has committed a crime to another of the agency or participation he had in the same. Word

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"confession" is not mere equivalent of word "statement" or "declaration."—People v. Strong, 30 Cal. 151.

[b] "Confession" receivable in evidence only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt; and the word does not apply to a statement made by a defendant of facts which tend to establish his guilt.—People v. Parton, 49 Cal. 632.

[c] Statements by defendant not in themselves involving guilt, but connected with other facts tending to prove it, are not a confession, and hence are admissible, though extorted by threats or promises.—People v. Le Roy, 65 Cal. 613, 4 Pac. 649.

[d] Statement made by defendant to coroner concerning cause of death of his wife, whom he is accused of murdering, is admissible in evidence, and, not being a confession, is not subject to rule that a confession must first be shown to have been made freely and voluntarily, and the evidence is not objectionable where it appears that statement was made to several other persons, and it seems to have been made freely and voluntarily.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[e] A statement by defendant, in reply to the remark of a constable that he wished he had stopped a wagon which passed him the night of the theft, driving rapidly, that it was best for him that he did not, or otherwise he might not have stopped any more, is not a confession, so as to render it inadmissible without proof that it was voluntarily made.—People v. Hickman, 113 Cal. 80, 45 Pac. 175.

[f] A statement by defendant, in answer to the remark of the constable who arrested him that his possession of the stolen article looked suspicious, "Well, damned if it don't," is not a confession, so as to render it inadmissible without proof that it was voluntarily made.—People v. Hickman, 113 Cal. 80, 45 Pac. 175.

[g] Statement made to prosecuting attorney denying robbery and accounting for its possession by claiming to have found it is not a confession.—People v. Ammerman, 118 Cal. 32, 50 Pac. 15.

[h] Confession is person's declaration of his agency or participation in crime. Term is restricted to acknowledgments of guilt.—People v. Ammerman, 118 Cal. 32, 50 Pac. 15.

[i] On trial for burglary, evidence that defendants, being found in possession of the stolen goods, stated that they had bought them, and asked not be taken to jail, is admissible, without preliminary proof that the statements were voluntarily made, since they are not a confession of guilt.—People v. Ashmead, 118 Cal. 508, 50 Pac. 681.

[j] Acts and admissions of one charged with criminal libel tending to show his proprietorship of the paper in which the libel was published are not confessions, in legal contemplation.—People v. Miller, 122 Cal. 84, 54 Pac. 523.

[k] In a prosecution for robbery, evidence of a conversation had between witness and defendant, in which the latter stated that on the night of the offense he slept in a boxcar down by the bridge, was not a confession of guilt, and therefore did not require proof that it was voluntary, in order to justify its admission.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 459, 460; 14 Cent. Dig., cols. 1834-1838, §§ 1139-1145.

§ 253. Admissibility and Effect.

[a] In a trial for murder, where the admission or confession of the party was resorted to as evidence, it was held to be error to exclude any portion of it made at the same time with that portion of it which was admitted.—People v. Navis, 3 Cal. 106.

[b] Question as to admissibility of confessions is one for exercise of sound judicial discretion, to be guided by the circumstances of each particular case.—People v. Jim Ti, 32 Cal. 60.

[c] Confessions which are entirely voluntary when made are admissible in evidence, even if, on a prior occasion, some promise of favor not acted upon, and which had ceased to be operative, had been made to induce the accused to confess.—People v. Jim Ti, 32 Cal. 60.

[d] Confessions are to be received with great caution.—People v. Gelabert, 39 Cal. 664.

[e] If any part of a confession is given in evidence, the whole must be given.—People v. Gelabert, 39 Cal. 663.

[f] Confession cannot be proved on cross-examination without preliminary proof that it was voluntary.—People v. Yeaton, 75 Cal. 417, 418, 17 Pac. 544.

[g] Conference with accused which brought about letter confessing guilt is one transaction and where letter is admitted conference should also be admitted.—People v. Yeaton, 75 Cal. 418, 17 Pac. 544.

[h] Declaration or confession voluntarily made without inducement or threat is admissible.—People v. Goldenson, 76 Cal. 349, 350, 19 Pac. 161.

[i] A voluntary confession of murder is not inadmissible because made to free defendant's sister, then under arrest for the crime, from suspicion, especially where defendant testifies in self-defense to every fact contained in the confession, and the sister testifies that he acknowledged to her substantially the same facts immediately after the killing.—People v. Smalling, 94 Cal. 112, 29 Pac. 421.

[j] Admissions and confessions of defendant, which it appears were freely and voluntarily made are properly received in evidence. People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

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[k] All verbal admissions should be received with great caution, and the whole of what the prisoner said on the subject at the time of making the admission or confession should be taken together.—People v. Tarbox, 115 Cal. 57, 46 Pac. 986.

[l] Guilt of a defendant cannot be proved by his confession or admissions only; but admissions of the defendant, not amounting to a confession of guilt, are not to be rejected because they may, when connected with other facts proved, tend to establish his guilt.—People v. Miller, 122 Cal. 84, 54 Pac. 523.

[m] Proper foundation being laid, questions put to elicit evidence of confessions by accused are proper.—People v. Chaves, 122 Cal. 134, 54 Pac. 596.

[n] Confessions of defendant are admissible, if proved to have been freely and voluntarily given, and made without duress, or inducement, or promise.—People v. Eslabe, 127 Cal. 243, 59 Pac. 577.

[o] Before a confession of the defendant can be admitted, the prosecution must show that it was voluntary, and made without any previous inducement, intimidation, or threat, and it is error not to permit the defendant to cross-examine the witness upon the preliminary inquiry, before the confession is received; but such error is without prejudice where a subsequent cross-examination failed to show that the confession was not voluntary, or to impeach the previous statement of the witness that it was voluntary.—People v. Miller, 135 Cal. 69, 67 Pac. 12.

[p] Testimony of witnesses to a confession made by one defendant, implicating a codefendant jointly tried with him for the same offense, is inadmissible hearsay as to the codefendant; and notwithstanding the absence of a specific objection that the evidence was such hearsay, yet where the defendants were represented by the same counsel, and the evidence was objected to as incompetent, the codefendant is entitled to the benefit of the exception taken to its admission.—People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 461, 462, 478; 14 Cent. Dig., cols. 1838-1846, §§ 1146-1156.

§ 254. —— To Prove Corpus Delicti.

[a] Although extrajudicial confessions cannot warrant a conviction unless corroborated by proof aliunde of the corpus delicti, yet full proof of the body of the crime, independently of the confession, is not required, it being sufficient that there are corroborating facts which, with the confession, show the existence of an offense of which the defendant is guilty.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

[b] The corpus delicti, involving all the elements of the crime, must be established independently of evidence which merely tends to connect the defendant with the crime charged; and the admissions or confessions of the defendant cannot be considered as evidence of the corpus delicti, nor used to establish any necessary element in the commission of the crime.—People v. Tapia, 131 Cal. 647, 63 Pac. 1001.

[c] The corpus delicti necessary to establish the crime of obtaining money under false pretenses must be proved by evidence independent of the extrajudicial confessions or admissions of defendant.—People v. Ward, 145 Cal. 736, 79 Pac. 448.

§ 255. Voluntary Character.

[a] Where a person charged with larceny was told, previous to his arrest, that if he would tell where the money was he would be let off, which he declined to do, but afterward when in jail, and the property had been found, confessed that he had taken it, held, that such confession was voluntary, and was not induced by hope, and was admissible evidence against him.—People v. Jim Ti, 32 Cal. 60.

[b] If confession be in substance repeated before examining magistrate a few days after the arrest, and reduced to the form of a written statement, the statement is inadmissible as evidence, if confession was originally made under such inducements as to exclude the first confession.—People v. Johnson, 41 Cal. 452.

[c] A confession made to an officer who has the prisoner in custody, whether it appear to have been made voluntarily or not, is admissible if it was not induced by improper means.—People v. Long, 43 Cal. 444.

[d] When person charged with crime is arrested and held in custody more than twenty-four hours without being taken before a magistrate, voluntary confessions made by him to the officer are not to be excluded as evidence, on the ground that he was illegally in custody after the twenty-four hours expired.—People v. Devine, 46 Cal. 46.

[e] District attorneys should never offer evidence of confessions not voluntarily made.—People v. Thompson, 84 Cal. 606, 24 Pac. 384.

[f] Fact that statement was made while under arrest does not take away the voluntary character of the confession or render it inadmissible.—People v. Miller, 135 Cal. 69, 67 Pac. 12.

[g] Confession is free and voluntary though made to officers while under arrest, in absence of inducement or threat.—People v. Walker, 140 Cal. 156, 73 Pac. 831.

[h] Evidence of confessions made by a defendant while under arrest are admissible if voluntarily made, the fact that defendant was under arrest not necessarily proving that the declarations were involuntary.—People v. Abbott, 4 Pac. 769.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 464-469; 14 Cent. Dig., cols. 1851-1867, §§ 1163-1174; cols. 1899-1905, §§ 1202-1206.

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§ 256. Promises, Inducements or Advice of Officer.

[a] Confessions or disclosures made under any promise or encouragement of any hope or favor are inadmissible.—People v. Smith, 15 Cal. 409.

[b] Confessions made to prosecutor and owner of property stolen, upon inducements held out by him that if defendant would disclose his confederates he would use his influence to get defendant acquitted, are not admissible in evidence against him.—People v. Smith, 15 Cal. 408.

[c] Defendants were accused of larceny, and were told by the sheriff who arrested them that it was no use for them to deny the offense, and that it would be lighter for them if they confessed. Two days later they signed a written confession before the committing magistrate, acknowledging the larceny. Held, that their confession was not admissible on the trial, on the ground that it was obtained through inducements held out to them.—People v. Johnson, 41 Cal. 452.

[d] A confession of a crime made to one in authority, upon a promise to the accused that it will be better for him to make a full disclosure, is not admissible in evidence upon the trial of the accused.—People v. Barrie, 49 Cal. 342.

[e] Confession induced by advice of sheriff that it would be better for accused is not voluntary and is inadmissible.—People v. Thompson, 84 Cal. 604, 24 Pac. 384.

[f] A confession obtained from a prisoner charged with a crime, which he had previously denied, by means of a statement by the sheriff that they had a sure case against him, and a promise by the sheriff to use his influence in the prisoner's behalf if he would admit his guilt, is not admissible in evidence against him, nor are repetitions of such confession, made to other officers, though without further inducement.—People v. Castro, 125 Cal. 521, 58 Pac. 133.

[g] Upon the trial of a charge of rape, committed by sexual intercourse with a girl under age of consent, testimony as to the conduct of the defendant at the office of the city marshal, where he was induced to go by the brothers of the prosecutrix, and where he was under the restraint of threats and promises, is not admissible to show an implied admission by him of a statement then made by the prosecutrix; nor is evidence of her statement, based upon such conduct, admissible.—People v. Williams, 133 Cal. 165, 65 Pac. 323.

[h] Defendant, accused of murder, was kept in jail for a month without being permitted advice of counsel and without preliminary examination; being visited once or twice a day by the sheriff, who told him he had better tell the truth, that a former statement denying guilt was untrue, that there was evidence tending to implicate him in the crime, and that he (the sheriff) believed accused was implicated, but would do what he could for him if he would tell the truth. Held, that defendant's statement made under these circumstances was not free and voluntary, and should have been excluded.—People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

§ 257. Threats, Hope and Fear.

[a] A confession extorted by or obtained through the influence of threats is inadmissible.—People v. Smith, 15 Cal. 409.

[b] Confessions made under the influence of hope or fear are inadmissible.—People v. Smith, 15 Cal. 409.

[c] The ground of the rule excluding confessions obtained by threats from one charged with a crime is the possibility that the confession may be false, and it does not apply to a confession of the place where stolen property is concealed, when the finding of the property at the place indicated precludes the possibility of the confession being untrue. People v. Ah Ki, 20 Cal. 177.

[d] A confession made under the influence of threats is inadmissible, where there are no facts or circumstances establishing its truth.—People v. Ah How, 34 Cal. 218.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 475, 476; 14 Cent. Dig., cols. 1887-1894, §§ 1189-1195.

§ 258. Mental Incapacity—Excitement or Pain.

[a] That written confession was made when defendant was under state of great excitement does not affect its admissibility.—People v. Cokhanour, 120 Cal. 254, 52 Pac. 505.

[b] The fact that defendant, on trial for murder, had a bullet wound in his head, and was not in the full possession of his faculties at the time he made a confession, does not affect its admissibility, but may be considered in determining its weight.—People v. Miller, 135 Cal. 69, 67 Pac. 12.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 477; 14 Cent. Dig., cols. 1896, 1897, §§ 1198, 1199.

§ 259. —— Intoxication.

[a] A confession made under the influence of liquor furnished the prisoner with the consent of the officer having him in charge, and to whom the confession was made, but not influenced by anything said by the officer, is admissible.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 477; 14 Cent. Dig., col. 1896, 1897, § 1199.

§ 260. Involuntary Confessions Resulting in Discovery of Physical Facts.

[a] An involuntary confession may be admitted in evidence when it points to the discovery of physical facts, tending to establish guilt, which are proven in connection therewith.—People v. Ah Ki, 20 Cal. 177.

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[b] Where an involuntary confession states inculpatory facts or circumstances found to be true, such parts of the confession as disclose the inculpatory circumstances are admissible.—People v. Hoy Yen, 34 Cal. 176.

[c] Where prisoner, accused of robbery of certain money, promised to point out place where the money was buried, and afterward pointed out a place at which, it was proved by other witnesses, the stolen money was found, held, that such statement, when taken in connection with said fact and proof, was admissible in evidence against him, although not voluntarily made.—People v. Hoy Yen, 34 Cal. 176.

§ 261. Corroboration.

[a] If prosecution proved defendant's confessions of the crime with which he stands charged circumstances may be shown corroborative of those confessions.—People v. Jones, 32 Cal. 80.

[b] A confession not corroborated by independent evidence of the corpus delicti is not sufficient to support a conviction of felony.—People v. Thrall, 50 Cal. 415.

[c] One who, with intent to forge the check of R. & M., signs the name of "A. E. R. & Co." thereto, believing it to be the true name of the firm, cannot be convicted of forgery upon his confession alone that he had signed the name "A. E. R. & Co."—People v. Elliot, 90 Cal. 586, 27 Pac. 433.

[d] Under an information charging accused with burning a dwelling-house, evidence that other buildings were also burned was admissible in proof of the corpus delicti, and also to corroborate accused's confession that the other buildings were burned.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 483, 484; 14 Cent. Dig., cols. 1918-1923, §§ 1222-1226.

§ 262. Laying Foundation—Proving Corpus Delicti.

[a] Term "corpus delicti" involves elements of crime; and, in order to prove it, all of the elements of crime must be made to appear before defendant's confessions are admissible for any purpose, and they cannot be used to establish any necessary element of the commission of a crime.—People v. Simonsen, 107 Cal. 35, 40 Pac. 440.

[b] Upon a charge of obtaining property under false pretenses, through misrepresentations made by the defendant as to his ownership of land, evidence of the extrajudicial statements and admissions of the defendant are insufficient to prove the fact that he owned no land as represented, that fact being an essential element and part of the corpus delicti, which must be established before the admissions of the defendant are admissible in evidence.—People v. Simonsen, 107 Cal. 345, 40 Pac. 440.

[c] Upon the trial of a defendant charged with burglary with intent to commit larceny, evidence that the prosecuting witness had articles of personal property belonging to him in the house where he lived, at 6 o'clock P. M. of a certain day, and that about 9 o'clock P. M. of the same day, police officers came to his house with the defendant, and with said articles belonging to the witness, together with the testimony of the police officers that the defendant had the articles in his possession, and surrendered them to them, and went with them to the room of the prosecuting witness, and showed them the place in the room where he got them, is sufficient proof of the corpus delicti to justify evidence of the admissions of the defendant made to the officers, that he took the stuff because he was hard up, and expected to get a good price for it.—People v. Harris, 114 Cal. 575, 46 Pac. 602.

[d] In order to justify a conviction, a jury must be satisfied beyond a reasonable doubt of every fact necessary to constitute the offense, and to identify the defendant as its perpetrator; but it is not necessary that the evidence of the corpus delicti should be of such conclusive character, nor that it should itself connect the defendant with the perpetration of the offense, in order to justify the admission of the defendant's confessions. People v. Jones, 123 Cal. 65, 55 Pac. 698.

[e] Evidence in a homicide case held sufficient to prove the corpus delicti so as to allow of admission of defendant's statement. People v. Grill (Cal. App.), 86 Pac. 613.

[f] In a prosecution for infanticide the admission or confession of defendant held insufficient to sustain a conviction without independent proof that the death of the infant was caused by a criminal act.—People v. Eldridge (Cal. App.), 86 Pac. 832.

§ 263. —— Voluntary Character.

[a] If the prosecution, in a criminal case, offers in evidence a confession made by the defendant in a deposition made by him before a committing magistrate, the foundation must be laid for its introduction by preliminary proof showing, prima facie, that it was freely and voluntarily made.—People v. Soto, 49 Cal. 67.

[b] If a confession is offered in evidence, defendant is entitled, before it is received, to prove that it was not voluntarily made.—People v. Soto, 49 Cal. 67.

[c] Where witness testifies that confession was voluntary, without inducement or threat, and there is opportunity for cross-examination, his testimony cannot be stricken as conclusion of law.—People v. Goldenson, 76 Cal. 350, 19 Pac. 161.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1908-1914, §§ 1212-1218.

§ 264. Written Confessions.

[a] Written confession made at preliminary examination is admissible at trial.—People v. Cokahnour, 120 Cal. 254, 52 Pac. 505.

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FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 479; 14 Cent. Dig., cols. 1906-1908, §§ 1208-1211.

§ 265. Judicial Confessions.

[a] Under the code a person accused of crime may voluntarily become a witness for or against himself at a preliminary examination; and, if it appears that his testimony was voluntary and free from undue influence, it may be used in evidence against him on his subsequent trial for the offense.—People v. Kelley, 47 Cal. 125.

[b] A voluntary confession made by defendant at the coroner's inquest is admissible.—People v. Taylor, 59 Cal. 640.

[c] Since accused is not compelled to testify at the coroner's inquest, his confession made at such inquest is voluntary and admissible.—People v. Martinez, 66 Cal. 278, 5 Pac. 261.

[d] Statements made by defendant, while testifying as a witness on the trial of one charged with the same offense as that for which he is being tried, are admissible against him, where it does not appear that he objected to being sworn or to testifying on that occasion.—People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 480; 14 Cent. Dig., cols. 1905, 1906, § 1207.

L. EVIDENCE AT PRELIMINARY EXAMINATION OR AT FORMER TRIAL.

ADMISSIBILITY IN GENERAL, § 266.
GROUNDS FOR ADMISSION, § 267.
—— ABSENCE OF WITNESS, § 268.
—— DEATH OF WITNESS, § 269.
LAYING FOUNDATION—SHOWING DILIGENCE TO PROCURE WITNESS, § 270.
METHOD OF PROOF, § 271.
AUTHENTICATION AND SUFFICIENCY OF NOTES AND TRANSCRIPTS, § 272.
EFFECT, § 273.

Statements made by accused in criminal prosecutions as evidence. See ante, § 173.
Judicial confessions. See ante, § 265.
Admissibility of evidence given at inquest or preliminary examination. See Homicide, §§ 132-134.

§ 266. Admissibility in General.

[a] A deposition taken before an examining magistrate, on the preliminary examination of a person charged with the commission of a felony, is not admissible on his trial; (1) Because the magistrate is not authorized or required to take it; and (2) because taken before the defendant was held to answer.—People v. Garrett, 6 Cal. 203.

[b] To prove what witness swore to on former trial is producing testimony anew, and is not using or referring to the former verdict, and does not conflict with section 439 of the Criminal Practice Act.—People v. Devine, 46 Cal. 46.

[c] The testimony of a witness, taken down by the justice of the peace on defendant's preliminary examination, is not admissible on the ground that the witness, though within reach of the subpoena of the courts, was too unwell to appear, under Penal Code, section 686, permitting such testimony to be read only in certain specified cases.—People v. Bojorquez, 55 Cal. 463.

[d] Statements made by defendant before the coroner's jury are admissible in evidence. People v. Herbert, 61 Cal. 544; People v. Martinez, 66 Cal. 278, 5 Pac. 261.

[e] Written statement of evidence given by defendant before grand jury, which he admits to be correct, is admissible against him. People v. Northey, 77 Cal. 632, 19 Pac. 865, 20 Pac. 129.

[f] The deposition of an absent witness, taken at the preliminary examination, may be used at the trial in a case of homicide, and its admission is not in violation of section 13 of article 1 of the constitution of the state.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[g] Testimony of witness given at preliminary examination conducted in English language is not inadmissible because court asked interpreter to ask witness if he understood.—People v. Sierp, 116 Cal. 250, 48 Pac. 88.

[h] Constitution, article 1, section 13, providing for the taking, in the presence of defendant and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, "when there is reason to believe that the witness, from inability or other cause, will not attend at the trial," does not prohibit the admission, on a murder trial, of testimony given by an absent witness on the preliminary examination.—People v. Sierp, 116 Cal. 249, 48 Pac. 88.

[i] The introduction of the testimony given at the preliminary examination by an absent witness for the prosecution in a homicide case is not inhibited by Constitution, article 1, section 13, providing for the taking in defendant's presence of depositions in criminal cases other than homicide, where there is reason to believe that the witness will not attend at the trial.—People v. Cady, 117 Cal. 10, 48 Pac. 908.

[j] Deposition taken upon the preliminary examination of the defendant upon other charges of crime against him, so far as not made applicable by stipulation to preliminary examination for offense on trial, is not admissible in evidence against defendant, by reason of death of witness.—People v. Brennan, 121 Cal. 495, 53 Pac. 1098.

[k] The statute allowing the admission in evidence at trial of reporter's notes of testimony taken at the preliminary examination of defendant is constitutional.—People v. Plyer, 126 Cal. 379, 58 Pac. 904.

[l] Testimony of witness before committing magistrate, if properly offered, is admissible, though official stenographer dictated notes to typewriter whom he employed, but whose work he compared with his notes.—People v. Donnelly, 143 Cal. 394, 77 Pac. 177.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1928-1930, § 1230.

§ 267. Grounds for Admission.

[a] Common-law rule that testimony of a witness given upon a former trial of a cause between the same parties is admissible for or against either party, upon showing that the witness is dead or without the jurisdiction of the court, though modified by the Penal Code so as to forbid the prosecution in a criminal case from introducing the testimony of a deceased or absent witness unless taken before the committing magistrate, or by deposition taken conditionally in the presence of the defendant, remains unchanged as to the rights of the defendant.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

FOR AUTHORITIES FROM OTHER STATES:

Stenographers' notes as evidence, and the right to read them to the jury: 81 Am. St. Rep. 358, note. See, also, 14 Cent. Dig., cols. 1930-1936, §§ 1231-1235.

§ 268. —— Absence of Witness.

[a] Proof may be introduced of what witness testified to on former trial if witness has left state.—People v. Devine, 46 Cal. 46.

[b] Deposition taken at preliminary examination may be used at trial when witness is absent from state.—People v. Nelson, 85 Cal. 426, 427, 24 Pac. 1006.

[c] In criminal case testimony of witness taken at former trial, who is absent from the state at the time of a second trial, is admissible, and, being absolutely incompetent, is subject to the general objection that the evidence was incompetent, irrelevant, and immaterial.—People v. Gordon, 99 Cal. 227, 33 Pac. 901.

[d] Where a witness could not be found in the county where the trial was to be had, after inquiries had been made by an officer who knew him "at every place and from everyone" he thought would know anything of him, and subpoenas had been sent by the district attorney to the sheriff of every county in the state, and returns had been received from forty-six of such sheriffs, certifying that after diligent search the witness could not be found in their respective counties, the court was justified in permitting the introduction of the witness' deposition taken at the preliminary examination under Penal Code, section 686, authorizing the deposition of such a witness to be read on its being satisfactorily shown to the court that he cannot, with due diligence, be found within the state.—People v. Witty, 138 Cal. 576, 72 Pac. 177.

[e] Where case was continued on account of absence of owner from state, and such absence was prolonged so that no subpoena could be served upon him, and there was a sufficient showing of diligence, his deposition taken at the preliminary examination, properly certified by the shorthand reporter, and without any harmful variance from the reporter's notes, was properly admitted in evidence.—People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

[f] Under Penal Code, section 686, subdivision 3, providing that the deposition of a witness may be used in criminal actions on its being satisfactorily shown to the court that the witness cannot with due diligence be found in the state, the question as to whether a witness can with due diligence be found in the state is one of fact, to be determined by the court.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

FOR AUTHORITIES FROM OTHER STATES:

Absent witnesses, evidence of, when admissible in criminal trials: 61 Am. St. Rep. 886, note. See, also, 14 Cent. Dig., cols. 1933-1935, § 1233.

§ 269. —— Death of Witness.

[a] On a second trial for an alleged crime the prosecution may prove what a witness, who has died since the former trial, testified to on that trial.—People v. Brotherton, 47 Cal. 388; People v. Murphy, 45 Cal. 137.

[b] Where it is admitted, upon the trial of a defendant charged with the commission of a crime, that one of the witnesses, whose testimony was taken upon preliminary examination, is dead, it is proper to read in evidence his testimony taken before the committing magistrate, which had been taken down in shorthand, transcribed, certified, and filed, as required by section 869 of the Penal Code; and an objection thereto upon the ground "that due diligence has not been shown to bring this witness before the court to obtain his evidence in the regular way" is properly overruled.—People v. Douglass, 100 Cal. 1, 34 Pac. 490.

[c] Evidence taken on a preliminary examination on one charge cannot, on subsequent stipulation that it be considered the evidence on another charge, be given in evidence on trial of the latter case; Penal Code, section 686, providing merely that in a criminal action, where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of defendant, who has had an opportunity to cross-examine the witness, the deposition may be read, on its being shown that the witness is dead.—People v. Brennan, 121 Cal. 495, 53 Pac. 1098.

[d] An accused may waive the right of confronting his witnesses secured by Penal Code, section 686, and hence may introduce in evidence the testimony of a deceased witness, whether the testimony was given at the preliminary examination or on a former trial.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

[e] Under Penal Code, section 686, providing that a defendant shall have the right to confront the witnesses against him, except where the charge has been preliminarily examined by a committing magistrate, and the testimony taken down in the presence of defendant, the prosecution cannot introduce the testimony of a deceased witness, which

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was taken on a former trial of the case.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1931-1933, § 1232.

§ 270. Laying Foundation—Showing Diligence to Procure Witness.

[a] Evidence held insufficient to sustain a finding of diligence to obtain witness within the state, so as to authorize the use of his deposition taken at a preliminary examination, as authorized by Penal Code, section 686. People v. Ballard, 1 Cal. App. 222, 81 Pac. 1040.

[b] Where a subpoena for the prosecuting witness, with a return that he cannot be found in San Francisco, is offered, and after a delay of seven days, for additional search, subpoenas issued to eight other counties, with returns that the witness cannot be found, are offered, sufficient foundation is laid for the introduction of the witness' deposition taken before the committing magistrate.—People v. Carty, 77 Cal. 213, 19 Pac. 490.

[c] Depositions taken at preliminary examination may be used at trial when witness is absent from state and with due diligence cannot be found.—People v. Nelson, 85 Cal. 426, 24 Pac. 1006.

[d] Where an officer serving a subpoena went to the hotel occupied by a witness, and was there told that he had left the state, and he then went to one of witness' haunts, and received the same reply, and to another, where he was informed that witness was liable to return at any time, and he made further efforts to locate him, without success, such showing was sufficient to authorize introduction of the witness' testimony on a former preliminary examination.—People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

[e] It cannot be said that the court erred in rejecting the testimony of a former witness, where sufficient diligence was not shown to ascertain his whereabouts, and to serve him with a subpoena.—People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48.

[f] Diligence herein held sufficient to show that there was no abuse of discretion on the part of the trial court in permitting the deposition of the witness to be read, pursuant to Penal Code, section 686, subdivision 3, providing that the deposition of a witness may be used in criminal actions, on it being satisfactorily shown that the witness cannot with due diligence be found in the state.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[g] In a prosecution for robbery, subpoenas for an absent witness that had been issued and returned unserved are admissible for the purpose of showing what had been done toward making the service on the missing witness.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[h] The uncontradicted evidence that a witness, who testified at the preliminary examination of accused on the charge of murder, was at the time of the trial, and for two months preceding it had been, in a foreign country, is sufficient to show that he could not be found in the state, within Penal Code, section 686, providing for the introduction in evidence of the deposition of a witness on preliminary examination, on it being shown that the witness cannot be found within the state.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[i] Where a witness telegraphed and wrote to the district attorney from another state that he could not be present at the trial, which began about twelve days thereafter, and the return to a subpoena for such witness was that he could not be found within the county, there was a showing of such "due diligence" as justified the reading at the trial of his evidence taken at the preliminary examination before a committing magistrate, under Penal Code, section 686.—People v. Munroe, 33 Pac. 776.

[j] A subpoena for the prosecuting witness, a farm laborer, issued more than two weeks before the trial, and like writs sent and specially commended to the sheriffs of four adjoining counties, were all returned unserved. The county officer testified that inquiry had been made of the farmers in the chief towns of the county, and all over the county. Held a predicate for a sworn stenographer's report of his evidence in the preliminary examination.—People v. Davis, 36 Pac. 96.

[k] Under Penal Code, section 686, people held entitled to read the deposition of a witness whose attendance could not be procured, without having moved the committing magistrate to put the witness under bonds in accordance with Penal Code, section 879.—People v. Flannery (Cal. App.), 84 Pac. 461.

§ 271. Method of Proof.

[a] Evidence of committing magistrate, as to the statement made by the prisoner on his preliminary examination, is not admissible on the trial.—People v. Gibbons, 43 Cal. 557.

[b] The testimony given by a witness on a former trial, but since deceased, may be proved on a subsequent trial, by permitting a person who kept notes of such testimony, and who swears they contain the substance thereof, to read his notes to the jury.—People v. Murphy, 45 Cal. 137.

[c] The provision of Statutes of 1872, page 551, section 2, making the phonographic reporter's notes of the testimony upon a preliminary examination for a felony prima facie evidence, does not render the notes admissible where the testimony was taken through an interpreter.—People v. Lee Fat, 54 Cal. 527.

[d] Testimony of reporter, based upon his notes, is incompetent to prove the testimony of a witness given in a foreign language at a former trial, and taken down by the reporter from the interpreter. The interpreter, or some other person who heard and understood the language in which the testimony was given should have been called.—People v. Ah Yute, 56 Cal. 119.

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[e] The shorthand notes of a reporter, taken upon a former trial, cannot be used as evidence upon a new trial, the reporter being dead.—People v. Qurise, 59 Cal. 343.

[f] Grand juror may testify as to admissions made by accused when testifying before jury.—People v. Northey, 77 Cal. 633, 634, 19 Pac. 865, 20 Pac. 129.

[g] Evidence given at preliminary examination may be shown by reporter using notes taken by him to refresh his memory.—People v. Carty, 77 Cal. 216, 19 Pac. 490.

[h] A stenographer, who took down the evidence at a trial, may, subject to cross-examination from the adverse party, testify from his notes as to the evidence. Code of Civil Procedure, section 2047, providing that a witness may refresh his memory respecting a fact, by anything written by himself at the time such fact occurred, but that the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.—People v. Lem You, 97 Cal. 224, 32 Pac. 11.

[i] Death of a witness whose testimony was taken at the preliminary examination must be proved at the trial in the same manner that any other fact is proved by relevant and competent evidence, with the right of cross-examination, and cannot be established by the ex parte affidavit of a relative of the witness. People v. Plyler, 126 Cal. 379, 58 Pac. 904.

[j] A stenographer may testify as to evidence given by accused before the grand jury, where the evidence in no sense amounts to confession.—People v. Sexton, 132 Cal. 37, 64 Pac. 107.

[k] Offer by defendant to prove admissible testimony of witnesses given upon a former trial, which was not alone to prove their testimony by the recollection of the official reporter, reinforced by his stenographic notes, but included, as well, an offer to prove it by the official transcript of those notes on file in the court, is sufficient to show prejudicial error in refusing to admit the testimony.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

[l] The stenographer's notes of the testimony of an interpreter who interpreted the testimony of the defendant, who testified in Chinese at the preliminary examination, are inadmissible hearsay as against the defendant, and cannot be used for the purpose of impeaching his testimony. The fact that the interpreter testified that he accurately stated in English all that the defendant said in Chinese cannot render the stenographer's notes admissible.—People v. John, 137 Cal. 220, 69 Pac. 1063.

[m] That a deposition of a witness at a preliminary examination contained interpolated words in parentheses by the reporter, which, on defendant's objection, were ordered omitted in reading the deposition to the jury, did not render the deposition inadmissible.—People v. Witty, 138 Cal. 576, 72 Pac. 177.

[n] Admission of transcript of testimony taken at preliminary examination in police court held, under the evidence, not error.—People v. Melandrez (Cal. App.), 88 Pac. 372.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1936-1948, §§ 1236-1246.

§ 272. Authentication and Sufficiency of Notes and Transcripts.

[a] The stenographic notes of a witness' testimony, taken on the preliminary examination, which are not written out, certified, and filed by the reporter, as provided by Penal Code, section 869, are not admissible in evidence at the trial after the death of the witness.—People v. Cunningham, 66 Cal. 668, 4 Pac. 1144.

[b] Stenographer's transcript of testimony at preliminary examination, duly filed, is placed on same footing as deposition and admissible as such.—People v. Grundell, 75 Cal. 303, 17 Pac. 214.

[c] Requirement as to time of filing transcript of evidence taken at preliminary examination is directory and filing within reasonable time is sufficient.—People v. Grundell, 75 Cal. 304, 17 Pac. 214.

[d] The certified transcript of the testimony at the preliminary examination, in order to be admissible at the trial, must show affirmatively that the testimony therein set out was taken at the examination of the accused, and the defect cannot be cured by oral testimony.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[e] Where the transcript of testimony taken at a preliminary examination does not have the title of any court or cause in which the testimony was taken, and it is certified to be a true copy of the testimony instead of a correct statement of the testimony, the authentication and certificate are not sufficient to be admissible in evidence upon the trial of the accused.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[f] Penal Code, section 869, subdivision 5, provides that the reporter's stenographic notes of depositions taken in cases of homicide must be filed with the county clerk. Held, in a prosecution for murder, not error to overrule an objection to the admission in evidence of the deposition of a witness, since deceased, taken at the preliminary examination, where it was not affirmatively shown that the reporter's notes had been filed with the county clerk.—People v. Eslabe, 127 Cal. 243, 59 Pac. 577.

[g] Authentication of the deposition of a witness given on the preliminary examination of the defendant accused of a felony, by a certificate of the stenographer who took the testimony, stating that it is "a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above-entitled case," though careless in not following the language of the statute, is in substantial compliance therewith, and includes in the meaning of the certificate "a

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was taken on a former trial of the case.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cent. Dig., cols. 1931-1933, § 1282.

§ 270. Laying Foundation—Showing Diligence to Procure Witness.

[a] Evidence held insufficient to sustain a finding of diligence to obtain witness within the state, so as to authorize the use of his deposition taken at a preliminary examination, as authorized by Penal Code, section 686. People v. Ballard, 1 Cal. App. 222, 81 Pac. 1040.

[b] Where a subpoena for the prosecuting witness, with a return that he cannot be found in San Francisco, is offered, and after a delay of seven days, for additional search, subpoenas issued to eight other counties, with returns that the witness cannot be found, are offered, sufficient foundation is laid for the introduction of the witness' deposition taken before the committing magistrate.—People v. Carty, 77 Cal. 213, 19 Pac. 490.

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[i] Where a witness telegraphed and wrote to the district attorney from another state that he could not be present at the trial, which began about twelve days thereafter, and the return to a subpoena for such witness was that he could not be found within the county, there was a showing of such "due diligence" as justified the reading at the trial of his evidence taken at the preliminary examination before a committing magistrate, under Penal Code, section 686.—People v. Munroe, 33 Pac. 776.

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[c] The provision of Statutes of 1872, page 551, section 2, making the phonographic reporter's notes of the testimony upon a preliminary examination for a felony prima facie evidence, does not render the notes admissible where the testimony was taken through an interpreter.—People v. Lee Fat, 54 Cal. 527.

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[e] The shorthand notes of a reporter, taken upon a former trial, cannot be used as evidence upon a new trial, the reporter being dead.—People v. Qurise, 59 Cal. 343.

[f] Grand juror may testify as to admissions made by accused when testifying before jury.—People v. Northey, 77 Cal. 633, 634, 19 Pac. 865, 20 Pac. 129.

[g] Evidence given at preliminary examination may be shown by reporter using notes taken by him to refresh his memory.—People v. Carty, 77 Cal. 216, 19 Pac. 490.

[h] A stenographer, who took down the evidence at a trial, may, subject to cross-examination from the adverse party, testify from his notes as to the evidence. Code of Civil Procedure, section 2047, providing that a witness may refresh his memory respecting a fact, by anything written by himself at the time such fact occurred, but that the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.—People v. Lem You, 97 Cal. 224, 32 Pac. 11.

[i] Death of a witness whose testimony was taken at the preliminary examination must be proved at the trial in the same manner that any other fact is proved by relevant and competent evidence, with the right of cross-examination, and cannot be established by the ex parte affidavit of a relative of the witness. People v. Plyler, 126 Cal. 379, 58 Pac. 904.

[j] A stenographer may testify as to evidence given by accused before the grand jury, where the evidence in no sense amounts to confession.—People v. Sexton, 132 Cal. 37, 64 Pac. 107.

[k] Offer by defendant to prove admissible testimony of witnesses given upon a former trial, which was not alone to prove their testimony by the recollection of the official reporter, reinforced by his stenographic notes, but included, as well, an offer to prove it by the official transcript of those notes on file in the court, is sufficient to show prejudicial error in refusing to admit the testimony.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

[l] The stenographer's notes of the testimony of an interpreter who interpreted the testimony of the defendant, who testified in Chinese at the preliminary examination, are inadmissible hearsay as against the defendant, and cannot be used for the purpose of impeaching his testimony. The fact that the interpreter testified that he accurately stated in English all that the defendant said in Chinese cannot render the stenographer's notes admissible.—People v. John, 137 Cal. 220, 69 Pac. 1063.

[m] That a deposition of a witness at a preliminary examination contained interpolated words in parentheses by the reporter, which, on defendant's objection, were ordered omitted in reading the deposition to the jury, did not render the deposition inadmissible.—People v. Witty, 138 Cal. 576, 72 Pac. 177.

[n] Admission of transcript of testimony taken at preliminary examination in police court held, under the evidence, not error.—People v. Melandrez (Cal. App.), 88 Pac. 372.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1936-1948, §§ 1236-1246.

§ 272. Authentication and Sufficiency of Notes and Transcripts.

[a] The stenographic notes of a witness' testimony, taken on the preliminary examination, which are not written out, certified, and filed by the reporter, as provided by Penal Code, section 869, are not admissible in evidence at the trial after the death of the witness.—People v. Cunningham, 66 Cal. 668, 4 Pac. 1144.

[b] Stenographer's transcript of testimony at preliminary examination, duly filed, is placed on same footing as deposition and admissible as such.—People v. Grundell, 75 Cal. 303, 17 Pac. 214.

[c] Requirement as to time of filing transcript of evidence taken at preliminary examination is directory and filing within reasonable time is sufficient.—People v. Grundell, 75 Cal. 304, 17 Pac. 214.

[d] The certified transcript of the testimony at the preliminary examination, in order to be admissible at the trial, must show affirmatively that the testimony therein set out was taken at the examination of the accused, and the defect cannot be cured by oral testimony.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[e] Where the transcript of testimony taken at a preliminary examination does not have the title of any court or cause in which the testimony was taken, and it is certified to be a true copy of the testimony instead of a correct statement of the testimony, the authentication and certificate are not sufficient to be admissible in evidence upon the trial of the accused.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[f] Penal Code, section 869, subdivision 5, provides that the reporter's stenographic notes of depositions taken in cases of homicide must be filed with the county clerk. Held, in a prosecution for murder, not error to overrule an objection to the admission in evidence of the deposition of a witness, since deceased, taken at the preliminary examination, where it was not affirmatively shown that the reporter's notes had been filed with the county clerk.—People v. Eslabe, 127 Cal. 243, 59 Pac. 577.

[g] Authentication of the deposition of a witness given on the preliminary examination of the defendant accused of a felony, by a certificate of the stenographer who took the testimony, stating that it is "a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above-entitled case," though careless in not following the language of the statute, is in substantial compliance therewith, and includes in the meaning of the certificate "a

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correct statement of such testimony and proceedings in the case," as required by section 869 of the Penal Code.—People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

[h] A reporter personally dictating from his shorthand notes of the testimony on a preliminary examination to an assistant, who, under his direction and in his presence, makes the longhand transcript, transcribes his shorthand notes within Penal Code, section 869, requiring the reporter to transcribe into longhand his shorthand notes.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[i] Where a reporter personally dictated from his shorthand notes of the testimony at a preliminary examination to an assistant, who made the longhand transcript, the evidence of the reporter that he accurately dictated to his typewriter, and the evidence of his typewriter that he literally put into longhand the dictation, was competent to show that the transcript was a correct statement of the testimony.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[j] A defendant on trial for crime, who desires to show that the transcript of the testimony at the preliminary examination is incorrect, may avail himself of the reporter's shorthand notes filed with the county clerk, as required by statute.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[k] Penal Code, section 869, subdivision 5, requiring the reporter, within ten days after the close of the preliminary examination, if defendant is held for trial, to transcribe his shorthand notes, and certify and file the same with the county clerk, is directory merely, and the filing of the same within a reasonable time is sufficient to warrant its use as the deposition of a witness at the examination not found within the state at the time of the trial.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[l] Where it was shown that a person was an official stenographer of the police court, that he was specially appointed and sworn by the committing magistrate to take down the testimony on the preliminary examination of defendant, that he took down the testimony, that he filed a transcript thereof with the clerk, and that he made the signature at the end of the transcript, it was sufficiently shown that the person who signed the certificate at the close of such testimony was an official stenographer.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[m] The failure of the reporter to make a comparison with his notes of the longhand transcript done at his dictation by an assistant does not show that the statement of the testimony contained in the transcript is incorrect.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[n] Penal Code, section 686, subdivision 3, provides for the admission in a criminal case of testimony taken by question and answer in the presence of defendant at a preliminary hearing. Under section 869 the transcript in longhand of the shorthand notes of the testimony and proceedings, made and certified by the shorthand reporter appointed by the magistrate at the preliminary hearing to take the testimony, and who did take it, when it is filed with the county clerk, is put on the same footing as a deposition. Held, that the fact that the testimony was taken through an interpreter does not affect the admissibility of the deposition.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

§ 273. Effect.

[a] Penal Code, section 686, provides that the deposition of a witness, taken, as therein provided, at a preliminary examination, may be read at the trial upon its being satisfactorily shown to the court that the witness is dead, or cannot, with due diligence, be found within the state. Section 1345 provides that such depositions are to be taken subject to like objections to the questions and answers contained therein as if the witnesses had been examined orally in court. Held, that defendant is not entitled to have such deposition admitted on the trial as absolutely true.—People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cent. Dig., col. 1948, § 1247.

M. WEIGHT AND SUFFICIENCY.

IN GENERAL, § 274.
CIRCUMSTANTIAL EVIDENCE, § 275.
NUMBER OF WITNESSES, § 276.
CREDIBILITY OF WITNESSES, § 277.
DEGREE OF PROOF REQUISITE AND REASONABLE DOUBT, § 278.
—— CORPORATE EXISTENCE, § 279.
—— VENUE OF OFFENSE, § 280.
—— FORMER CONVICTION, § 281.
—— INTENT, § 282.
—— ALIBI, § 283.
—— INSANITY, § 284.
—— MITIGATING CIRCUMSTANCES, § 285.

§ 274. In General.

[a] Document proved to have been executed by secondary evidence without objection is as much in evidence as though instrument had been produced.—People v. Mauritzen, 84 Cal. 89, 24 Pac. 33.

[b] Possession of stolen goods, unexplained, is not, of itself, sufficient to justify conviction.—People v. Hannon, 85 Cal. 375, 24 Pac. 706.

[c] Evidence derived from comparison of handwritings is very unsatisfactory, and entitled to little weight when conclusion is contrary to positive evidence.—People v. Buckley, 116 Cal. 149, 47 Pac. 1009.

[d] The fact that a train was due at a certain station at a certain time is some evidence, however slight, that it actually was there at that time.—People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

[e] An admission by the prosecuting attorney that any number of witnesses would tes-

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tify that the reputation of deceased for peace and quiet was bad was, in effect, admission that the reputation of deceased for peace and quiet was bad in fact.—People v. Shaver, 120 Cal. 354, 52 Pac. 651.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 486, 487; 14 Cent. Dig., cols. 1949-1955, §§ 1248-1258.

§ 275. Circumstantial Evidence.

[a] Where evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witness.—People v. Cronin, 34 Cal. 191.

[b] The law does not require, in order to justify the inference of legal guilt in cases of circumstantial evidence, that the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The true rule is that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion.—People v. Murray, 41 Cal. 66.

[c] In order to convict on circumstantial evidence, the evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony.—People v. Padillia, 42 Cal. 535; People v. Cronin, 34 Cal. 191; People v. Eckman, 72 Cal. 582, 14 Pac. 359.

[d] Where independent facts and circumstances are relied upon to identify the accused as the person who committed the crime charged, each material independent fact or circumstance necessary to complete the chain or series of independent facts tending to establish a presumption of guilt should be established to the same degree of certainty as the main fact.—People v. Ah Chung, 54 Cal. 398.

[e] Although the fact that defendant was seen near the place where and about the time when the crime was committed is a material circumstance, a conviction based upon circumstantial evidence may be supported without it.—People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[f] A conviction may be had on circumstantial evidence alone, where all the circumstances distinctly point to the guilt of accused, and are inexplicable on any other reasonable hypothesis.—People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

[g] When circumstantial evidence is relied upon to establish guilt it should be sufficient to exclude every other rational hypothesis than guilt, but not to exclude every other hypothesis, and an instruction that it must include every other hypothesis than the guilt of the defendant is properly rejected. People v. Ward, 105 Cal. 335, 38 Pac. 945.

[h] Where defendant is accused of murder, and independent facts and circumstances are relied upon to identify the accused as person committing offense charged, each material fact or circumstance necessary to complete the chain or series of independent facts tending to establish the guilt must be established to a moral certainty and beyond a reasonable doubt; and if the jury have a reasonable doubt upon any single essential fact relied upon to complete the chain of circumstances, they cannot convict the defendant as long as they entertain such doubt.—People v. Smith, 106 Cal. 73, 39 Pac. 40.

[i] To warrant inference of legal guilt from circumstantial evidence, a conviction in the minds of the jurors to a moral certainty and beyond a reasonable doubt, arising from the evidence of the defendant's guilt, is sufficient, and an absolute or mathematical demonstration of guilt is not required.—People v. Bellamy, 109 Cal. 610, 42 Pac. 236.

[j] Circumstances relied upon to establish guilt must be consistent with that hypothesis and inconsistent with any other rational conclusion.—People v. Eagan, 116 Cal. 291, 48 Pac. 120.

[k] Decisions made by courts of other states in relation to the relative weight of direct and circumstantial evidence, where trial judges were free from any constitutional or statutory restrictions upon their power to sum up the evidence, are inapplicable under our constitution.—People v. Vereneseneckockockhoff, 129 Cal. 499, 58 Pac. 156, 62 Pac. 111.

[l] People v. Cronin, 34 Cal. 191, and cases affirming the doctrine of that case as to the relative weight of direct and circumstantial evidence, overruled. (McFarland, J., Garoutte, J., and Van Dyke, J., dissenting.)—People v. Vereneseneckockockhoff, 129 Cal. 499, 58 Pac. 156, 62 Pac. 111.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 487-489; 14 Cent. Dig., cols. 1955-1962, §§ 1259-1262.

§ 276. Number of Witnesses.

[a] Direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason.—People v. Westlake, 62 Cal. 303.

§ 277. Credibility of Witnesses.

[a] Evidence of witness is not to be rejected because he swears to opposite statements. Jury must receive and weigh it, but they may reject it or accept one side of it as true.—People v. Durrant, 116 Cal. 200, 48 Pac. 75.

FOR AUTHORITIES FROM OTHER STATES:

Disregard by jury of uncontradicted or unimpeached witness: 81 Am. Dec. 268, note. See, also, 12 Cyc. 486; 14 Cent. Dig., cols. 1951, 1952, § 1252.

§ 278. Degree of Proof Requisite and Reasonable Doubt.

[a] Proof beyond reasonable doubt is necessary to establish a fact against a prisoner;

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but preponderating proof, proof necessary to satisfy a jury of a fact, is sufficient to establish a fact in his favor.—People v. Milgate, 5 Cal. 127.

[b] A reasonable doubt is not a mere possible or imaginary doubt. Demonstration is not required beyond possibility of contrary.—People v. Graham, 21 Cal. 267.

[c] Reasonable doubt to warrant acquittal is not a mere possible doubt, but is such doubt as after the entire comparison and consideration of all the evidence leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.—People v. Strong, 30 Cal. 151.

[d] No conviction should be had unless the jury is "entirely satisfied," from evidence, that the defendant is guilty. (Per Crockett, J.)—People v. Phipps, 39 Cal. 326.

[e] A verdict of guilty under a charge that the jury must acquit unless they find deceased was killed by "Paul Tibeaux, while the defendant aided and abetted the killing," is erroneous where the evidence was that the fatal shot was fired by a Frenchman named "Paul," without showing that he was the same person known as "Paul Tibeaux."—People v. Coyodo, 40 Cal. 586.

[f] Evidence must satisfy jury, to moral certainty and beyond a reasonable doubt—that is, it must entirely satisfy jury—of guilt of defendant before they can convict. If jury are not entirely satisfied they should acquit.—People v. Padillia, 42 Cal. 535.

[g] A reasonable doubt of guilt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge—a certainty that convinces and directs the understanding, and satisfies the reason and judgment.—People v. Ashe, 44 Cal. 288.

[h] Although it may be positively proved that one of two or more persons committed a crime, yet, if it is uncertain which is the guilty party, all must be acquitted.—People v. Woody, 45 Cal. 289.

[i] In the decision of a criminal case involving life or liberty, something more than a mere preponderance of evidence is required to convict the defendant. There must be in the minds of the jury an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of the evidence.—People v. Brannon, 47 Cal. 96.

[j] It is not necessary that the evidence for the prosecution in a criminal case should show that the innocence of the defendant is impossible in order to justify the jury in finding him guilty, but it is enough if such evidence demonstrate the guilt of the defendant beyond a reasonable doubt.—People v. Brotherton, 47 Cal. 388.

[k] The jury must be satisfied beyond a reasonable doubt, before they can convict, that the defendant and no other person committed the offense.—People v. Kerrick, 52 Cal. 446.

[l] The truth of testimony on which depends, in part, defendant's guilt, is to be determined by the jury, and a fact tending to prove it need not be established beyond a reasonable doubt. A preponderance of evidence is sufficient.—People v. Mitchell, 63 Cal. 480.

[m] Guilt must be established by clear and satisfactory proof, and generally, beyond reasonable doubt.—Buckley, In re, 69 Cal. 3, 10 Pac. 69.

[n] There must be conviction of guilt in minds of jury to justify verdict affirming guilt, but it need not be an absolute conviction beyond possibility of doubt.—People v. Ferry, 84 Cal. 34, 24 Pac. 33.

[o] Evidence need not establish guilt to "absolute" moral certainty.—People v. Nelson, 85 Cal. 430, 24 Pac. 1006.

[p] Reasonable doubt is not such doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself.—People v. Bemmerly, 87 Cal. 120, 121, 35 Pac. 266.

[q] To justify the conviction of a defendant on a criminal charge he must not only be proven to have committed an offense, but the very offense charged in the indictment.—People v. Fagan, 98 Cal. 230, 33 Pac. 60.

[r] Evidence merely showing a possible opportunity for the commission of the offense, but not excluding reasonable opportunity for its commission by another, is insufficient to sustain a conviction.—People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

§ 279. —— Corporate Existence.

[a] On a trial for a crime committed against a corporation, the de facto existence of the corporation is all that is necessary to be shown.—People v. Frank, 28 Cal. 507; People v. Hughes, 29 Cal. 257; People v. Barric, 49 Cal. 342.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 494; 14 Cent. Dig., cols. 1974, 1975, § 1276.

§ 280. —— Venue of Offense.

[a] In a trial for murder, the only proof offered that it was committed in the county laid was the statement of the coroner who held the inquest that the body was found in such county. Semble, that defendant's point that the venue was not proved was not well taken.—People v. Williams, 18 Cal. 187.

[b] There is no necessity that any witness testify, in so many words, to the place of the offense; but it is sufficient if the evidence as a whole leaves no reasonable doubt that the acts charged were committed within the place laid.—People v. Manning, 48 Cal. 335.

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[c] If whole testimony leaves no room for reasonable doubt as to venue, it is sufficiently proven, though no witness testifies to it in so many words.—People v. Tonielli, 81 Cal. 279, 22 Pac. 658.

[d] The superintendent of a ranch in Yolo county kept books there of his receipts and expenditures, making monthly reports to his principal in San Francisco. He shipped horses to Sacramento, and there received the proceeds of their sale, but made no book entry or report thereof. Held, sufficient evidence that the embezzlement was committed in Sacramento county to justify the magistrate in holding him for trial there.—Palmer, Ex parte, 86 Cal. 631, 25 Pac. 130.

[e] Proof that crime was committed on well-known streets of city where court is sitting sufficiently establishes venue.—People v. McGregar, 88 Cal. 143, 144, 26 Pac. 97.

[f] Where it is testified that the deceased resided in the county, and it is plainly implied that she resided at the house in front of which her body was found and into which it was carried, the venue is sufficiently proved. People v. Kamaunu, 110 Cal. 609, 42 Pac. 1090.

[g] Where the witnesses in a prosecution for manslaughter committed in K. county state that the deceased was killed at a certain store, and it incidentally appears from the testimony of several witnesses that the store named is in K. county, the venue is sufficiently established.—People v. Smith, 121 Cal. 355, 53 Pac. 802.

[h] Evidence that witness' residence was A.; that he gave defendant four hundred dollars to be loaned, which defendant afterward claimed to have done, and that defendant read the papers to witness, the note alleged to have been fictitiously uttered being among them; and that all these facts took place in a certain county is sufficient in a prosecution under Penal Code, section 476, for uttering a fictitious instrument, to prove the venue to be in that county.—People v. Terrill, 133 Cal. 120, 65 Pac. 303.

[i] It was sufficient proof of the venue to prove the locality of the defendant's saloon, where the liquor was sold, and that this took place in the county of the venue and state of California.—People v. Monroe, 138 Cal. 97, 70 Pac. 1072.

[j] Where the launch was intrusted to the defendant in the county of the venue, and was carried out of the county in violation of the trust, and the jury were sufficiently warranted by the circumstances in finding that the intent to embezzle the launch was formed in said county, and not after it had been taken from the county, the venue is sufficiently established, and the superior court of that county has jurisdiction of the offense. People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

[k] Under Penal Code, section 1102, and Code of Civil Procedure, section 2061 (5), evidence to support a conviction must establish guilt beyond a reasonable doubt.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 494-496; 14 Cent. Dig., cols. 1975-1984, §§ 1277-1284.

§ 281. —— Former Conviction.

[a] On the trial of one accused of burglary, and who was also charged with a previous conviction of larceny, the state introduced the records of the superior court of another county, showing the conviction of a person bearing the same name as defendant, for stealing a mare from one J. P. A witness testified that he knew defendant, and that he knew him at the time of the former conviction; that defendant at that time was working for J. P.; and that he had admitted to witness that he was sent to state's prison for stealing a horse from J. P. Held, sufficient to support a verdict of former conviction.—People v. Hettick, 126 Cal. 425, 58 Pac. 918.

§ 282. —— Intent.

[a] "Slight evidence" of guilty intent is insufficient to sustain conviction.—People v. Stewart, 80 Cal. 131, 132, 22 Pac. 124.

[b] A requested instruction, in a prosecution for arson, that intent was a material ingredient in every crime, and must be proved by positive evidence, was properly refused.—People v. Hiltel, 131 Cal. 577, 63 Pac. 919.

§ 283. —— Alibi.

[a] A defendant charged with an assault with intent to rob, in establishing an alibi, may adduce circumstances tending to fix the time at which he was at the other place.—People v. McCrea, 32 Cal. 98.

[b] An alibi must be established by preponderance of the testimony.—People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

[c] Evidence of defendant's absence from the place where the crime was committed is not a defense, but it is admissible to establish a defense; and if a reasonable doubt is created by the evidence, defendant should be acquitted.—People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

[d] Evidence of alibi should not be scrutinized differently than that given in support of any other issue.—People v. Levine, 85 Cal. 42, 22 Pac. 969, 24 Pac. 631; People v. Lattimore, 86 Cal. 404, 24 Pac. 1091.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1998-2001, §§ 1289-1291.

§ 284. —— Insanity.

[a] When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.—People v. Myers, 20 Cal. 518; People v. Bawden, 90 Cal. 195, 27 Pac. 204.

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[b] Uneasiness at an avowed neglect of sworn duty is no evidence of insanity.—People v. Francis, 38 Cal. 191.

[c] Where insanity is relied upon as a defense, the defendant must clearly establish that, at the time of committing the offense, he was not conscious that he was doing wrong.—People v. McDonell, 47 Cal. 134.

[d] The defense of insanity must be shown by a preponderance of evidence.—People v. Bell, 49 Cal. 485; People v. Travers, 88 Cal. 233, 26 Pac. 88; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Ward, 105 Cal. 335, 38 Pac. 945.

[e] When, in a criminal case, the insanity of the defendant at the time of the commission of the offense is relied on as a defense, it is not necessary that it should be proved beyond a reasonable doubt, but may be proved by a preponderance of evidence.—People v. Wilson, 49 Cal. 13.

[f] When a person accused of crime relies on the defense of insanity, he is bound to establish it by such a preponderance of evidence that, if the question were submitted to a jury in a civil case, they would find him insane.—People v. Messersmith, 61 Cal. 246.

[g] Insanity, when relied upon as a defense in a criminal case, is a fact which must be established by the same clearness and certainty as any other fact alleged by defendant in his defense.—People v. Hamilton, 4 Ky. Law Rep. 115, 62 Cal. 377.

[h] The fact that the jailer having charge of defendant testifies that he has observed defendant during his imprisonment, and believes him to be insane, is not sufficient to create such a doubt as to require the court to order the question of defendant's sanity to be submitted to the jury.—People v. Lee Fook, 85 Cal. 300, 24 Pac. 654.

[i] The doctrine of reasonable doubt does not apply to the question of the insanity of the defendant; but the burden is on the defendant to show by a preponderance of evidence that he was insane at the time of the alleged homicide.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[j] Insanity as a defense to crime must be proved by a preponderance of evidence.—People v. Allender, 117 Cal. 81, 48 Pac. 1014.

[k] Reasonable doubt as to insanity is not sufficient to make out that defense.—People v. Barthleman, 120 Cal. 11, 52 Pac. 112.

FOR AUTHORITIES FROM OTHER STATES:

See 39 L. R. A. 737, note. See, also, 12 Cyc. 496; 14 Cent. Dig., cols. 1984-1998, §§ 1285-1288.

§ 285. —— Mitigating Circumstances.

[a] It is incumbent on defendant to prove circumstances in mitigation or justification sufficiently to create reasonable doubt as to his guilt.—People v. Ah Gee Young, 86 Cal. 146, 147, 24 Pac. 860.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 496; 14 Cent. Dig., cols. 1984-2001, §§ 1285-1291.

XI. TIME OF TRIAL AND CONTINUANCE.

TIME OF TRIAL, § 286.
TIME TO PREPARE DEFENSE, § 287.
RIGHT TO SPEEDY TRIAL, § 288.
CONSTITUTIONAL PROVISION CONSTRUED, § 289.
DISCHARGE OF ACCUSED FOR DELAY, § 290.
—— DELAY GRANTED AT REQUEST OF ACCUSED, § 291.
—— DELAY IN FINDING INDICTMENT, § 292.
CONTINUANCE — DISCRETION OF COURT, § 293.
—— SUCCESSIVE APPLICATION, § 294.
—— GOOD FAITH, § 295.
GROUNDS FOR CONTINUANCE — WANT OF PREPARATION, § 296.
—— ABSENCE OF ATTORNEY, § 297.
—— ABSENCE OF WITNESS FOR PROSECUTION, § 298.
—— ABSENCE OF WITNESS FOR DEFENDANT, § 299.
—— DILIGENCE IN PROCURING WITNESS, § 300.
—— ABSENCE OF IMMATERIAL OR CUMULATIVE EVIDENCE, § 301.
ADMISSIONS TO PREVENT CONTINUANCE, § 302.
APPLICATION FOR CONTINUANCE—TIME TO MAKE, § 303.
—— SUFFICIENCY, § 304.
NECESSITY AND SUFFICIENCY OF AFFIDAVIT, § 305.

§ 286. Time of Trial.

[a] Where the day set for the trial of a murder case was a holiday, and the court, in the absence of defendant, reset it for the following day, at which time defendant went to trial without objection, and it does not appear that he was prejudiced, the conviction will not be set aside on that ground, especially as it was not necessary to reset the case, under Civil Code, section 11, providing that, whenever the day on which an act is to be performed is a holiday, the act may be performed on the next business day.—People v. Rader, 136 Cal. 253, 68 Pac. 707.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 498; 14 Cent. Dig., cols. 2004-2007, §§ 1294-1296.

§ 287. Time to Prepare Defense.

[a] Three days is not ample time in which to prepare for trial in murder case.—People v. Fredericks, 106 Cal. 557, 39 Pac. 944.

[b] Defendant herein held to have been given reasonable opportunity to prepare for trial.—People v. Winthrop, 118 Cal. 87, 50 Pac. 390.

[c] People v. Fredericks, 106 Cal. 557, regarding right of accused to be given reasonable opportunity to prepare defense applied to particular circumstances of that case and

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did not announce rule for conduct of other cases.—People v. Winthrop, 118 Cal. 88, 50 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 503, 504; 14 Cent. Dig., cols. 2022, 2023, § 1305.

§ 288. Right to Speedy Trial.

[a] Accused has constitutional right to speedy trial and court has no discretionary power to deny it or prolong imprisonment beyond time provided by law. Statute is imperative.—People v. Morino, 85 Cal. 517, 24 Pac. 892.

[b] Judge Temple thinks that constitutional guaranty of speedy trial imposes on state duty to provide courts which, under ordinary conditions, can furnish speedy trial.—People v. Buckley, 116 Cal. 152, 47 Pac. 1009.

[c] It is duty of prosecution diligently to prosecute case against defendant; and officers of state are not authorized to hold accused in imprisonment unnecessarily even for sixty days without speedy trial guaranteed by constitution.—Begerow, In re, 133 Cal. 349, 85 Am. St. Rep. 178, 65 Pac. 828.

[d] Declaration or rights, in constitution, is a command and limitation of power upon state officials by people, who created formal government. State cannot rightfully hold in prison ever an accused person longer than is necessary that he may be tried, before trial had and judgment rendered.—Begerow, In re, 133 Cal. 349, 85 Am. St. Rep. 178, 65 Pac. 828.

FOR AUTHORITIES FROM OTHER STATES:

See 41 Am. Dec. 604, 85 Am. St. Rep. 187, notes. See, also, 12 Cyc. 498; 14 Cent. Dig., cols. 2002, 2003, § 1292.

§ 289. Constitutional Provision Construed.

[a] Penal Code, section 1382, declares that if an accused, whose trial has been postponed on his own application, is not brought to trial within sixty days after filing the indictment, he is entitled to be discharged, and section 1387 provides that, if the offense is a felony, such discharge is not a bar to a further prosecution. Held, that such sections are not violative of Constitution, article 1, subdivision 13, guaranteeing the right to a public and speedy trial.—Begerow, In re, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528.

FOR AUTHORITIES FROM OTHER STATES:

Speedy trial of persons accused of crime, and what amounts to a denial of: 85 Am. St. Rep. 187, note. See, also, 12 Cyc. 498; 14 Cent. Dig., cols. 2003, 2004, § 1293.

§ 290. Discharge of Accused for Delay.

[a] The indictment in this case was demurred to and the demurrer sustained. This ruling was reversed on appeal. The trial court then fixed a day for the trial, against defendant's objections, more than sixty days after the remittitur was filed. The defendant demanded his discharge under section 1382 of the Penal Code, and the court so ordered, and dismissed the action. Held, that this section has no application to such a case, and that the court erred in its ruling.—People v. Giesea, 63 Cal. 345.

[b] Delay in prosecution of criminal case for more than sixty days for sufficient cause will not warrant dismissal.—People v. Camilo, 69 Cal. 541, 11 Pac. 128.

[bc] Case should not be dismissed for want of prosecution when delay was due to engagement of court in trial of other cases.—People v. Henry, 77 Cal. 447, 19 Pac. 830.

[c] Accused is not entitled to dismissal for nontrial under section 1382, Penal Code, when there has been mistrial and case has been continued on account of illness of juror.—Ross, Ex parte, 82 Cal. 109, 110, 22 Pac. 1086.

[d] It is enough to authorize dismissal for want of prosecution for defendant to show that statutory time to try him has expired and that case was not postponed on his application.—People v. Morino, 85 Cal. 517, 24 Pac. 892.

[e] What constitutes "good cause" for delay of trial beyond period of sixty days prescribed in section 1382, Penal Code, discussed but not decided.—People v. Buckley, 116 Cal. 152-155, 47 Pac. 1009.

[f] The mere statement of the judge, on denying the motion to dismiss, that during the time of delay the court had been wholly occupied with other cases, does not show good cause for the delay.—People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

[g] Nor was it good cause that a material witness for the state was absent during the period of delay, where no diligence was shown to procure his attendance.—People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

[h] Information was filed December 27th, and defendant was arraigned January 4th, and demurred on the 11th. Demurrer was argued the 18th, and overruled the 25th, and defendant then pleaded not guilty. Case was called for trial February 12th, and defendant obtained a continuance of one day, but the trial did not occur until March 18th. Held, that defendant was entitled to a dismissal under Penal Code, section 1382, enacted pursuant to the constitution, providing that the prosecution shall be dimissed, unless good cause to the contrary be shown, if a defendant whose trial has not been postponed at his own instance is not brought to trial within sixty days from filing of information.—People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

[i] Continuance of trial beyond sixty days caused by trial of other cases having precedence is not ground for dismissal.—People v. Vasalo, 120 Cal. 169, 52 Pac. 305.

[j] Provision that defendant must be tried within sixty days does not apply where defendant has appealed and had his case sent back for second trial.—People v. Lundin, 120 Cal. 311, 52 Pac. 807.

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[k] Under Penal Code, section 1382, providing that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information, a defendant waives such right by allowing a jury to be impaneled and sworn without first raising objection.—People v. Hawkins, 127 Cal. 372, 59 Pac. 697.

[l] Penal Code, section 1382, declares that the court, unless good cause to the contrary is shown, must order a prosecution dismissed if a defendant whose trial has not been postponed on his application is not brought to trial within sixty days after the filing of the information. Held, that where an information was filed March 10th, and the cause continued from March 17th to May 19th, and trial had June 6th, it was proper to deny a motion to dismiss the prosecution when both continuances were with defendant's consent, and from April 15th until June 1st the court was engaged in the trial of another cause.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[m] Under Constitution, article 1, section 13, guaranteeing to every person charged with crime a speedy trial, and Penal Code, section 1382, providing that the court, unless for good cause shown, must dismiss the prosecution when an accused, if the trial has not been postponed on his application, has not been brought to trial within sixty days after indictment, an accused showing a delay, not caused by him, of more than sixty days after a mistrial, without good reason, is entitled to discharge on habeas corpus.—Begerow, In re, 133 Cal. 349, 85 Am. St. Rep. 178-n, 65 Pac. 828.

[n] Under Penal Code, section 1382, requiring a dismissal when the information is not filed within thirty days after defendant is held to answer, "unless good cause to the contrary is shown," the fact that the district attorney is misled one day by an error in the stenographer's notes of the preliminary examination, the trial being had within sixty days from the offense, will warrant a refusal to dismiss.—People v. Farrington, 140 Cal. 656, 74 Pac. 288.

[o] Where the delay beyond sixty days in bringing to trial a defendant in a prosecution for crime is caused by a mistrial and a continuance by consent, he is not entitled to a dismissal therefor.—People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

[p] Where the record fails to show that defendant objected to numerous continuances, a denial of motion to dismiss, made on the ground that he had not been brought to trial within the time required by the Penal Code, will be affirmed.—People v. Bell, 36 Pac. 94, 95.

FOR AUTHORITIES FROM OTHER STATES:

See 56 L. R. A. 513, 531, notes. See, also, 12 Cyc. 499-502; 14 Cent. Dig., cols. 2007-2021, §§ 1297-1304.

§ 291. —— Delay Granted at Request of Accused.

[a] A defendant in a criminal prosecution is not entitled to be discharged, under section 1382 of the Penal Code, on the ground that he had not been brought to trial within sixty days after the filing of the information, when the delay of the trial was granted at his own request, and for his benefit.—People v. Cline, 74 Cal. 575, 16 Pac. 391.

[b] Postponement of trial for one day on application of defendant does not deprive him of right to speedy trial guaranteed by Constitution, and section 1382, Penal Code.—People v. Buckley, 116 Cal. 152, 47 Pac. 1009.

§ 292. —— Delay in Finding Indictment.

[a] The facts constituting good cause for the detention of a party not indicted at the next term of court after his commitment must in great measure be left to the discretion of the court, to be determined by the particular circumstances of each case.—Bull, Ex parte, 42 Cal. 196.

[b] Where a party who has been held to answer a criminal charge is not indicted by the grand jury, he is entitled to be discharged, unless there is a good cause shown for his further detention; nor is the mere recommendation of the grand jury that such party be detained to answer before another grand jury, of itself, good cause for his detention.—Bull, Ex parte, 42 Cal. 196.

§ 293. Continuance—Discretion of Court.

Postponement of preliminary examination. See ante, § 58½.

[a] Where there is sufficient showing as to materiality of absent witnesses, and no apparent lack of diligence in the effort to procure their attendance, a motion to continue a cause for the term, particularly if it be the first application, should be granted.—People v. McCrory, 41 Cal. 458.

[b] Application for continuance is addressed to discretion of court.—People v. Collins, 75 Cal. 412, 17 Pac. 430.

[c] Court may refuse to adjourn a trial from the middle of an afternoon until the next day, at the request of defendant's counsel, where the circumstances show no abuse of discretion.—People v. Shaw, 111 Cal. 171, 43 Pac. 593.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2027-2032, § 1311.

§ 294. —— Successive Applications.

[a] Where defendant was granted one continuance of sixty days on the ground of absence of a witness, it was not error to refuse to grant him a second continuance because of the same witness.—People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2032-2034, §§ 1312-1314.

§ 295. —— Good Faith.

[a] If facts shown on application for continuance cast suspicion on good faith of application, and induce belief that it was intended only for delay, court will not abuse its discretion in refusing it.—People v. Mortimer, 46 Cal. 114.

§ 296. Grounds for Continuance—Want of Preparation.

[a] Where defendant moved for a continuance on the ground of want of an opportunity to prepare for trial the district court is justified in denying the motion, where the affidavit of the district attorney shows he had a full opportunity to prepare for trial.—People v. Sprague, 53 Cal. 491.

[b] Where there was an insufficient showing of diligence, and no showing that the granting of further time would probably have a favorable result, the refusal of the magistrate to grant further time in which to secure attorneys is not an abuse of discretion; and the denial of a motion to set aside the information because of such refusal will not be disturbed upon appeal.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

[c] Upon the preliminary examination of a defendant charged with murder, a continuance of six days after the reading of the complaint, and informing the defendant of his right to counsel and witnesses, allows the defendant a reasonable time in which to secure counsel.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 187, 188; 14 Cent. Dig., cols. 2037-2040, §§ 1316, 1317.

§ 297. —— Absence of Attorney.

[a] The absence of counsel for the defense, on account of sickness, is a sufficient ground of continuance in a criminal case.—People v. Logan, 4 Cal. 188.

[b] Fact that one of defendant's counsel is engaged in trial of another case is not ground for continuance.—People v. Goldenson, 76 Cal. 341, 19 Pac. 161.

[c] Whether provision allowing continuance when attorney is member of legislature, etc., applies to criminal cases doubted.—People v. Goldenson, 76 Cal. 342, 19 Pac. 161.

[d] Defendant in a criminal case is not entitled to a continuance because his junior counsel is a member of the legislature, when it does not appear from the record that he was engaged in the defense when the session began.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[e] Absence of one of counsel is not ground for continuance of hearing appointed for fixing of date of execution of death sentence.—People v. Durrant, 119 Cal. 206, 51 Pac. 185.

[f] After the jury had been impaneled, and the trial had proceeded to the afternoon of the second day, the court was compelled to commit defendant's counsel for contempt incurred on the court's adjournment of the case by reason of the counsel's intoxication. Held, that an adjournment a reasonable time thereafter to allow other counsel to become familiar with the facts of the case was all that defendant could claim, and that a continuance was properly denied.—People v. Warren, 130 Cal. 678, 63 Pac. 87.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 171, 172; 14 Cent. Dig., cols. 2042-2046, § 1320.

§ 298. —— Absence of Witness for Prosecution.

[a] Continuance to enable prosecution to procure attendance of witnesses is not abuse of discretion.—People v. Treadwell, 69 Cal. 239, 10 Pac. 502.

§ 299. —— Absence of Witness for Defendant.

[a] Where, in a criminal case, a witness who has been subpoenaed for the defendant, is absent from temporary sickness, and it appears that his personal attendance may be procured without unreasonable delay, a resort to the statutory mode of taking his testimony should not be forced upon the defendant against his will, under penalty of going to trial without it, but a continuance, at least to the next term, should be granted. People v. Dodge, 28 Cal. 445.

[b] If the person indicted for murder, at the time and just before he killed the deceased, stated that he was about to kill him, and asked others to witness the killing, the absence of a witness who saw the defendant and the deceased have a friendly conversation the day before is no ground for a continuance, for the fact, if sworn to, would be no defense.—People v. Williams, 43 Cal. 344.

[c] In criminal case, if defendant has relied on promise of material witness to attend the trial the first time the case is called after the indictment is found, and for that reason has omitted to take his deposition, and the witness resides beyond the jurisdiction of the court, a continuance should be granted.—People v. Brown, 46 Cal. 102.

[d] An application for a continuance by a defendant in a criminal case is properly denied, if affidavits on behalf of the people are introduced which show that the absent witness is a fugitive from justice, and cannot probably be produced at the next term of the court, and particularly if the deposition of the absent witness was taken before the examining court, and the prosecution offers to allow it to be introduced in evidence on the trial.—People v. Cleveland, 49 Cal. 577.

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[e] Where defendant, who was indicted for murder, moves for a continuance, on the ground of the absence of a material witness, who would testify that he was at home on the night of the murder, the motion is properly denied where the affidavit of the prosecution shows that the defendant had testified before the grand jury that no one but his family was at home that night.—People v. Sprague, 53 Cal. 491.

[f] A continuance should not be granted if it does not appear that the attendance of the absent witness could be procured in a reasonable time.—People v. Lewis, 64 Cal. 401, 1 Pac. 490.

[g] An application for the continuance of the trial of a defendant accused of felony, upon the ground of the absence of material witnesses, is properly refused where nearly one year had elapsed between the date of the indictment and the date of the trial, and their importance was known during all this period to the defendant and to his counsel, and the prosecuting officers were, during the same period, making diligent search for them, and there was no reasonable cause to believe that further postponement would secure their attendance.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[h] Where the defendant pleads guilty of the murder, and the nature of the case shows that it was deliberate and premeditated, evidence that defendant was intoxicated is valueless, as also evidence of defendant's previous good character, and it is not improper to refuse to continue the cause for the giving of such evidence for the defendant.—People v. Miller, 114 Cal. 10, 45 Pac. 986.

[i] It is not an abuse of discretion to deny a continuance on account of absent witnesses, where it is not shown that any one of them would or could be procured within any reasonable time.—People v. Wade, 118 Cal. 672, 50 Pac. 841.

[j] Continuance for absence of witness rests in discretion of trial court.—People v. Chutnacut, 141 Cal. 683, 75 Pac. 340.

[k] It is error to refuse defendant a continuance for absence of witnesses from the county, where, from the uncontradicted affidavit of defendant, it appears that such witnesses were regularly subpoenaed; that the facts which defendant expected to prove by them, and which are stated in the affidavit, are material; that he could not prove the same facts by any other witnesses; and that he expected to be able to procure their attendance, if the trial was postponed.—People v. Lee, 8 Pac. 685.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 172, 186, 187; 14 Cent. Dig., cols. 2046-2049, §§ 1321, 1322.

§ 300. —— —— Diligence in Procuring Witness.

[a] A continuance will not be granted, in a criminal case, on the ground of the absence of a witness where it does not appear that any particular effort has been made to find him, or that any service has been made on him which he was bound to obey.—People v. Jocelyn, 29 Cal. 562.

[b] Defendant, on trial for murder, moved for a continuance on the ground that his chief witness, a Chinaman, was absent in China, and alleged that such witness was the only one who saw the assault on defendant by deceased, in consequence of which defendant afterwards shot deceased, and that such witness' testimony on the trial would be substantially the same as defendant's. It appeared that defendant was informed of the intended departure of the witness, and made no effort to induce him to remain, or to secure his testimony by deposition. Defendant claimed in his affidavit that the witness intended to return, and that he was provided with return papers, but of this he offered no proof. Held, that a refusal to grant a continuance on account of the absence of such witness was not an abuse of discretion.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

§ 301. —— —— Absence of Immaterial or Cumulative Evidence.

[a] It is not error to deny an application for continuance on the ground of absence of witnesses, where it appears that the facts sought to be proved by them could be proved by other witnesses present.—People v. Ah Fat, 48 Cal. 61.

[b] A motion for continuance on the ground of the absence of a witness upon a point not combated is properly denied.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[c] Defendant sought to establish bias on the part of the grand jury by showing that some of its members were in the courtroom when his associate in the crime was tried, and heard defendant plead his constitutional privilege. Defendant moved for a continuance in order to procure testimony of a member of the grand jury who would testify to this fact. Held, that the court properly refused a continuance, since the fact of proof would not establish prejudice or bias.—People v. Northey, 77 Cal. 618, 19 Pac. 865.

[d] The rule that a trial will not be postponed in order to obtain cumulative evidence does not apply on a trial for murder, where the only evidence at hand is that of defendant.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 174-179; 14 Cent. Dig., cols. 2049-2065, §§ 1323-1327.

§ 302. Admissions to Prevent Continuance.

[a] In criminal cases, on a motion for continuance by defendant, on the ground of the absence of a material witness, based on a sufficient affidavit, the agreement of the district attorney that the witness, if present, would

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have deposed as averred in defendant's affidavit, is not sufficient to warrant the overruling of the motion.—People v. Diaz, 6 Cal. 248.

[b] The district attorney should have admitted the truth of the facts to which the witness would testify absolutely in such case. People v. Diaz, 6 Cal. 248.

[c] In a prosecution for larceny, defendant moved for a continuance on the ground of absence of a witness by whom he expected to prove that, on the night of the alleged offense, prosecuting witness had no money in his possession, and so told the witness. The district attorney admitted that the prosecuting witness told the witness as stated. Held, that the admission was insufficient, since the witness would testify not only that the prosecuting witness told him that he had no money, but that as a matter of fact he had none.—People v. Brown, 54 Cal. 243.

FOR AUTHORITIES FROM OTHER STATES:

See 16 L. R. A. 239, note. See, also, 9 Cyc. 182-186; 14 Cent. Dig., cols. 2102-2112, §§ 1342-1347.

§ 303. Application for Continuance—Time to Make.

[a] It is not error to refuse an application for a continuance made after the jury has been selected and sworn, where no reason is given for the delay in making the application.—People v. Beam, 66 Cal. 394, 5 Pac. 677.

[b] Where a defendant neglected to apply for a continuance of a criminal case, on the ground of the illness of a material witness, until after the jury was impaneled, and then requested a continuance for two months, it was properly refused.—People v. Logan, 123 Cal. 414, 56 Pac. 56.

[c] Application for continuance not made until after jury was impaneled is properly refused.—People v. Logan, 123 Cal. 414, 56 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 198; 14 Cent. Dig., cols. 2137, 2138, § 1362.

§ 304. —— Sufficiency.

[a] Unless the application for a continuance in a criminal case shows that due diligence was used in attempting to procure the attendance or testimony of an absent witness, a continuance is properly refused.—People v. Baker, 1 Cal. 403; (1873) People v. Ashnauer, 47 Cal. 98.

FOR AUTHORITIES FROM OTHER STATES:

See 9 Cyc. 198-205; 14 Cent. Dig., cols. 2113-2137, §§ 1349-1361.

§ 305. Necessity and Sufficiency of Affidavit.

[a] Affidavit for continuance must show that the application is not made for purposes of delay.—People v. Thompson, 4 Cal. 238.

[b] An affidavit for continuance on the ground of the absence of a witness should show to the court in what the applicant's diligence consisted, whether by exhausting the process of the court, or otherwise.—People v. Thompson, 4 Cal. 238.

[c] An affidavit for continuance on the ground of absence of witnesses must show that there are no other persons by whom defendant could prove the same facts.—People v. Thompson, 4 Cal. 238; People v. Quincy, 8 Cal. 89; People v. Gaunt, 23 Cal. 156; People v. Ashnauer, 47 Cal. 98.

[d] An application by a defendant to postpone a trial on the ground of surprise, at the introduction of a witness whose name is not indorsed upon the indictment, must, when made, be supported by an affidavit or other evidence or suggestion showing the surprise, in the absence of which it should be denied. People v. Symonds, 22 Cal. 348.

[e] An affidavit for a continuance in a criminal action is not sufficient, which simply states that a subpoena for witnesses resident in a certain county had been put in the hands of the sheriff of that county, and he had "returned said subpoena not served." Due diligence is not shown.—People v. Williams, 24 Cal. 31.

[f] An affidavit for a continuance in a criminal case should show not only that efforts have been made to find the absent witness, but also, if service of a subpoena has been made on him, should show that it was such kind of service as he was bound to obey.—People v. Jocelyn, 29 Cal. 562.

[g] On an application for a continuance in a criminal case, an affidavit stating that the affiant believes that he can procure the attendance of witnesses residing out of the state, or their depositions, by the next term of court, is defective, as being in the alternative.—People v. Francis, 38 Cal. 183.

[h] Where, in an affidavit for a continuance in a criminal case, defendant states, on opinion and belief, that he can procure the personal attendance of witnesses from a foreign state at the next term, he must also state his reasons for his belief, and the nature of his opinion, that the court may decide whether or not there is reasonable ground to believe that the witnesses will attend, or the showing will be insufficient.—People v. Francis, 38 Cal. 183.

[i] To entitle party to continuance on ground of absence of evidence the affidavit must show the materiality of the facts which he expects to prove by the absent witness.—People v. Mellon, 40 Cal. 648.

[j] An affidavit for a continuance because of the absence of a material witness, who has been subpoenaed, must show that the witness cannot be readily reached by an attachment.—People v. Weaver, 47 Cal. 106.

[k] An application for a continuance because of an absent witness must show that accused has reasonable expectation of procuring the witness' attendance.—People v.

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but preponderating proof, proof necessary to satisfy a jury of a fact, is sufficient to establish a fact in his favor.—People v. Milgate, 5 Cal. 127.

[b] A reasonable doubt is not a mere possible or imaginary doubt. Demonstration is not required beyond possibility of contrary.—People v. Graham, 21 Cal. 267.

[c] Reasonable doubt to warrant acquittal is not a mere possible doubt, but is such doubt as after the entire comparison and consideration of all the evidence leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.—People v. Strong, 30 Cal. 151.

[d] No conviction should be had unless the jury is "entirely satisfied," from evidence, that the defendant is guilty. (Per Crockett, J.)—People v. Phipps, 39 Cal. 326.

[e] A verdict of guilty under a charge that the jury must acquit unless they find deceased was killed by "Paul Tibeaux, while the defendant aided and abetted the killing," is erroneous where the evidence was that the fatal shot was fired by a Frenchman named "Paul," without showing that he was the same person known as "Paul Tibeaux."—People v. Coyodo, 40 Cal. 586.

[f] Evidence must satisfy jury, to moral certainty and beyond a reasonable doubt—that is, it must entirely satisfy jury—of guilt of defendant before they can convict. If jury are not entirely satisfied they should acquit.—People v. Padillia, 42 Cal. 535.

[g] A reasonable doubt of guilt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge—a certainty that convinces and directs the understanding, and satisfies the reason and judgment.—People v. Ashe, 44 Cal. 288.

[h] Although it may be positively proved that one of two or more persons committed a crime, yet, if it is uncertain which is the guilty party, all must be acquitted.—People v. Woody, 45 Cal. 289.

[i] In the decision of a criminal case involving life or liberty, something more than a mere preponderance of evidence is required to convict the defendant. There must be in the minds of the jury an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of the evidence.—People v. Brannon, 47 Cal. 96.

[j] It is not necessary that the evidence for the prosecution in a criminal case should show that the innocence of the defendant is impossible in order to justify the jury in finding him guilty, but it is enough if such evidence demonstrate the guilt of the defendant beyond a reasonable doubt.—People v. Brotherton, 47 Cal. 388.

[k] The jury must be satisfied beyond a reasonable doubt, before they can convict, that the defendant and no other person committed the offense.—People v. Kerrick, 52 Cal. 446.

[l] The truth of testimony on which depends, in part, defendant's guilt, is to be determined by the jury, and a fact tending to prove it need not be established beyond a reasonable doubt. A preponderance of evidence is sufficient.—People v. Mitchell, 63 Cal. 480.

[m] Guilt must be established by clear and satisfactory proof, and generally, beyond reasonable doubt.—Buckley, In re, 69 Cal. 3, 10 Pac. 69.

[n] There must be conviction of guilt in minds of jury to justify verdict affirming guilt, but it need not be an absolute conviction beyond possibility of doubt.—People v. Ferry, 84 Cal. 34, 24 Pac. 33.

[o] Evidence need not establish guilt to "absolute" moral certainty.—People v. Nelson, 85 Cal. 430, 24 Pac. 1006.

[p] Reasonable doubt is not such doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself.—People v. Bemmerly, 87 Cal. 120, 121, 35 Pac. 266.

[q] To justify the conviction of a defendant on a criminal charge he must not only be proven to have committed an offense, but the very offense charged in the indictment.—People v. Fagan, 98 Cal. 230, 33 Pac. 60.

[r] Evidence merely showing a possible opportunity for the commission of the offense, but not excluding reasonable opportunity for its commission by another, is insufficient to sustain a conviction.—People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

§ 279. —— Corporate Existence.

[a] On a trial for a crime committed against a corporation, the de facto existence of the corporation is all that is necessary to be shown.—People v. Frank, 28 Cal. 507; People v. Hughes, 29 Cal. 257; People v. Barric, 49 Cal. 342.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 494; 14 Cent. Dig., cols. 1974, 1975, § 1276.

§ 280. —— Venue of Offense.

[a] In a trial for murder, the only proof offered that it was committed in the county laid was the statement of the coroner who held the inquest that the body was found in such county. Semble, that defendant's point that the venue was not proved was not well taken.—People v. Williams, 18 Cal. 187.

[b] There is no necessity that any witness testify, in so many words, to the place of the offense; but it is sufficient if the evidence as a whole leaves no reasonable doubt that the acts charged were committed within the place laid.—People v. Manning, 48 Cal. 335.

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[c] If whole testimony leaves no room for reasonable doubt as to venue, it is sufficiently proven, though no witness testifies to it in so many words.—People v. Tonielli, 81 Cal. 279, 22 Pac. 658.

[d] The superintendent of a ranch in Yolo county kept books there of his receipts and expenditures, making monthly reports to his principal in San Francisco. He shipped horses to Sacramento, and there received the proceeds of their sale, but made no book entry or report thereof. Held, sufficient evidence that the embezzlement was committed in Sacramento county to justify the magistrate in holding him for trial there.—Palmer, Ex parte, 86 Cal. 631, 25 Pac. 130.

[e] Proof that crime was committed on well-known streets of city where court is sitting sufficiently establishes venue.—People v. McGregar, 88 Cal. 143, 144, 26 Pac. 97.

[f] Where it is testified that the deceased resided in the county, and it is plainly implied that she resided at the house in front of which her body was found and into which it was carried, the venue is sufficiently proved. People v. Kamaunu, 110 Cal. 609, 42 Pac. 1090.

[g] Where the witnesses in a prosecution for manslaughter committed in K. county state that the deceased was killed at a certain store, and it incidentally appears from the testimony of several witnesses that the store named is in K. county, the venue is sufficiently established.—People v. Smith, 121 Cal. 355, 53 Pac. 802.

[h] Evidence that witness' residence was A.; that he gave defendant four hundred dollars to be loaned, which defendant afterward claimed to have done, and that defendant read the papers to witness, the note alleged to have been fictitiously uttered being among them; and that all these facts took place in a certain county is sufficient in a prosecution under Penal Code, section 476, for uttering a fictitious instrument, to prove the venue to be in that county.—People v. Terrill, 133 Cal. 120, 65 Pac. 303.

[i] It was sufficient proof of the venue to prove the locality of the defendant's saloon, where the liquor was sold, and that this took place in the county of the venue and state of California.—People v. Monroe, 138 Cal. 97, 70 Pac. 1072.

[j] Where the launch was intrusted to the defendant in the county of the venue, and was carried out of the county in violation of the trust, and the jury were sufficiently warranted by the circumstances in finding that the intent to embezzle the launch was formed in said county, and not after it had been taken from the county, the venue is sufficiently established, and the superior court of that county has jurisdiction of the offense. People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

[k] Under Penal Code, section 1102, and Code of Civil Procedure, section 2061 (5), evidence to support a conviction must establish guilt beyond a reasonable doubt.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 494-496; 14 Cent. Dig., cols. 1975-1984, §§ 1277-1284.

§ 281. —— Former Conviction.

[a] On the trial of one accused of burglary, and who was also charged with a previous conviction of larceny, the state introduced the records of the superior court of another county, showing the conviction of a person bearing the same name as defendant, for stealing a mare from one J. P. A witness testified that he knew defendant, and that he knew him at the time of the former conviction; that defendant at that time was working for J. P.; and that he had admitted to witness that he was sent to state's prison for stealing a horse from J. P. Held, sufficient to support a verdict of former conviction.—People v. Hettick, 126 Cal. 425, 58 Pac. 918.

§ 282. —— Intent.

[a] "Slight evidence" of guilty intent is insufficient to sustain conviction.—People v. Stewart, 80 Cal. 131, 132, 22 Pac. 124.

[b] A requested instruction, in a prosecution for arson, that intent was a material ingredient in every crime, and must be proved by positive evidence, was properly refused.—People v. Hiltel, 131 Cal. 577, 63 Pac. 919.

§ 283. —— Alibi.

[a] A defendant charged with an assault with intent to rob, in establishing an alibi, may adduce circumstances tending to fix the time at which he was at the other place.—People v. McCrea, 32 Cal. 98.

[b] An alibi must be established by preponderance of the testimony.—People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

[c] Evidence of defendant's absence from the place where the crime was committed is not a defense, but it is admissible to establish a defense; and if a reasonable doubt is created by the evidence, defendant should be acquitted.—People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

[d] Evidence of alibi should not be scrutinized differently than that given in support of any other issue.—People v. Levine, 85 Cal. 42, 22 Pac. 969, 24 Pac. 631; People v. Lattimore, 86 Cal. 404, 24 Pac. 1091.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 1998-2001, §§ 1289-1291.

§ 284. —— Insanity.

[a] When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.—People v. Myers, 20 Cal. 518; People v. Bawden, 90 Cal. 195, 27 Pac. 204.

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"Susie"; and a letter from Mrs. E. O. was in evidence, signed "Susie O." Held, that Mrs. Susie O. and Mrs. E. O. were sufficiently identified as the same person to warrant a denial of the motion.—People v. Breen, 130 Cal. 72, 62 Pac. 408.

[e] Names of witnesses examined before committing magistrate need not be inserted at foot of, or indorsed on, the information filed in court against defendant after he had been examined before such magistrate, though Penal Code, section 943, provides that when an indictment is found the names of the witnesses before the grand jury must be so indorsed.—People v. Sherman, 32 Pac. 879.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 513-515; 14 Cent. Dig., cols. 2172-2183, §§ 1409-1419.

§ 311. Reading Indictment and Stating Plea to Jury.

[a] Failure to read indictment and state plea to jury will be disregarded, if jury were fully informed of their substance.—People v. Sprague, 53 Cal. 491.

[b] Defendant, accused by information of assault with deadly weapon, and of a prior conviction for manslaughter, pleaded not guilty of the former, and guilty of the latter. The minutes of the trial stated that after the jury were sworn "the information is read, and the plea of not guilty stated to the jury by the clerk." Held, that this means that only the charge to which defendant pleaded not guilty was read.—People v. Douglass, 87 Cal. 281, 25 Pac. 417.

[c] If previous conviction is confessed, clerk must omit all reference to it in reading information.—People v. Wheatley, 88 Cal. 117, 26 Pac. 95.

B. COURSE AND CONDUCT OF TRIAL IN GENERAL.

POWER OF LEGISLATURE TO REGULATE, § 312.
COMPLIANCE WITH STATUTE, § 313.
RIGHT OF ACCUSED TO FAIR TRIAL, § 314.
PUBLICITY OF PROCEEDINGS, § 315.
PRESENCE OF JUDGE, § 316.
PRESENCE OF ACCUSED, § 317.
PRESENCE OF COUNSEL FOR ACCUSED, § 318.
CUSTODY AND RESTRAINT OF ACCUSED, § 319.
—— REMOVING MANACLES, § 320.
COUNSEL FOR PROSECUTION — APPOINTMENT, § 321.
—— ADDITIONAL PRIVATE COUNSEL, § 322.
COUNSEL FOR ACCUSED, § 323.
ARGUMENT TO JURY—RIGHT TO OPEN AND CLOSE, § 324.
VIEW AND INSPECTION, § 325.
EXPERIMENTS IN COURT, § 326.
IDENTIFICATION OF ACCUSED, § 327.
APPOINTMENT OF INTERPRETER, § 328.
AMENDMENT AND CORRECTION OF MINUTES, § 329.
PRESENCE OF JURY DURING ARGUMENT FOR NONSUIT, § 330.
EXCLUDING JURY PENDING INVESTIGATION OF ATTEMPT TO BRIBE JUROR, § 331.
CONDUCT OF COURT OFFICERS, § 332.
REMARKS AND CONDUCT OF COURT, § 333.

Of prosecution for homicide. See Homicide, VII, A.

§ 312. Power of Legislature to Regulate.

[a] Legislature may prescribe remedy and rules of practice in criminal cases, and limit time for objections to indictment.—People v. Arnold, 15 Cal. 476.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 519-522; 14 Cent. Dig., cols. 2203-2211, §§ 1450-1460.

§ 313. Compliance with Statute.

[a] Even if not in strict conformity with statute, the court below must of necessity be vested with a reasonable discretion in determining the preliminaries of a criminal trial. People v. Stonecifer, 6 Cal. 405.

[b] It is better for the court below to adhere strictly to the provisions of the statute, in respect to the mode of trial in criminal cases, than risk a reversal of the judgment by a deviation from the specific modes of procedure prescribed, even when the deviation does not seem to it material.—People v. Arnold, 15 Cal. 476.

[c] In trial of criminal cases court should comply strictly with statute.—People v. Coyne, 116 Cal. 297, 48 Pac. 218.

§ 314. Right of Accused to Fair Trial.

[a] Everyone accused of crime is entitled to a fair and impartial trial before an unbiased jury.—People v. Sansome, 84 Cal. 451, 24 Pac. 143.

[b] The purpose of a criminal trial is to discover and determine whether or not the defendant is guilty, and not merely to maintain at all hazards a theory of guilt, entertained beforehand; and it is the duty of the court to give the defendant a fair trial, according to the established rules of evidence, and to avoid error in respect to the rights of the accused.—People v. Shaw, 111 Cal. 171, 43 Pac. 593.

§ 315. Publicity of Proceedings.

[a] Order excluding from courtroom such of jurors summoned for term as are not impaneled to try the case is not a deprivation of the right of public trial.—People v. Sprague, 53 Cal. 491.

[b] The constitutional guaranty of a "public" trial is not infringed by an order of court excluding from the court all persons except the judge, jurors, witnesses and persons connected with the case.—People v. Swafford, 65 Cal. 223, 3 Pac. 809.

[c] During the progress of a criminal trial, the defendant having become greatly excited so as to disturb the progress of the trial, the

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court made an order that the lobby outside of the courtroom should be cleared of spectators, and that no persons, except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on the trial, should be allowed to remain. The order did not require the doors of the courtroom to be closed, and was made on behalf of the defendant, as well as to preserve order, because the attendance of a crowd of spectators in the courtroom tended to excite her. Held, that the order was not in violation of the defendant's right to a public trial.—People v. Kerrigan, 73 Cal. 222, 14 Pac. 849.

[d] A defendant accused of crime has a constitutional right to a public trial, and an order made against the objection of the defendant excluding from the courtroom during the trial of the case, all persons except the officers of the court and the defendant is prejudicial error, which is ground for a new trial.—People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

[e] The requirement of a public trial is for the benefit of the accused, that the public may see that he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if without partiality or favoritism a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether.—People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

[f] The trial should be public in the ordinary common-sense acceptation of the term, and the doors of the courtroom should be kept open, and the public are entitled to be admitted with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial.—People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

[g] The fact that officers of court were allowed to be present in no way made trial public.—People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

FOR AUTHORITIES FROM OTHER STATES:

Public trial, right to and what are infringements upon it: 28 Am. St. Rep. 308, note; 14 L. R. A. 809, note. See, also, 12 Cyc. 520; 14 Cent. Dig., cols. 2204, 2205, § 1452.

§ 316. Presence of Judge.

Absence of judge from trial as absence of due process of law. See Constitutional Law, § 243.

[a] It is irregular, on the trial of a criminal case, for one of the judges, who has commenced the trial of the cause, to leave the court, and have another judge substituted in his place.—People v. Eckert, 16 Cal. 110.

[b] The judge is a component part of the court, and there can be no court without him, and what was done in his absence was done in the absence of the court; and a defendant convicted under such circumstances has been deprived of his liberty without due process of law.—People v. Tupper, 122 Cal. 424, 68 Am. St. Rep. 44, 55 Pac. 125.

[c] There can be no court without presence of judge.—People v. Blackman, 127 Cal. 238, 59 Pac. 573.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 522, 523; 14 Cent. Dig., cols. 2211-2213, §§ 1461-1464.

§ 317. Presence of Accused.

[a] Where, after jury retires, they return and ask that certain depositions be read to them, and this is done during the absence of the prisoner, a judgment of conviction will be reversed.—People v. Kohler, 5 Cal. 72.

[b] Prisoner must be present during whole of trial in cases of felony.—People v. Kohler, 5 Cal. 72.

[c] Persons charged with a misdemeanor may, in the discretion of the court, be allowed to plead by attorney and be tried in their absence.—People v. Ebner, 23 Cal. 158.

[d] Where a defendant, who was indicted for felony, was absent from the court when the jury came in and announced their verdict, but returned before they were discharged, and it did not appear that he was prejudiced by such absence, it was held that the verdict was not thereby rendered invalid.—People v. Miller, 33 Cal. 99.

[e] In a prosecution for a felony, the prisoner must be personally present in court when the verdict is rendered, and, if it is received in his absence, it is invalid.—People v. Beauchamp, 49 Cal. 41.

[f] Absence of accused from courtroom for inappreciable time while counsel is preparing address to jury is not reversible error. People v. Bush, 68 Cal. 628, 40 Pac. 169.

[g] Defendant's affidavit that his trial was continued in his absence, and that he was not present at the trial of his codefendant, shows no ground for a new trial, under Penal Code, section 1181, providing that defendant is entitled to a new trial, "when the trial has been had in his absence, if the indictment is for a felony."—People v. O'Brien, 88 Cal. 483, 26 Pac. 362.

[h] Setting a case on March 3d for trial April 12th in absence of defendant, but in presence of counsel, held not prejudicial error.—People v. Erwin (Cal. App.), 88 Pac. 871.

FOR AUTHORITIES FROM OTHER STATES:

Necessity for presence of accused: 68 Am. Dec. 219, note. Trial in the absence of the accused: 28 Am. Dec. 629,

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note. See, also, 12 Cyc. 523-528; 14 Cent. Dig., cols. 2214-2227, §§ 1465-1484.

§ 318. Presence of Counsel for Accused.

[a] It is reversible error for the court, in a criminal prosecution, to recall the jury and give them oral instructions in the absence of defendant's attorney.—People v. Trim, 37 Cal. 274.

[b] Where, in a criminal prosecution, the jury comes into court with a verdict, and defendant's attorney is notified of the fact, the court, after waiting a sufficient length of time for the attorney to come into court, is justified in receiving the verdict, polling the jury, and discharging it.—People v. Bennett, 65 Cal. 267, 3 Pac. 868.

[c] It is not a cause for reversal that defendant's counsel was absent when the court overruled the demurrer to the information; no reason being assigned for his absence, and it not being shown that defendant was injured thereby.—People v. Rice, 73 Cal. 220, 14 Pac. 851.

§ 319. Custody and Restraint of Accused.

[a] Where the defendant is indicted for a felony, and has been admitted to bail, the court should, at the commencement of the trial, order him into actual custody.—People v. Beauchamp, 49 Cal. 41.

FOR AUTHORITIES FROM OTHER STATES:

Unnecessary shackling or confining of prisoner during trial: 27 Am. Rep. 116, note; 39 L. R. A. 821, note. See, also, 12 Cyc. 529, 530; 14 Cent. Dig., cols. 2226, 2227, § 1484.

§ 320. —— Removing Manacles.

[a] By common law prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape. People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.

[b] To require prisoner during progress of his trial to appear and remain with chains and shackles upon his limbs, without evident necessity as a means of securing his presence for judgment, is a violation of the common-law rule and of the thirteenth section of the Criminal Practice Act.—People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.

§ 321. —— Counsel for Prosecution—Appointment.

[a] It is not error to permit private counsel to assist the district attorney in the prosecution of criminal cases.—People v. Turcott, 65 Cal. 126, 3 Pac. 461.

[b] Penal Code, section 1130, providing for supplying the place of the district attorney by appointment of the court when he cannot prosecute, is not exclusive, and in such case an attorney may be employed to prosecute by the board of supervisors; and there need be no formal order of court, as required by said section.—People v. Walters, 98 Cal. 138, 32 Pac. 864.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 530-532; 14 Cent. Dig., cols. 2228-2237, §§ 1485-1495.

§ 322. —— Additional Private Counsel.

[a] On a criminal trial, the court may, in its discretion, allow the prosecuting attorney additional counsel.—People v. Blackwell, 27 Cal. 65.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 530-532; 14 Cent. Dig., cols. 2229-2236, §§ 1487-1494.

§ 323. Counsel for Accused.

[a] On an indictment for murder the court of sessions is not bound to assign counsel for prisoner.—People v. Moice, 15 Cal. 329.

[b] When defendant's counsel are absent from trial and he refuses to choose others, court may appoint attorney.—People v. Goldenson, 76 Cal. 344, 19 Pac. 161.

[c] The fact that one accused of crime is a lawyer does not deprive him of the right to be represented by counsel.—People v. Naphaly, 105 Cal. 641, 39 Pac. 29.

[d] Right of accused having two counsel to have additional counsel is largly discretionary with trial court.—People v. Gregory, 120 Cal. 21, 52 Pac. 41.

[e] Application to enroll relative of judge as additional counsel for accused, granting of which would disqualify judge, result in continuance and discharge of jurors selected is properly refused.—People v. Gregory, 120 Cal. 21, 52 Pac. 41.

[f] Upon trial for offense not punishable with death, the court may refuse to permit more than one counsel to argue the case for the defendant.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 533-535; 14 Cent. Dig., cols. 2237-2241, §§ 1496-1506.

§ 324. Argument to Jury—Right to Open and Close.

[a] In the trial of criminal cases, it is within the discretion of the court to require the defendant to open, and the prosecution to close, the argument to the jury.—People v. Haun, 44 Cal. 96.

[b] Court in discretion may require defendant to open and prosecution to close the argument, without assigning reasons.—People v. Doyell, 44 Cal. 96.

[c] Under Penal Code, district attorney must open and may conclude the argument, though offense was committed prior to code. People v. Mortimer, 46 Cal. 114.

[d] If other counsel are associated with the district attorney, the court may, in its discre-

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tion, allow the associate counsel to conclude the argument.—People v. Strong, 46 Cal. 302; People v. Murphy, 47 Cal. 103.

[e] It is discretionary with trial court to allow private counsel employed to assist in prosecution to open and close.—People v. Powell, 87 Cal. 365, 366, 25 Pac. 481.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 535, 536; 14 Cent. Dig., cols. 2241-2243, §§ 1507-1509.

§ 325. View and Inspection.

[a] When jury are permitted to view premises, it is error to allow a witness to explain the position of parties.—People v. Green, 53 Cal. 60.

[b] View by jury cannot be taken under section 1119 of the Penal Code, without presence of defendant.—People v. Bush, 68 Cal. 634, 10 Pac. 169; People v. Lowrey, 70 Cal. 194, 11 Pac. 501.

[c] During view person appointed by court to show jury places named in its order may point out and designate such places to jury. People v. Bush, 71 Cal. 602, 12 Pac. 781.

[d] Penal Code, section 1119, giving the court power to order a view, is not unconstitutional as depriving the accused of right to be confronted with witnesses against him, as the statute contemplates his presence at the view.—People v. Bush, 71 Cal. 602, 12 Pac. 781.

[e] Under Penal Code, section 1119, view may be ordered in a county other than that where the trial is had, and a person appointed by the court to show the jury the places named in the order of the court may point out and name such places to them. People v. Bush, 71 Cal. 602, 12 Pac. 781.

[f] It is within the discretion of the court, on a trial for burglary, when informed by the jury that they cannot agree on a verdict without a view of the premises, to allow such view, with consent of defendant.—People v. Hawley, 111 Cal. 78, 43 Pac. 404.

[g] Whether jury should view premises in any case is discretionary with trial judge. People v. White, 116 Cal. 19, 47 Pac. 771.

[h] Penal Code, section 1119, provides that when, in the opinion of the court, it is proper that the jury should view the place of the crime, it may order the jury to be taken by the sheriff to the place, which must be shown to them by a person appointed by the court for that purpose. Held, that where the court in a prosecution for murder appointed a witness, who had heard and seen the defendant declare and point out the scene and objects relating to the crime before the coroner's jury, to show the jury the place described by the defendant and the witness points out the different places to them, stating what the defendant had said before the coroner's jury in regard to each, an objection that the jury received evidence out of court, other than that which came from an inspection of the premises, is not available, since the witness by necessity was compelled to orally designate the place, to comply with the statute.—People v. Milner, 122 Cal. 171, 54 Pac. 833.

[i] Where prosecutrix in a rape case on cross-examination fully described the position into which she had been forced by defendant, and the jury was allowed to inspect the buggy wherein the crime was committed, there was no error in refusing to compel prosecutrix on cross-examination to again assume the position in view of the jury.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[j] Upon the trial of a defendant charged with arson, where the court ordered an inspection by the jury of the burned premises without objection by the defendant, and the counsel agreed in court that the jury might inspect the entire premises, and each party pointed out all the scenes and objects desired, and it was agreed after the return of the jury that the purposes of the motion had been accomplished to the satisfaction of both sides, objections to irregularities in the proceedings are waived; and it cannot be objected on appeal for the first time that there was irregularity in the mode of pointing out objects by the officer in charge of the jury, to which no objection was urged in the court below.—People v. Fitzgerald, 137 Cal. 546, 70 Pac. 554.

[k] On a prosecution for the larceny of cattle, it is error for the court, jury, counsel, and officers of the court to go to a neighboring corral to examine the brands on certain cattle, when such examination is not conducted as a part of the regular trial,—neither the cattle nor the brands being offered in evidence, nor defendant given an opportunity to object,—since Penal Code, section 1119, authorizing the court to order the jury to be conducted to the place in which the offense was committed, or other material fact occurred, does not apply to such case.—People v. Fagan, 33 Pac. 846.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 537; 14 Cent. Dig., cols. 2248, 2249, §§ 1516-1519.

§ 326. Experiments in Court.

[a] Admission of evidence of experiment is in discretion of court, and it is not bound to suspend trial and try experiment in presence of jury.—People v. Levine, 85 Cal. 43, 47, 22 Pac. 969, 24 Pac. 631.

[b] It is not error to allow experimental tests in a murder trial to be made by the prosecuting officers, but it is the better practice to have such tests made by other witnesses.—People v. Crandall, 125 Cal. 129, 57 Pac. 785.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 521; 14 Cent. Dig., cols. 2208-2210, § 1457.

§ 327. Identification of Accused.

[a] Upon a charge of robbery, where the prosecuting witness described the size of the party robbing him, it is not error for the

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court to overrule an objection to a request of the district attorney that the defendant should stand up for comparison. It would not be error for the court to compel the defendant to stand up for comparison.—People v. Oliveria, 127 Cal. 377, 59 Pac. 772.

FOR AUTHORITIES FROM OTHER STATES:

See 28 L. R. A. 699, note.

§ 328. **Appointment of Interpreter.**

[a] Under section 1884, Code of Civil Procedure, court is vested with discretion in granting or refusing application of the defendant for an interpreter.—People v. Young, 108 Cal. 8, 41 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 520; 14 Cent. Dig., col. 2207, § 1455.

§ 329. **Amendment and Correction of Minutes.**

[a] Trial court has power to correct its minutes to make them import verity, and any mere irregularity in them must be disregarded.—People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

§ 330. **Presence of Jury During Argument for Nonsuit.**

[a] It is within the discretion of the court to allow the jurors to remain in the courtroom during the argument of a motion for a nonsuit.—People v. Tomlinson, 102 Cal. 19, 36 Pac. 506.

§ 331. **Excluding Jury Pending Investigation of Attempt to Bribe Juror or Witness.**

[a] It is not error to refuse to have jury present while investigating charge of attempt to bribe juror.—People v. Kalkman, 72 Cal. 214, 13 Pac. 500.

[b] If the circumstances pending a criminal trial are such as to impress the court with a suspicion that a witness has been tampered with or bribed by the attorney for the defendant, the investigation of the matter should be conducted in the absence of the jury in order that the jurors might not be influenced in their verdict by any developments arising from such investigation.—People v. Abbott, 101 Cal. 645, 36 Pac. 129.

§ 332. **Conduct of Court Officers.**

[a] Immediately after adjournment, during a criminal trial, and before the jury had retired, a deputy sheriff put handcuffs on one of defendant's witnesses. This witness was at the time a prisoner in the jail, charged as a party to the same crime as the defendant. There was no showing that the officer was not acting in good faith. Held, not to constitute misconduct on the part of the officer prejudicial to defendant.—People v. Metzger, 143 Cal. 447, 77 Pac. 155.

§ 333. **Remarks and Conduct of Court.**

[a] Court should be careful in guarding itself and jury from suspicion of prejudice by refraining from remarks which appear adverse to either party.—People v. Goldenson, 76 Cal. 353, 19 Pac. 161.

[b] Under Penal Code, section 1093, providing that where one indicted for felony is also charged with a prior conviction, which he confesses, the clerk, in reading the indictment to the jury, shall omit all that relates to such former conviction, it is prejudicial error to direct the clerk, reading an indictment for robbery, to read that part charging a prior conviction for burglary, which was confessed, and permit him to announce that "the defendant confessed the same, and was guilty."—People v. Sansome, 84 Cal. 449, 24 Pac. 143.

[c] By Penal Code, section 1093, subdivision 6, it is made illegal to charge the jury concerning matters of fact; but where the court, during the charge, addressed itself to the attorneys, and, as justifying the charge, stated that in its opinion the evidence tended to prove certain facts, there was no error.—People v. McLean, 84 Cal. 480, 24 Pac. 32.

[d] On an information for receiving stolen goods from W., in ruling against an objection to the admission in evidence of letters from W. to defendant, it was error for the court to state in the presence of the jury that his chief reason for admitting them was that defendant had several times contradicted herself on the record.—People v. Willard, 92 Cal. 482, 28 Pac. 585.

[e] In a criminal prosecution, where the jury return into court some time after the case has been submitted to them, and state that there is no prospect for an agreement, it is prejudicial error for the judge to state that, in view of the evidence, he is at a loss to understand why the jury should disagree, since such remark cannot fail to create the impression that in his opinion the evidence required a conviction.—People v. Kindelberger, 100 Cal. 367, 34 Pac. 852.

[f] Trial judge should be careful not to make unnecessary remarks about the evidence in course of trial.—People v. Woon Tuck Wo, 120 Cal. 295, 52 Pac. 833.

[g] Remarks of court during trial herein held not ground for reversal.—People v. Woon Tuck Wo, 120 Cal. 295, 52 Pac. 833.

[h] Where an objection is made to evidence as irrelevant, it is proper for the court, in overruling the objection, to state the fact to which the evidence is relevant—especially when the court states that it is for the jury to determine whether the fact is proved. People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[i] Where, on a prosecution for rape, a physician testified, without objection, that medical authorities placed the proportion of true to false charges of rape as one true charge to twelve false, and the court remarked that he did not see what that would have to do with any particular case, because the guilt or innocence of accused in

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each case would depend on its own merits, the remarks were not ground for reversal, since, accused having no right to have the statement of the witness go to jury, he could not have been prejudiced by the remarks. People v. Bene, 130 Cal. 159, 62 Pac. 404.

[j] A statement by the judge during the progress of a trial for arson bearing on the amount of insurance on the destroyed property, but which is made to the attorneys, and in which he says that he does not wish to be understood as quoting the evidence, is not reversible error, since it is not a statement to the jury.—People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

[k] Where, on a trial for manslaughter, the court, in overruling a motion to strike certain testimony on behalf of the state, said: "I think the testimony is all right," such remark was not error, since the jury could not have understood it as an intimation that in the opinion of the judge the witness was telling the truth.—People v. Smith, 134 Cal. 453, 66 Pac. 669.

[l] In a prosecution for larceny it is not error, in giving instructions requested by defendant, to say to the jury that the defendant had asked them.—People v. Wilder, 134 Cal. 182, 66 Pac. 228.

[m] In a prosecution for murder, allusion to the fact that defendant was admittedly sane was made in the argument by the prosecuting counsel. Defendant's counsel afterward asked leave to reply to such statement. In the ensuing conversation the court stated that the question was whether defendant was insane at the time of the homicide. Counsel said, "And the question whether he is sane now or not is not an issue?" to which the court replied, "It is only a matter of argument as to what his condition of mind was at the time of the commission of the crime." The entire defense was insanity. Held, that the use of the word "crime" in the statement by the judge was not prejudicial to defendant as an opinion as to his guilt.—People v. Daily, 135 Cal. 104, 67 Pac. 16.

[n] Where, on a criminal prosecution the testimony of a witness was read to the jury at their request, it was not error for the judge to have the last question re-read to him.—People v. Eaton, 136 Cal. xix, 68 Pac. 593.

[o] On the retrial of a criminal case after reversal in sustaining defendant's objection to certain questions, the court remarked, "I do not propose to have this case go up there and be reversed again if I can help it." Held not ground for reversal, as indicating to the jury that the court expected or wanted a verdict of guilty.—People v. Keith, 141 Cal. 686, 75 Pac. 304.

[p] Where a witness for the state in a criminal case is absent when wanted, and is brought in by an officer, it is error for the court, in the presence of the jury, to hold a colloquy with such witness, which tends to discredit defendant and his counsel, and lead the jury to believe that, if they were not guilty of a grave offense in procuring the absence of the witness, they were, in the opinion of the court, capable of committing it, and that such conduct on their part could only be induced by consciousness of defendant's guilt.—People v. Abbott, 34 Pac. 500.

[q] Remark of the trial court in excluding certain evidence held not error.—People v. Smith (Cal. App.), 84 Pac. 449.

[r] Accused held not prejudiced by an observation of the trial judge that a witness against him had been testifying merely to opinions.—People v. Fernandez (Cal. App.), 86 Pac. 899.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cent. Dig., cols. 2250-2268, §§ 1520-1535.

C. RECEPTION OF EVIDENCE.

RIGHT OF ACCUSED TO CONFRONT WITNESS, § 334.
SEPARATION AND EXCLUSION OF WITNESSES, § 335.
COMPELLING CALLING OF WITNESSES, § 336.
—— AFTER EVIDENCE CLOSED, § 337.
COMPELLING WITNESS TO OBTAIN INFORMATION, § 338.
OFFER OF PROOF, § 339.
EFFECT OF ADMISSIONS, § 340.
EXCLUSION OF IMPROPER OR IMMATERIAL EVIDENCE, § 341.
ORDER OF PROOF AND REOPENING CASE, § 342.
PRELIMINARY PROOF, § 343.
REBUTTAL EVIDENCE, § 344.

§ 334. Right of Accused to Confront Witnesses.

[a] Rule seems to be that any witness may be introduced on the trial by consent of the court, notwithstanding he was not before the grand jury, subject only to the right of the prisoner to a postponement, in case such evidence should operate as a surprise upon him.—People v. Freeland, 6 Cal. 96.

[b] It is right of accused to have his witnesses orally examined in court, and to confront them with those called, to impeach their testimony.—People v. Diaz, 6 Cal. 248.

[c] Penal Code, section 686, declaring that defendant shall have the right to be confronted with the witnesses against him in the presence of the "court," refers to the court in which the action is being tried, so that the reporter's notes of testimony, given on the trial of a former indictment for the same offense, by a witness out of the state, are inadmissible.—People v. Chung Ah Chue, 57 Cal. 567.

[d] Penal Code, section 686, 689, allowing depositions taken on the preliminary examination of an accused to be used in evidence on his trial, do not deprive him of his constitutional right to confront the witnesses against him; he being present at such examination, and having an opportunity to cross-examine.—People v. Oiler, 66 Cal. 101, 4 Pac. 1066.

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[e] Legislature has power to restrict accused to having testimony of witness confined in penitentiary procured by deposition.—Willard v. Superior Court, 82 Cal. 461, 462, 22 Pac. 1120.

[f] The testimony of a witness at the preliminary examination, where the witness is out of the state at the time of the trial, cannot be proved by the testimony of the stenographer, who was present at the examination, and heard the testimony, as Penal Code, section 686, gives the accused the right to be confronted with the witnesses against him in the presence of the court, without any other exception than that the deposition of a witness at the preliminary examination may, under certain circumstances, be read. People v. Gardner, 98 Cal. 127, 32 Pac. 880.

[g] Under Penal Code section 686, providing that in a criminal action defendant is entitled "to be confronted with the witnesses against him in the presence of the court," except in specified instances, the transcribed testimony of a witness taken by the shorthand reporter on a previous trial of a criminal action, not within the exceptions of such statute, is not admissible in evidence on the second trial because such witness is absent from the state.—People v. Gordon, 99 Cal. 227, 33 Pac. 901.

[h] Statute purporting to impair fundamental right of defendant to be confronted with witnesses against him in presence of court is to be liberally construed in his favor, and whenever state in its prosecution for crime would offer against accused testimony of witnesses not given in presence of court, it must point to statute which authorizes such procedure, and bring itself within its provisions.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[i] Right of accused to be confronted by witness does not render deposition taken at preliminary examination inadmissible.—People v. Sierp, 116 Cal. 252, 48 Pac. 88.

[j] Accused was not entitled during the taking of testimony and after the jury had been impaneled to interrogate several of the jurors as to whether they had read any reports of the trial in the newspapers.—People v. Fernandez (Cal. App.), 86 Pac. 899.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2269-2278, §§ 1538-1548.

§ 335. Separation and Exclusion of Witnesses.

[a] Trial court may make order excluding from the courtroom all the witnesses but the witness under examination.—People v. Sprague, 53 Cal. 491.

[b] Wife and daughters of defendant may be included in an order excluding witnesses. People v. Sprague, 53 Cal. 491.

[c] Exclusion of witnesses from courtroom is within the discretion of court.—People v. Garnett, 29 Cal. 622; People v. Hong Ah Duck, 61 Cal. 387; People v. Sam Lung, 70 Cal. 515, 11 Pac. 673.

[d] The exclusion of witnesses while the evidence is being taken is largely in the discretion of the trial court.—People v. McCarty, 117 Cal. 65, 48 Pac. 984.

[e] In a criminal trial, it was not an abuse of discretion to allow the sheriff, who was also a witness for the state, to remain in the courtroom during trial.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2278-2287, §§ 1549-1566½.

§ 336. Compelling Calling of Witness.

[a] Where property was stolen while in charge of an employee, and another person was charged with the crime, it was held that it was not necessary for the prosecution at the trial to call such employee as a witness. People v. Jim Ti, 32 Cal. 60.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2288-2294, §§ 1567-1579.

§ 337. —— After Evidence Closed.

[a] It is not error to deny a defendant's motion, in a prosecution for murder, after the prosecution has rested, to order the prosecution to call and examine as witnesses certain persons said to have been present at the time of the homicide.—People v. Robertson, 67 Cal. 646, 8 Pac. 600.

§ 338. Compelling Witness to Obtain Information.

[a] The court properly refused to direct a witness to ascertain a certain fact during a recess of the court, as a witness cannot be required to obtain information in order to be able to answer a question.—People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

§ 339. Offer of Proof.

[a] If a witness is called to identify papers in order to lay the foundation for introducing them in evidence, the opposing counsel is entitled to an inspection of the papers before the close of the testimony, in order to enable him to offer testimony in explanation of the papers, or to disprove their authenticity.—People v. Stevens, 52 Cal. 457.

[b] On a trial for murder, a witness was asked, "Did [accused] ever take a meal at your house before?" An objection to the question was sustained. The question was an isolated one, and there was no intimation that the purpose was to show that witness and accused were not intimate acquaintances. Held that, in the absence of such showing, the ruling was not erroneous.—People v. Shaw, 111 Cal. 171, 43 Pac. 593.

[c] The state has a right to call as a witness a person charged with the same offense as that of defendant, and it is immaterial that he refused to testify on the ground that his evidence might incriminate him.—People v. Plyler, 121 Cal. 160, 53 Pac. 553.

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[d] Evidence offered for the purpose of contradicting the prosecutrix on a rape trial was properly rejected, where counsel did not point out to the court wherein such evidence was contradictory.—People v. Totman, 135 Cal. 133, 67 Pac. 51.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2299-2301, §§ 1593-1596.

§ 340. Effect of Admissions.

[a] Where the prosecuting attorney, to avoid delay to obtain the presence of a witness, admits that the witness will testify to certain facts, those facts are as much before the jury as though the witness had appeared and testified to them.—People v. Tyler, 36 Cal. 522.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2305, 2306, § 1606.

§ 341. Exclusion of Improper or Immaterial Evidence.

[a] The admissibility of evidence is not question for jury.—People v. Glenn, 10 Cal. 32.

[b] Irrelevant evidence may be excluded by the court, though not objected to by counsel.—People v. Turcott, 65 Cal. 126, 3 Pac. 461.

[c] It is not error for the court on its own motion, and with or without an objection from the prosecution, to exclude portions of depositions, on behalf of the defense, which are hearsay.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[d] It is not error for trial judge to refuse to be sworn on hearing of motion for new trial to show that he had admonished the bailiff not to allow jury to read papers relating to case. Such showing is not material, but the fact, if it existed, was matter within knowledge of court, and might be stated as a fact in a bill of exceptions without proof. People v. Azoff, 105 Cal. 632, 39 Pac. 59.

[e] Where isolated questions are asked by counsel for defendant, which are apparently irrelevant, immaterial and aimless, and no purpose of the evidence is disclosed, it is not error to exclude the questions, although a relevant purpose might have been stated. People v. Shaw, 111 Cal. 171, 43 Pac. 593.

§ 342. Order of Proof and Reopening Case.

[a] If defendant's counsel, after the prosecution has rested, ask for leave to further cross-examine the prosecutor on new matter, the facts that the people have rested and that defendant may recall the prosecutor as his own witness are not sufficient reasons for the court to deny the request.—People v. Parton, 49 Cal. 632.

[b] The order of testimony is a matter within the discretion and control of the trial court.—People v. Shainwold, 51 Cal. 468.

[c] Reopening a case for the purpose of introducing evidence in support of a plea of once in jeopardy is a matter in discretion of the court.—People v. Ross, 65 Cal. 104, 3 Pac. 491.

[d] It is within the discretion of the court to allow evidence in rebuttal which should have been offered in chief.—People v. Clark, 84 Cal. 573, 24 Pac. 313.

[ef] It is discretionary with trial court to allow defendant in own behalf to testify after evidence is all in and court has commenced charge to jury.—People v. Christensen, 85 Cal. 570, 24 Pac. 888; People v. Mayes, 113 Cal. 618, 45 Pac. 860.

[g] The fact that letters of a defendant, containing admissions, were admitted in evidence before the corpus delicti had been proven, will not authorize the reversal of a judgment of conviction, the order of testimony being largely discretionary with the trial court.—People v. Whiteman, 114 Cal. 338, 46 Pac. 99.

[h] Order in which evidence as to conspiracy shall be received is in discretion of court.—People v. Van Horn, 119 Cal. 330, 51 Pac. 538.

[i] It is largely in discretion of court to allow prosecution to introduce some evidence in rebuttal, which should have been introduced in chief; and its ruling will not be disturbed on appeal, where no abuse of discretion is disclosed.—People v. Teixeira, 123 Cal. 297, 55 Pac. 988.

[j] Where the court notified the prosecuting attorney, about to prove confessions of accused, that, if he did not afterward prove the corpus delicti, the confessions would be stricken, it was not an abuse of discretion to admit proof of confessions before that of the corpus.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

[l] Permitting the calling of a witness by the state, after the defense has closed its case, to testify to matters not prejudicial to defendant, is harmless error.—People v. Lewis, 124 Cal. 551, 57 Pac. 470.

[m] Where defendant does not submit case at close of evidence for the prosecution, the court may properly allow the prosecution, on just terms, to supply a fact in its evidence at any time before the final submission of the case.—People v. Lewis, 124 Cal. 551, 57 Pac. 470; People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

[o] Proof of the corpus delicti does not necessarily involve or require proof that the crime was committed by the defendant. The proper order of evidence is, that there should be, first, independent proof of the body of the offense, but a case should not be reversed, merely because of a departure from such order.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[p] It is not error to allow a witness for the prosecution to testify after defendant has opened his case, when the reasons given by the court for so doing show there has been no abuse of the discretion given by

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Penal Code, section 1094.—People v. Bowers, 18 Pac. 660.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2307-2309, §§ 1609, 1610; cols. 2311, 2312, § 1613.

§ 343. Preliminary Proof.

[a] Where confessions of guilt are offered against the defendant, and objected to by him, on the ground that they were not voluntarily made, the question thus presented is for the court alone, and must be decided before the testimony goes to the jury.—People v. Ah How, 34 Cal. 218.

[b] Evidence of attempted bribery of prosecuting witness by person not connected with defendant is inadmissible.—People v. Choy Ah Sing, 84 Cal. 278, 24 Pac. 379.

[c] An objection that declarations of alleged conspirators were admitted before there was sufficient proof of the conspiracy is of no avail, where the conspiracy is thereafter sufficiently proved.—People v. Van Horn, 119 Cal. 323, 51 Pac. 538.

[d] It is proper to allow a witness to be withdrawn in order to lay a foundation for the admissibility of his testimony.—People v. Prather, 120 Cal. 660, 53 Pac. 259.

[e] Code of Civil Procedure, section 1870, subdivision 6, providing that after proof of a conspiracy the act or declaration of a coconspirator shall be admissible, is not mandatory; and, where it is otherwise difficult to present the evidence, the court may, in its discretion, admit the testimony of the accomplice first.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[f] In a prosecution of a witness to a will for perjury in swearing that he duly witnessed it, there was no error in permitting evidence of a conspiracy between the beneficiary and subscribing witnesses to defraud the estate, after the admission of the declarations of the beneficiary that she had offered to pay another witness the amount she was going to pay defendant, where, taking all the evidence together, it established the conspiracy, since the order of proof rested in the sound discretion of the court.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[g] In a prosecution for selling liquor to an Indian, the admission of evidence of a constable, who stood outside defendant's saloon while the Indian and another were in the saloon buying the liquor, that such constable got a bottle of whisky from the Indian after he came from the saloon, and that the persons present drank whisky from the bottle, before evidence of the Indian that he bought the bottle and contents from defendant was introduced, was not reversible error. People v. Monroe, 138 Cal. 97, 70 Pac. 1072.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2309-2311, §§ 1611, 1612.

§ 344. Rebuttal Evidence.

[a] Where the existence of a certain person in regard to whom a defendant has testified is questioned by the prosecution, it may introduce testimony in rebuttal showing that efforts have been made by the officers to learn of the existence or whereabouts of such person, and that they were unsuccessful.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[b] Evidence held inadmissible in rebuttal of contradictory evidence which presented no new matter.—People v. Hill, 116 Cal. 566, 48 Pac. 711.

[c] Where the fact that R. called a third person to the scene of the homicide before its occurrence was material to defendant's case in a prosecution for murder, a witness for the prosecution could testify in rebuttal that the calling was after the homicide, though the calling was not done in defendant's presence.—People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

[d] Where on a prosecution for rape a witness testified that the mother of the outraged child stated in a conversation with her husband on the day of the crime that she had seen the child coming out of the brush, but did not see the accused with her, and that the child was not hurt, it was proper rebuttal to recall the father and mother and permit them to deny the statement, they not having testified to the matter before.—People v. Figueroa, 134 Cal. 159, 66 Pac. 202.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2312-2316, §§ 1615-1617.

D. OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

OBJECTIONS, § 345.
WAIVER OF OBJECTIONS, § 346.
MOTION TO STRIKE OUT, § 347.
EXCEPTIONS, § 348.

§ 345. Objections.

[a] General objection to admissibility of evidence is insufficient.—People v. Apple, 7 Cal. 289; People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

[b] An objection of testimony held not to be good, because being too general.—Denning v. Rankin, 19 Cal. 640.

[ba] Unless the defendant objects at the time when they are offered that the confessions were not proved to be voluntary, he cannot afterward object to want of such proof.—People v. Rodriguez, 10 Cal. 50.

[c] When the only objection to the admission of evidence was because it was "irrelevant and incompetent," it cannot afterward be objected to on the ground that no proper foundation was laid for it.—People v. Frank, 28 Cal. 507.

[d] If evidence which is competent only for particular purpose is admitted generally, and the counsel for the defendant fails to ask

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the court to limit the evidence to the purpose for which it was competent, or to ask a charge to the jury to that effect, the defendant cannot afterward complain that the testimony was inadmissible for some other purpose.—People v. Collins, 48 Cal. 277.

[e] Objection that evidence is immaterial does not raise the point whether it was competent and admissible to impeach the witness, or competent to go to his credibility.—People v. Manning, 48 Cal. 335.

[f] Party objecting to evidence must specify the ground of his objection, and waives all objections not so specified.—People v. Manning, 48 Cal. 335.

[g] Where testimony taken down on defendant's preliminary examination was inadmissible because the absence of the witness was not accounted for in such manner as would render the deposition competent, an objection to the introduction of the "testimony" as incompetent is sufficient, since, the deposition being incompetent, the testimony contained therein is likewise incompetent.—People v. Bojorquez, 55 Cal. 463.

[h] A party objecting to evidence must specify ground of his objection; if he does not there is no error in overruling it, and an exception taken to the ruling is not revisable on appeal.—People v. Chee Kee, 61 Cal. 404; People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

[i] If defendant insists that his deposition before the committing magistrate is the best evidence of his statements, he cannot object to it after its admission.—People v. Salorse, 62 Cal. 139.

[j] Where a physician is asked, in a murder trial, whether, from the appearance of a wound, deceased could have shot himself, and an objection is made that the testimony is incompetent, no foundation having been laid, and after evidence by the physician as to his after evidence by the physician as to his experience, the question is again asked, and the same objection is made, the question before the court is whether the witness is competent as an expert, and not whether the opinion, when given is competent evidence. People v. Mahoney, 77 Cal. 529, 20 Pac. 73.

[k] An objection to the admission in evidence of the coat worn by deceased at the time of the homicide, because it was not shown to be in the same condition as when taken from the body of deceased, will not be considered, where such objection was not specifically made, but counsel objected on another ground.—People v. O'Brien, 78 Cal. 41, 20 Pac. 359.

[l] Objection to evidence must state ground thereof.—People v. Nelson, 85 Cal. 428, 24 Pac. 1006.

[m] Where evidence is absolutely incompetent, a general objection to its admission is sufficient.—People v. Gordon, 99 Cal. 227, 33 Pac. 901.

[n] Where objections to evidence go to the weight of the testimony, rather than to its admissibility, the court does not err in admitting it, though it is somewhat remote, and relates to an incident not directly traceable to the accused.—People v. Martin, 102 Cal. 558, 36 Pac. 952.

[o] Premature objection to preliminary question in relation to a receipted bill, amount of which evidence afterward showed was paid to defendant and not accounted for, and was included in amount charged in information to have been embezzled, is properly overruled.—People v. Biddleman, 104 Cal. 608, 38 Pac. 502.

[p] Fact that objections to evidence in a criminal case might have been put in better form is not ground for disregarding them. People v. Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

[q] An objection by the defense to the admission of what the deceased did on a certain visit to the defendant will be held to include what he said on that occasion, when it appears that the parties to the prosecution and the court so understood it.—People v. Shattuck, 109 Cal. 673, 42 Pac. 315.

[r] Where the clothing worn by the deceased at the time of the killing was introduced in evidence, a mere general and indefinite objection that the proper predicate had not been laid for its introduction, is insufficient, and does not include the specific objection that the clothes when offered in evidence were not shown to be in the same condition as when taken from the body.—People v. Conklin, 111 Cal. 616, 44 Pac. 314.

[s] An objection to the sufficiency of the identification of the pistol and cartridges is waived, where no specific objection is made upon that ground, but only the general objection that the evidence was incompetent, irrelevant and immaterial, and not connected with the defendant.—People v. Louis Foo, 112 Cal. 17, 44 Pac. 453.

[t] Where, to discredit accused's testimony, a witness is asked as to defendant's "reputation" for truth, etc., instead of his "general reputation," a general objection to such question, without calling the attention of the court to the particular vice in the form of the question, is insufficient.—People v. Hickman, 113 Cal. 80, 45 Pac. 175.

[u] Objection that no proper foundation is laid does not present point that fact sought to be elicited is not subject of expert inquiry. People v. Durrant, 116 Cal. 210, 48 Pac. 75.

[v] On a trial for murder, objection to a threatening article published by defendant, as "not competent or material," does not raise the question whether the article on its face refers to deceased.—People v. Sehorn, 116 Cal. 503, 48 Pac. 495.

[w] Evidence which is introduced without objection may be considered as aiding in establishing any fact which it tends to prove. People v. Smith, 121 Cal. 355, 53 Pac. 802.

[x] Where objection to a previous question asked of a witness, as to his understanding of the libelous language used in relation to the persons libeled, had been overruled, and the question was reframed so as to ask as to his

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understanding of the language used, without reference to particular persons, and was answered without objection, the opposite party cannot afterward object to the answer given. People v. Miller, 122 Cal. 84, 54 Pac. 523.

[y] Where proper objection is made by defendant to evidence of a confession on the ground that defendant was in custody, and that it is incumbent on the state to show that promises had not previously been made to induce such confession, and the objection is overruled, and exception taken, it is not necessary that same objection should be repeated to evidence of other confessions to entitle defendant to have all such evidence excluded on its subsequently appearing that such inducements were offered.—People v. Castro, 125 Cal. 521, 58 Pac. 133.

[z] In a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, testimony by a witness of declarations of the beneficiary tending to show a conspiracy to defraud testator's estate by establishing a fraudulent will being properly admitted, it was not error to admit evidence of declarations in the same conversation by her tending to show that defendant was a party to such conspiracy, over an objection to strike out the whole testimony.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[aa] An objection to the reading of the testimony of a police officer given at the preliminary examination, on the trial, to refresh his memory, merely reciting that it is an objection to the testimony of the lower court on the pretense that it is used to refresh the memory of the witness or for any other purpose, without any objection to the evidence as incompetent, secondary, or hearsay, is insufficient.—People v. Joy, 135 Cal. xix, 66 Pac. 964.

[bb] In a prosecution for rape, a witness was asked whether anything was said by prosecutrix as to her relations with defendant, to which she answered in the affirmative, and was then asked whether the prosecutrix stated defendant had had intercourse with her. Objections were interposed, and the court permitted the witness to answer the last question, and defendant excepted. On further cross-examination witness stated that prosecutrix spoke about it about five days later, and that prosecutrix said defendant had had intercourse with her on a certain date. Held, that all the testimony given by the witness was covered by the previous objection and exception of defendant.—People v. Wilmot, 139 Cal. 108, 72 Pac. 838.

[cc] Where a question is put to a witness is not objected to before the answer is given, there is a waiver of any right to complain of the admission of the testimony under the answer.—People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

[dd] An objection to a hypothetical question, asked of a medical expert, held insufficient to raise the question of the witness' qualifications.—People v. Bowers (Cal. App.), 82 Pac. 553.

For Authorities from Other States:

See 14 Cent. Dig., cols. 2329-2331, §§ 1628, 1629.

§ 346. Waiver of Objections.

[a] Defendant's counsel offered to question a witness as to her husband having, at her instance, approached the defendant's friends for the purpose of obtaining money from him. The proffer was denied by the court "for the present." No exception was reserved, the proffer was not subsequently renewed, and no effort was made to obtain an ultimate decision on the point. Held, that it must be considered as waived.—People v. Sanford, 43 Cal. 29.

[b] Where ruling upon an objection to a question is reserved by the court, and the defendant does not afterward ask for or make any effort to obtain a ruling upon the objection, or move to strike out the answer to the question, the ruling upon which has been reserved, the legal presumption is that a ruling has been waived.—People v. Westlake, 62 Cal. 303.

[c] Defendant may waive objection that evidence is incompetent; and failure to object to it on that ground is such waiver. People v. Smith, 121 Cal. 355, 53 Pac. 802.

§ 347. Motion to Strike Out.

[a] The practice, whether in civil or criminal cases, of deliberately permitting the evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated.—People v. Long, 43 Cal. 444.

[b] Practice of deliberately permitting evidence to be given without objection in first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated.—People v. Rolfe, 43 Cal. 444; 61 Cal. 540.

[c] A motion to strike evidence must specify the grounds in like manner as an objection to the question in the first instance. People v. Eckman, 72 Cal. 582, 14 Pac. 359.

[d] Court may temporarily refuse to strike out evidence if counsel promises to subsequently show its relevancy.—People v. McLean, 84 Cal. 482, 24 Pac. 32.

[e] Motion to strike out evidence not objected to at time of its admission is addressed to discretion of court.—People v. Samario, 84 Cal. 485, 24 Pac. 283.

[f] Objection to evidence cannot be taken for first time by motion to strike it out. People v. Nelson, 85 Cal. 426, 428, 24 Pac. 1006.

[g] Motion to strike out evidence not previously objected to is addressed to the sound legal discretion of the court, and may be properly denied if made on account of the absence of preliminary proof, or is addressed to evidence of an irrelevant or immaterial

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fact, but should be granted when the objection is not technical, but substantial, and the justice of the case required the rejection of incompetent hearsay evidence or inherently illegal testimony as to a material fact.—People v. Wallace, 89 Cal. 158, 26 Pac. 650.

[h] The rule that, where no objection is made to an interrogatory, a motion to strike out the answer will not be entertained, does apply where the answer is not responsive to the question put to the witness.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[i] It is error to strike out on motion an answer which is directly responsive to a question not objected to when asked.—People v. Johnson, 106 Cal. 289, 39 Pac. 622.

[j] Failure to move to strike out evidence received subject to motion to strike out if not made relevant is acquiescence that it remain in the case.—People v. Durrant, 116 Cal. 219, 48 Pac. 75.

[k] If an answer is nonresponsive to the question asked, but no motion to strike it out is made, the objection is waived.—People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

[l] Where a witness, in response to a question, answered more in detail than was proper, the wrong can be reached only by motion to strike out the objectionable matter. People v. Colvin, 118 Cal. 349, 50 Pac. 539.

[m] It is not error to refuse to strike out testimony of a witness called for the prosecution which had some relevancy to the issues in the case, and was not prejudicial to the defendant, nor to refuse to strike out testimony introduced without objection on cross-examination about matters testified to in chief.—People v. Patterson, 124 Cal. 102, 56 Pac. 882.

[n] When an unexpected answer of a witness, which could not be anticipated by objection to the question, contains inadmissible and prejudicial matter, a motion to strike it out is the proper remedy. When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late unless preceded by an objection to the question, but the rule is otherwise when the answer may or may not be admissible.—People v. Williams, 127 Cal. 212, 59 Pac. 581.

[o] Admission of testimony as to statements of a third person to one accused of a crime, though not accompanied with proof of the conduct of accused, was not error, where accused did not move to strike it out.—People v. Machado, 130 Cal. xviii, 63 Pac. 66.

[p] A motion to strike out the evidence of a witness as to the declarations of a coconspirator which covers competent evidence of such declarations is too broad, and is properly overruled.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[q] Where irrelevant evidence, prejudicial to accused, is admitted on assurance of the prosecutor to connect it with the case, and he fails to do so, it is proper for the court to strike it out, and instruct the jury to disregard it.—People v. Bird, 132 Cal. 261, 64 Pac. 259.

[r] A motion cannot be entertained to strike out evidence which was responsive to a question not objected to.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[s] Evidence deceived without objection will not be struck out on motion.—People v. Ardell, 135 Cal. xix, 66 Pac. 970.

[t] When improper, hearsay and argumentative matter is not asked to be stricken out, objection to it is waived.—People v. Cole, 141 Cal. 192, 74 Pac. 547.

[u] When there is no motion to strike out an irrelevant answer to a relevant question, it remains part of testimony.—People v. Teshara, 141 Cal. 637, 75 Pac. 338.

[v] The question asked a witness, who had testified to a conversation with a codefendant on the night of the homicide, while defendant was close by, what the conversation was, is not improper, so that, if improper evidence was contained in the answer, a motion to strike it out was necessary to authorize complaint thereof.—People v. Lawrence, 143 Cal. 148, 76 Pac. 893.

[w] On a prosecution for assault with intent to commit rape, the father of a prosecutrix testified that when he reached defendant's place of business, shortly after the time when it was claimed that the alleged assault was committed there, defendant stated to him that prosecutrix had been there, but that he had done nothing to her. Held, that a motion to strike out the entire testimony of the father was properly denied, even if the declaration of the defendant that he had done nothing to prosecutrix was inadmissible, since that portion of the statement in which defendant admitted that prosecutrix was at his place of business was competent.—People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

[x] Where the nature of a question put to a witness clearly indicates that the evidence sought to be elicited would be inadmissible, a motion to strike out the answer is not available unless a preliminary objection to the question has been made.—People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

[y] Refusal to strike certain testimony impeaching defendant held not error.—People v. Jailles, 146 Cal. 301, 79 Pac. 965.

[z] Where a part of an answer is not responsive to the question, and a part is directly so, but the whole is relevant, material and competent, it is proper to refuse to strike it out as being irrelevant, immaterial, and incompetent, and as being irresponsive to the question.—People v. Munroe, 33 Pac. 776.

[aa] Refusal to strike a witness' affirmative answer to a question as to whether defendant was able to distinguish between right and wrong held not error, the witness having previously given similar testimony without objection.—People v. Easton (Cal. Sup.), 82 Pac. 840.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2341-2345, §§ 1639-1644.

§ 348. Exceptions.

[a] Exception is formal protest against ruling on question of law.—People v. Towes, 38 Cal. 141.

[b] Allowing one of jury panel to act as trier cannot afterward be objected to unless exception is reserved.—People v. Voll, 43 Cal. 166.

[c] An exception to testimony cannot be taken for the first time by a motion to strike out.—People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

[d] Under terms of section 1170 of Penal Code, no exception is allowed to a defendant from a ruling of the trial court denying a challenge for actual bias.—People v. Wong Ark. 96, Cal. 125, 30 Pac. 1115.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols 2345-2348, §§ 1645-1650.

E. ARGUMENT AND CONDUCT OF COUNSEL.

DISCRETION OF COURT AS TO NUMBER OF COUNSEL ARGUING CASE, § 349.
LIMITING TIME OF ARGUMENT, § 350.
TIME FOR ARGUMENT, § 351.
OPENING STATEMENT, § 352.
PRESENTATION OF EVIDENCE, § 353.
ARGUMENT—IN GENERAL, § 354.
—— EXHIBITS AND ILLUSTRATIONS, § 355.
—— READING STATEMENTS OF ACCUSED NOT IN EVIDENCE, § 356.
—— READING TRANSCRIPT OF EVIDENCE, § 357.
—— READING PARTS OF INSTRUCTIONS, § 358.
—— READING EXTRACTS FROM MEDICAL WORKS, § 359.
—— MATTERS NOT WITHIN ISSUES, § 360.
—— MATTERS NOT SUSTAINED BY EVIDENCE, § 361.
—— COMMENTS ON EVIDENCE OR CREDIBILITY OF WITNESSES, § 362.
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—— COMMENTS ON CHARACTER OR CONDUCT OF ACCUSED, § 365.
READING LAW TO JURY, § 366.
—— ABUSIVE LANGUAGE, § 367.
REMARKS AND CONDUCT OF COUNSEL PENDING TRIAL, § 368.
RETALIATORY REMARKS OR CONDUCT, § 369.
ERROR CURED BY INSTRUCTIONS OR REBUKE OF COURT, § 370.

Right to open and close. See ante, § 324.

§ 349. Discretion of Court as to Number of Counsel Arguing Case.

[a] In a capital criminal case the court may, in its discretion, allow more than two counsel to address the jury, either on behalf of the people or the defendant.—People v. Ah Wee, 48 Cal. 236.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 568; 14 Cent. Dig., cols. 2353-2358, §§ 1655-1657.

§ 350. Limiting Time of Argument.

[a] A limitation of the arguments of counsel on a trial for felony to one and three-fourths hours on each side is not unreasonable.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[b] A trial for robbery lasted five days, three of which were occupied in hearing twenty-four witnesses. The evidence was circumstantial and conflicting. Held, that an order of the court limiting the time of argument of counsel to one hour exceeded the discretionary power of the court.—People v. Green, 99 Cal. 564, 34 Pac. 231.

[c] An order limiting the time of argument in a criminal case held an abuse of discretion requiring a reversal.—People v. Fernandez (Cal. App.), 87 Pac. 1112.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2354-2358, § 1657.

§ 351. Time for Argument.

[a] Counsel for prisoner is not entitled to make his argument on the case made out by the prosecution when prosecution closes. The argument is to be made when the evidence is concluded.—People v. Williams, 43 Cal. 344.

§ 352. Opening Statement.

[a] It is not an abuse of discretion for the court to restrict counsel for defendant in the opening statement to stating what he expects to prove, without any argument on such facts. People v. Bezy, 67 Cal. 223, 7 Pac. 643.

[b] It is within discretion of court to limit opening statement to one counsel.—People v. Goldenson, 76 Cal. 348, 19 Pac. 161.

[c] Counsel for defendant in opening statement must confine himself to facts, effect thereof and his conclusions therefrom without argument on evidence introduced by prosecution.—People v. Goldenson, 76 Cal. 349, 19 Pac. 161.

[d] Counsel has no right, in opening statement, to refer to other cases or read law in illustration of his argument.—People v. Goldenson, 76 Cal. 348, 19 Pac. 161.

[e] Refusal to allow counsel to argue law to jury in opening address is proper.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Carty, 77 Cal. 216, 19 Pac. 490.

[f] Where the evidence is sufficient to justify the verdict, it is immaterial whether or not the district attorney fully stated it in his opening to the jury.—People v. Ellsworth, 92 Cal. 594, 28 Pac. 604.

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[g] A statement by the district attorney, in his opening statement to the jury, that he would prove certain acts of defendant as evidence of guilt, will not be prejudicial error unless made in bad faith, although he is not permitted to introduce such evidence. People v. Searcey, 121 Cal. 1, 53 Pac. 359.

[h] The remark was not prejudicial as it tended to raise in the minds of the jury the belief that proof thereof was essential to the prosecution's case.—People v. Lewis, 124 Cal. 551, 57 Pac. 470.

[i] A prosecuting attorney, in his opening to the jury, stated that he would prove a certain act contributory to the death of deceased to have been done by defendant. There was no evidence introduced which tended to prove the act. Held, that such statement, if made in good faith, and with intent to attempt its proof, was not an abuse of his position.—People v. Lewis, 124 Cal. 551, 57 Pac. 470.

[j] It is not error for the district attorney to state in his opening argument, that, in a former prosecution against defendant for an assault to commit murder, he consented to allow him to plead guilty of assault with a deadly weapon, "owing to the fact that it is sometimes very difficult, in these little troubles between that class of people, to have them come up and prosecute," where the fact of such plea of guilty and consent was proved.—People v. Molina, 126 Cal. 505, 59 Pac. 34.

[k] The district attorney is not guilty of misconduct for merely including in his opening statement facts expected to be proved, some of which remained unproved, where there is nothing to indicate an intentional disregard of truth, or clear intent to influence the jury by false statements.—People v. Gleason, 127 Cal. 323, 59 Pac. 592.

[l] The prosecution in a criminal case may open the case without any preliminary or opening statement, notwithstanding Penal Code, section 1093, subdivision 2.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 570, 571; 14 Cent. Dig., cols. 2358-2361, §§ 1659, 1660.

§ 353. Presentation of Evidence.

[a] District attorneys should avoid interposing technical objections to admission of testimony offered by defendant, or to questions put by him in cross-examining a witness called for the people.—People v. Benson, 52 Cal. 380.

[b] Court should not allow prosecuting attorney to comment in such manner, in urging admissibility of evidence, as to prejudice jury.—People v. Lee Chuck, 78 Cal. 329, 20 Pac. 719.

[c] Repetition of improper questions, persistently assuming existence of damaging facts, is ground for reversal.—People v. Mullings, 83 Cal. 145, 146, 17 Am. St. Rep. 223, 23 Pac. 229.

[d] Where the prosecuting attorney, in a criminal action, asks a defendant questions which he knows to be wholly inadmissible and wrong, without the expectation of answers, the clear purpose of which is to prejudice the jury against the defendant in a vital matter by the mere asking of the question, a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict.—People v. Wells, 100 Cal. 459, 34 Pac. 1078.

[e] Attorney for prosecution should not ask inadmissible questions for the purpose of exciting suspicions in the mind of jurors prejudicial to defendant, nor repeat question to which objection has been sustained, nor, during trial, make remarks unjustly injurious to the defendant.—People v. Ryan, 108 Cal. 581, 41 Pac. 451.

[f] Where a witness as to good moral character of accused was asked on cross-examination a question hinting at a former crime of accused, which, with the answer, was stricken out, and it was not shown to have been asked in bad faith and without grounds for expecting an affirmative answer, it is not ground for a new trial.—People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[g] An offer of the district attorney to prove that defendant had an abandoned and malignant heart, as tending to show that the homicide was the offspring of malice, and not of a sudden heat of passion, though excluded by the court, is not an act of bad faith, since there is good authority sustaining the admissibility of such evidence.—People v. McKay, 122 Cal. 628, 55 Pac. 594.

[h] The repeated asking by the district attorney, on a prosecution for statutory rape, notwithstanding the sustaining of objections thereto, of questions the object of which clearly appears to have been to leave the impression on the minds of the jurors that defendant had committed other crimes, and had repeatedly changed his name, is prejudicial error.—People v. Derbert, 138 Cal. 467, 71 Pac. 564.

[i] It was not misconduct for the prosecuting attorney to ask a witness for the defense if he had not made a certain statement contrary to his evidence which included bad language, nor to ask further questions, to which objections were sustained, in the absence of any showing of bad faith in the cross-examination; nor was it misconduct in argument to denounce the motives of the defendant and to endeavor to show that he was a cold-blooded murderer, where there was evidence tending to show him guilty.—People v. Gage, 139 Cal. 154, 72 Pac. 965.

[j] On a prosecution for murder, it was proper to sustain an objection to a question put to defendant, at the outset of his examination, as to whether he gave correct testimony at the preliminary examination.—People v. Leung Ock, 141 Cal. 323, 74 Pac. 986.

[k] On cross-examination of a witness for defendant in a criminal case, he said, refer-

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ring to another witness, "D knows he is perjuring himself against an innocent man." "Just like you are doing now!" said the district attorney. "Just like I am doing now," answered the witness. The witness had testified to many facts going to show the innocence of the defendant, and the witness D was an eyewitness who had identified the defendant as one of the persons who committed the crime. Held, that the district attorney was not guilty of misconduct.—People v. Metzger, 143 Cal. 447, 77 Pac. 155.

[l] The conduct of the prosecuting attorney in offering evidence on a trial for homicide held not reversible error.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

§ 354. Argument—In General.

[a] That district attorney in argument accuses prisoner personally of a cowardly attack is not ground of reversal.—People v. Wheeler, 65 Cal. 77, 2 Pac. 892.

[b] Counsel has no right to comment on action of court in refusing continuance.—People v. Goldenson, 76 Cal. 348, 19 Pac. 161.

[c] A prosecuting attorney may challenge counsel for defendant to explain the evidence in the case "upon any other reasonable hypothesis than that of guilt," and then comment on the failure to do so.—People v. Hall, 94 Cal. 595, 30 Pac. 7.

[d] Accused is not entitled to benefit of any doubt created by argument of counsel. People v. Ammerman, 118 Cal. 29, 50 Pac. 15.

[e] Use of well-known historical incidents to illustrate argument is not misconduct.—People v. Barthleman, 120 Cal. 15, 16, 52 Pac. 112.

[f] A district attorney's argument, stating that the county had been free from crime for fifteen years subsequent to 1877, and that it was unnecessary for him to say why crime exists in the community, or why arguments are being bandied back and forth in the state as to whether the jury system is a failure, is not so prejudicially erroneous as to justify a reversal of a conviction, where the evidence was sufficient to sustain the verdict, and the jury were instructed to disregard all matters outside the record.—People v. Molina, 126 Cal. 505, 59 Pac. 34.

[g] The range of discussion, illustration, and argumentation of counsel before a jury is wide. Matters of common knowledge and historical facts may be referred to, and interwoven in the argument, and allusion may be made to the prevalence of crime, and to the duty of the jury.—People v. Molina, 126 Cal. 505, 59 Pac. 34.

[h] Courts are not favorably disposed toward granting new trials for misconduct of the district attorney in his argument of the case. In regulating the arguments of counsel, much is left to the discretion of the trial court, and the judgment will not be reversed by this court for mere fervor of the district attorney in his argument.—People v. Owens, 132 Cal. 469, 64 Pac. 770.

[i] It was not misconduct for the prosecuting attorney to allude, in his closing argument upon the question of insanity, to the "present sanity" of the defendant, which was not disputed.—People v. Daily, 135 Cal. 104, 67 Pac. 16.

[j] Argument of prosecuting attorney on a criminal trial held not erroneous.—People v. Salas (Cal. App.), 84 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

See 46 L. R. A. 641, note. See, also, 12 Cyc. 572-582; 14 Cent. Dig., cols. 2364-2407, §§ 1663-1687.

§ 355. —— Exhibits and Illustrations.

[a] Use of physical object such as empty box to illustrate an argument is not error where district attorney and court inform jury that it is not an exhibit and is not to be considered as evidence.—People v. Durrant, 116 Cal. 221, 48 Pac. 75.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 572; 14 Cent. Dig., cols. 2368, 2369, § 1666.

§ 356. —— Reading Statement of Accused not in Evidence.

[a] When accused has made statements to the district attorney and sheriff, which the court reporter has taken down in shorthand, and written out, and has testified that his longhand transcript truly sets out accused's statements, it is not error for the district attorney in his argument to read from said transcript, though not introduced in evidence. People v. Greening, 102 Cal. 384, 36 Pac. 665.

§ 357. —— Reading Transcript of Evidence.

[a] In a prosecution for grand larceny, it was not error, during the district attorney's address to the jury, to refuse defendant's request that the stenographer's notes of a witness' evidence be read to the jury, on account of an alleged misstatement of it by the district attorney.—People v. Faulke, 96 Cal. 17, 30 Pac. 837.

§ 358. —— Reading Parts of Instructions.

[a] There is no objection to the district attorney's reading to the jury parts of the court's instructions, if the court permits.—People v. Davis, 36 Pac. 96.

[b] The use of the instructions in the argument to the jury is within the discretion of the court.—People v. Denomme, 56 Pac. 98.

§ 359. —— Reading Extracts from Medical Works.

[a] In the absence of evidence that a medical book is of recognized authority in the profession, the district attorney, in his closing argument to the jury, should not be allowed to read from such book extracts "commenting upon and treating of the subject of insanity."—People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70.

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FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 573; 14 Cent. Dig., col. 2369, § 1667.

§ 360. —— Matters not Within Issues.

[a] On prosecution for homicide, unwarranted reference in argument of counsel to criminal history of county held not cause for reversal.—People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734.

[b] It is not error to prevent counsel for defendant from commenting on the actions of juries in similar local cases, and to state that the case before the court should be tried on the evidence given in court, and the law applicable thereto.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 575; 14 Cent. Dig., cols. 2369, 2370, § 1668.

§ 361. —— Matters not Sustained by Evidence.

[a] On a prosecution for homicide, argument of district attorney held not in violation of rule rendering it prejudicial error for the district attorney to state facts pertinent to the issue and not in evidence, or assume arguendo such facts to be in the case when they are not.—People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734.

[b] Where prosecuting attorney in his argument to jury asserts a fact not in evidence, which is prejudicial to defendant, it is error. People v. Mitchell, 62 Cal. 411.

[c] The prosecuting attorney cannot be charged with misconduct in urging a theory as to defendant's acts or motives, though such theory has slight, if any, evidence to support it—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[d] Where an officer's testimony that he had searched prisoner's trunk because he was suspected of a theft other than that charged had been ruled out, it was reversible error for the prosecuting attorney, in his closing address, to state that he personally knew that the prisoner's trunk was not searched for the theft stated by the officer, but for a third theft, though such misconduct was rebuked by the court.—People v. Valliere, 127 Cal. 65, 59 Pac. 295.

[e] The evidence showed that a blood-stained club was found in decedent's saloon immediately after the assault, and that the wound on his head was made by such an instrument. Decedent declared in his dying statement that he was hit with a club, and that it was used by defendant. Held that, though the club was not formally offered as an exhibit, such fact did not preclude reference to it by the prosecuting attorney in his argument.—People v. Amava, 134 Cal. 531, 66 Pac. 794.

[f] On a prosecution for murder, the fact that the theory of the prosecuting attorney, as set forth in his argument, that the motive was robbery, was not supported by the evidence, was not sufficient to make such argument misconduct.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

FOR AUTHORITIES FROM OTHER STATES:

Arguments at trials based on facts not in evidence: 48 Am. Rep. 337, note. See, also, 12 Cyc. 574; 14 Cent. Dig., cols. 2370-2372, § 1669.

§ 362. —— Comments on Evidence or Credibility of Witnesses.

[a] It is within the right of district attorney to urge in argument to jury that the evidence is conclusive of defendant's guilt. People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734.

[b] Where evidence is properly admitted in a criminal trial, though it tends to prove the defendant guilty of another crime than the one charged against him, counsel for the prosecution has the right to discuss such evidence to the jury, and to argue any theory which may legitimately be deduced therefrom. People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[c] Remarks made by district attorney in his argument to the jury, upon a trial for murder, which are in accordance with the evidence and pertinent to the issues, are not harmful.—People v. Molina, 126 Cal. 505, 59 Pac. 34.

[d] Where defendant in a murder trial voluntarily took the stand in his own behalf, and went fully into the details of the difficulty between himself and the deceased, claiming that he acted in self-defense, it was not improper for the prosecuting attorney to comment on his failure to deny certain statements which other witnesses claimed he had made.—People v. Wong Bin, 139 Cal. 60, 72 Pac. 505.

[e] In a prosecution for assault with intent to commit murder, the prosecuting witness testified that during the night on which the alleged assault occurred he and defendant were at a dance, and that during the evening he asked a woman who was sitting beside defendant to dance with him, whereupon defendant objected, and told him she was not going to dance with him. Defendant denied any such occurrence, and that he spoke to the witness, or that the witness spoke to him. The district attorney in his closing argument characterized as incredible the story that the prosecuting witness assaulted the defendant with a knife, as testified to by defendant, and said that the fact of the business was that there was a little feeling caused by the occurrence at the hall, and these men met on the public road, and one word brought on another, until defendant pulled his revolver and fired at the prosecuting witness, and that that was how it happened. Held insufficient to show misconduct on the part of the district attorney; the remarks being legitimate argument under the evidence.—People v. Romero, 148 Cal. 458, 77 Pac. 163.

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[f] Where, in a prosecution for robbery, two ex-convicts testified as witnesses for defendant, it was not error for the district attorney to emphasize such convictions in his argument to the jury.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

[g] In a prosecution for burglary, defendant held not entitled to object to argument of the prosecuting attorney as to the credit to be accorded to defendant and state's witnesses, subjecting defendant to severe criticism.—People v. Davis (Cal. App.), 81 Pac. 716; Id. 147 Cal. 346.

[h] Prosecuting officer is entitled to assert to the jury his conviction that the evidence convinces him of accused's guilt.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 573-578; 14 Cent. Dig., cols. 2372-2377, §§ 1670, 1671.

§ 363. —— Comments on Failure of Accused to Testify.

[a] Fact that accused declines to testify on his own behalf cannot be commented on by public prosecutor in his remarks to jury.—People v. Tyler, 36 Cal. 522; People v. Brown, 53 Cal. 66.

[b] It is ground for reversal to permit the prosecuting attorney, over defendant's objection, to comment on defendant's refusal to be questioned, on cross-examination, as to matters not proper on a cross-examination. People v. McGungill, 41 Cal. 429.

[c] The failure of the defendant to testify on any given point should not be commented on in argument by the district attorney.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[d] Penal Code, section 1323, declares that the neglect or refusal of a defendant to be a witness cannot be used against him on the trial. On a prosecution under Statutes of 1891, page 285, chapter 206, making it a felony for one to permit his wife to remain in a house of prostitution, etc., defendant did not testify as to whether he and his alleged wife had been actually married, but he testified that on going ashore from a man-of-war at one time he saw her in a saloon; that she said she had done wrong, and asked him to take her back again; that he saw her again some weeks later; that they met another man, and the three spent several hours drinking; that he promised to take her back; and engaged a room and stayed all night with her, and the next thing he knew she was in a house of prostitution. Held, that as the jury might have inferred that defendant was taking her back to live with him as a paramour, or that he was condoning her offense as a husband, it was not error for the district attorney to comment on the failure of defendant to deny that the woman in question was his wife.—People v. Mead, 145 Cal. 500, 78 Pac. 1047.

[e] Under Penal Code, section 1323, a reference by the assistant counsel for the state to defendant's failure to take the stand and testify held prejudicial error, though promptly rebuked by the court.—People v. Morris (Cal. App.), 84 Pac. 463.

FOR AUTHORITIES FROM OTHER STATES:

See 54 C. C. A. 373, note. See, also, 12 Cyc. 576; 14 Cent. Dig., cols. 2377-2383, § 1672.

§ 364. —— Comments on Absence of Witnesses or Failure to Call Them.

[a] Comment by counsel for the state on the absence of a witness for defendant is no ground for reversing a conviction.—People v. Young, 102 Cal. 411, 36 Pac. 770.

[b] In a prosecution for manslaughter, the evidence of the state consisted principally of the evidence of two men who testified that defendant killed deceased; but at the inquest and preliminary examination they testified that they did not know who did the killing. Defendant's brother was present when deceased was killed, and defendant testified that his brother told him that deceased killed himself, but his brother did not testify. Held, that comments by the district attorney in his argument to the jury to the effect that the defense had subpœnaed the brother, and then did not put him on the stand, and that the presumption of law was that the brother's testimony would have been adverse to defendant, were unauthorized, and the overruling of defendant's objections thereto material error.—People v. Smith, 121 Cal. 355, 53 Pac. 802.

§ 365. —— Comments on Character or Conduct of Accused.

[a] Where counsel for the people, by remarks during a trial for murder, and by statements to the jury not founded on the evidence, imputes to defendants a character for violence, even though the court instruct the jury to disregard any statement of fact not warranted by the evidence, a verdict of guilty will be reversed.—People v. Ah Len, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286.

[b] Where defendant claimed that on the day of the homicide he started to town to put deceased under bond to keep the peace, a remark, in interrogatory form, made by the prosecuting attorney on cross-examination, that defendant knew what it was to be put under bonds himself, was harmless error.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[c] In a prosecution for robbery alleged to have been committed by defendant after leaving the saloon of H., it is not error for the district attorney in his closing remarks to refer to H. as "Old Harris, the whisky seller," and to state that "this man [referring to defendant] ought to be in the penitentiary."—People v. McMahon, 124 Cal. 435, 57 Pac. 224.

[d] In a prosecution for receiving stolen goods, the district attorney asked defendant, when a witness in his own behalf, whether he had been "offering for sale across the track a roll of silk." The question was ruled out, but, in arguing to the jury, the prosecuting attorney

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stated that defendant was a "fence keeper," and, after alluding to the "hole in the wall," told the jury, in effect, that defendant was keeping "just that sort of a joint," thereby implying that he was keeping a place for the habitual reception of stolen goods. Held, that the discretion of the court in granting defendant a new trial for misconduct of the district attorney would not be interfered with.—People v. Sing Lee, 145 Cal. 190, 78 Pac. 636.

[e] In a prosecution for burglary in a house of prostitution, defendant held not entitled to object to a statement by prosecuting attorney in argument that defendant had been living off prosecutrix's earnings.—People v. Davis (Cal. App.), 147 Cal. 346, 81 Pac. 716, 718.

[f] In a prosecution for burglary, a reference by the prosecuting attorney to the fact that defendant's relatives were present with him during the trial held not error.—People v. Davis (Cal. App.), 147 Cal. 346, 81 Pac. 716, 718.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 579; 14 Cent. Dig., cols. 2387-2390, § 1674.

§ 366. —— Reading Law to Jury.

[a] The reading of law to the jury is within the discretion of the court.—People v. Anderson, 44 Cal. 65.

[b] It is not error to permit the district attorney to read, during his argument before jury, portions of an opinion of the supreme court, but such a practice is not commendable. People v. Forsythe, 65 Cal. 101.

[c] Allowing counsel to read law to jury is discretionary.—People v. Treadwell, 69 Cal. 238, 10 Pac. 502.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 583, 584; 14 Cent. Dig., cols. 2402-2407, §§ 1682-1687.

§ 367. —— Abusive Language.

[a] On prosecution for homicide, statement of district attorney in argument that defendant ought to have been lynched held not cause for reversal.—People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734.

[b] Counsel for the prosecution ought not to indulge in extravagant vituperative epithets against the defendant.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[c] In a prosecution for murder, the remark of the district attorney in argument, that, "when this foul fiend from hell sent T. [decedent] to his Maker, the motive came from a heart as black as the crime committed," is not improper; one accused of murder not being entitled as of right to be referred to as if he were innocent in an argument by the officer who was endeavoring to demonstrate his guilt.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 581; 14 Cent. Dig., cols. 2397, 2398, § 1679.

§ 368. Remarks and Conduct of Counsel Pending Trial.

[a] Mode pursued by district attorney in calling court's attention to attempt to bribe jury criticized.—People v. Kalkman, 72 Cal. 214, 13 Pac. 500.

[b] Prosecution cannot go upon one theory to make out its case, and upon a wholly inconsistent theory to meet a special defense.—People v. Willard, 92 Cal. 482, 28 Pac. 585.

[c] Where it appears that the court carefully guarded the rights of the defendant, and that the district attorney did not act through passion or prejudice, or with intent to injure the defendant, it was not prejudicial misconduct for him to request the bystanders to retire while the prosecutrix was testifying, nor to ask objectionable questions of witnesses, which could not have injured the defendant. People v. Vann, 129 Cal. 118, 61 Pac. 776.

[d] Where, on a prosecution for rape, after defendant's attorney had commenced to state what he assumed he could show as to the previous unchastity of the prosecutrix, the district attorney remarked, "You know very well you couldn't show any such thing," the remark was not ground for reversal, since it could not have influenced the jury.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[e] Where, in a criminal prosecution, after an objection to a question asked by the district attorney had been sustained, the district attorney, in an undertone addressed to defendant's attorney, which was heard by one juryman, stated, "That's getting on dangerous grounds, isn't it?" while erroneous, was not prejudicial the court having immediately directed the jury to pay no attention to the statements made by the attorneys.—People v. Brittain, 142 Cal. 8, 75 Pac. 314.

§ 369. Retaliatory Remarks or Conduct.

[a] Statements of objectionable facts in argument in reply to similar argument of opposing counsel will not reverse where court instructed jury not to consider them.—People v. Bush, 68 Cal. 629, 10 Pac. 169.

[b] On a criminal trial, the counsel for defendant refused to reply to the opening argument of the prosecuting attorney after the evidence was in, and the latter claimed the right to argue the case further to the jury, which claim the court denied. The prosecuting attorney then remarked, in the presence of the jury, that "the defense was endeavoring to prevent the prosecution from arguing the truth of the charge." Held, that this was not prejudicial to defendant.—People v. Ross, 85 Cal. 383, 24 Pac. 789.

[c] Misconduct by counsel is not justified by like misconduct by opposing counsel.—People v. Kramer, 117 Cal. 647, 49 Pac. 842.

[d] Where defendant's counsel, in argument, assumed that accused had children, a statement by the district attorney, in reply, to the effect that he denied that there was any proof that any children of defendant existed, was not objectionable.—People v. Philbon, 138 Cal. 530, 71 Pac. 650.

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[e] A juror on his voir dire was asked by the defense if he had any special prejudice against offenses "committed during Sunday broils." The district attorney, objecting, remarked that no one "broiled" but defendant. The juror was accepted without challenge. Held no prejudice.—People v. Davis, 36 Pac. 96.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 582; 14 Cent. Dig., cols. 2399-2402, § 1681.

§ 370. Error Cured by Instructions or Rebuke of Court.

[a] Where the attorney for the state makes statements to the jury not warranted by the evidence, and the court tells the jury that they should not be regarded by them in considering the case, the judgment will not be reversed therefor.—People v. Kamaunu, 110 Cal. 609, 42 Pac. 1090.

[b] A conviction will not be set aside because a prosecuting attorney, in his argument, urged the jury to disbelieve defendant's witnesses, who were Chinamen, where he also told them they were the sole judges of the credibility of all witnesses, and the court gave a proper and full instruction on the point.—People v. Foo, 112 Cal. 17, 44 Pac. 453.

[c] Improper questions which are ruled out on objection or stricken when answered are not ground for reversal.—People v. Sears, 119 Cal. 271, 51 Pac. 325.

[d] Remarks made by the district attorney outside of the issues, which were objected to by the defendant, and which the jury were especially instructed by the court to disregard, and which did not reach a course of proceeding militating against justice and the fair and orderly conduct of the cause, are not ground of error.—People v. Putnam, 129 Cal. 258, 61 Pac. 961.

[e] Where, on trial of a prosecution for rape, the deputy district attorney remarked during the state's argument that a physician who knew about the marks on defendant's face was subpoenaed by the defense, but not called as a witness, and that the constable who made the arrest was not called, the statements were not ground for reversal, where the court properly ordered the remarks stricken, and instructed the jury to disregard them.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[f] Where, on a prosecution for manslaughter, counsel for the people in the course of his argument referred to an objection made by the defense to certain testimony reflecting on the character of the accused, and said, "Happy, oh happy, would we have been, had the defense thrown the bars down and allowed us to prove the character of this defendant," and the court, without waiting for an objection from the defense, ordered no comment on such matter, rebuked counsel, and instructed the jury not to consider the defendant's character, such conduct on the part of counsel was no basis for a reversal.—People v. Smith, 134 Cal. 453, 66 Pac. 669.

[g] An improper statement to the jury by counsel for the people in a prosecution for embezzlement, that the attorney believes the defendant to be a thief and an embezzler, and a scoundrel, etc., does not authorize the reversal of a judgment of conviction, when the jury is instructed to disregard such statement.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[h] The repeated asking by the district attorney, on a prosecution for a statutory rape, notwithstanding the sustaining of objections thereto of questions the object of which clearly appears to have been to leave the impression on the minds of the jurors that defendant had committed other crimes and had repeatedly changed his name, was not cured by the action of the court in excluding the answers and directing the jury to disregard counsel's remarks. People v. Derbert, 138 Cal. 467, 71 Pac. 564.

[i] Where the court instructed the jury to disregard remarks of the district attorney, complained of, immediately on objection being made, and checked the attorney from making further remarks, error therein was cured.—People v. Edwards, 139 Cal. 527, 73 Pac. 416.

[j] In a prosecution for petit larceny by one who was charged with having before been convicted of burglary, while the district attorney was arguing the question of the admissibility of the record of dismissal of the information for petit larceny by a justice, which had been pleaded as a bar to the prosecution, he said: "The question turns essentially on whether or not the offense is a misdemeanor, or whether it is a felony. Our contention is that by reason of a former conviction, and the statute making (your honor is familiar with it) a second conviction of petit larceny—" Here the defendant's attorney objected, and the judge admonished the jury fully to pay no attention to what the district attorney had said. Held, that as it did not appear that the district attorney was acting in bad faith when he made the remark, and as the court promptly admonished the jury that it was not evidence, the remark was not cause for reversal.—People v. Smith, 143 Cal. 597, 77 Pac. 449.

[k] Improper remarks of the district attorney in the argument of the case will not require a reversal, where no objection was taken and the court interposed to stop them and the attorney desisted.—People v. Lyle, 4 Pac. 977.

[l] Where the prosecuting attorney proposes to read to the jury in his argument a paper not in evidence, and stated that it purported to be the record of defendant as furnished by a chief of police, his course, while reprehensible, does not prejudice defendant when it is promptly rebuked by the court, who charges the jury that statements of counsel not in proof are not evidence, and to be disregarded.—People v. Bowers, 18 Pac. 660.

[m] Error arising from argument of prosecuting attorney on a criminal trial held cured by the court's statement to the jury.—People v. Salas (Cal. App.), 84 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2412-2420, § 1693.

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F. PROVINCE OF COURT AND JURY IN GENERAL.

POWER OR PROVINCE OF JURY, § 371.
CONSTITUTION AND STATUTES CONSTRUED, § 372.
QUESTIONS FOR COURT OR JURY—IN GENERAL, § 373.
—— PRELIMINARY OR INTRODUCTORY QUESTIONS, § 374.
—— INTENT, § 375.
—— PLACE OF COMMISSION OF CRIME, § 376.
—— JEOPARDY, § 377.
—— ALIBI, § 378.
—— INSANITY, § 379.
—— SCIENTIFIC QUESTIONS, § 380.
—— IDENTITY OF ACCUSED, § 381.
—— WEIGHT AND EFFECT OF EVIDENCE, § 382.
—— CORROBORATION OF ACCOMPLICE, § 383.
—— CREDIBILITY OF WITNESSES, § 384.
—— CREDIBILITY OF ACCOMPLICES, § 385.
CREDIBILITY OF ACCUSED, § 386.
—— INFERENCES FROM FLIGHT OF ACCUSED, § 387.
—— DEGREE OF CRIME, § 388.
—— EXTENT OF PUNISHMENT, § 389.
DIRECTION OF VERDICT, § 390.
INSTRUCTIONS INVADING PROVINCE OF JURY, § 391.
—— INTENT, § 392.
—— ASSUMING FACTS AND CHARGING ON MATTERS OF FACTS, § 393.
—— WEIGHT AND EFFECT OF EVIDENCE, § 394.
—— CREDIBILITY OF WITNESSES, § 395.
—— CREDIBILITY OF ACCUSED, § 396.
—— OPINION AS TO FACTS, § 397.
INFERENCES FROM FACTS, § 398.
—— DETERMINATION WHETHER THERE IS EVIDENCE, § 399.
—— APPLICATION OF LAW TO FACTS, § 400.
—— EXTENT OF PUNISHMENT, § 401.
—— INSTRUCTING JURY AS TO THEIR DUTY, § 402.

In prosecutions for homicide. See Homicide, VII, B.

§ 371. Power or Province of Jury.

[a] "Power" of jury is the same as "province" of jury.—People v. Pool, 27 Cal. 573.

§ 372. Constitution and Statutes Construed.

[a] Provision of constitution forbidding instructions with respect to matters of fact is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case, or to take away their exclusive right to weigh the evidence and determine the facts. The meaning of the provision is that the judge shall decide upon the law and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter.—People v. Ybarra, 17 Cal. 166.

[b] Though it is conceded to be a proper rule of construction that the words of our constitution are to be construed in the same sense that had been previously fastened upon similar language by the decisions of other states, yet there are no authoritative decisions of other states which have fastened upon the language of our constitution the construction that judges may, in their charges to juries, criticise the weight and credibility of evidence.—People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

[c] Code of Civil Procedure, section 2061, which provides that the jury are on all proper occasions to be instructed that the testimony of an accomplice ought to be viewed with distrust and the evidence of the oral admission of a party with caution, is repugnant to the constitutional injunction against judges charging as to matters of fact.—People v. Wardrip, 141 Cal. 229, 74 Pac. 744.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 587; 14 Cent. Dig., col. 2426, § 1696.

§ 373. Questions for Court or Jury—In General.

[a] Jury in a criminal case are the exclusive judges of the facts.—People v. English, 30 Cal. 214.

[b] The court cannot submit to a jury the determination of a mere matter of law.—People v. Ivey, 49 Cal. 56.

[c] If evidence tends to charge witness as an accomplice, jury must determine whether he is such.—People v. Curlee, 53 Cal. 607.

[d] Situation of parties, surrounding circumstances and incentives to crime are questions for jury.—People v. McCurdy, 68 Cal. 579, 10 Pac. 207.

[e] Ownership of money embezzled is question of fact.—People v. Treadwell, 69 Cal. 236, 10 Pac. 502.

[f] While jury has naked power to decide all questions arising on the general issue of not guilty, it only has the right to find facts, and apply to them the law as given by the court.—People v. Lem You, 97 Cal. 224, 32 Pac. 11.

[g] The question whether a witness is an accomplice is for the jury.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[h] An instruction that although it was in the court's province, in the first instance, to determine the admissibility of the decedent's dying declaration, the jury was not bound by the fact of admission to conclude that it was made in view of impending death, etc., but that it was for them to determine whether it was so made, and whether it had been correctly reported, is not erroneous.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[i] The question whether a witness is an accomplice is for the jury.—People v. Bunkers (Cal. App.), 84 Pac. 364.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 589-593; 14 Cent. Dig., cols. 2427-2447, §§ 1697-1723; cols. 2466-2468, § 1736.

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§ 374. —— Preliminary or Introductory Questions.

[a] Where dying declarations in writing, signed by deceased, have been first introduced, or their absence accounted for, the admissibility of evidence of oral declarations of similar import is a question for the court.—People v. Glenn, 10 Cal. 32.

[b] Court should not submit evidence to jury to be considered by them if they are of the opinion that it is applicable to the issue, but to be disregarded by them if they are of a contrary opinion.—People v. Ivey, 49 Cal. 56.

§ 375. —— Intent.

[a] Intent is question for jury.—People v. Mize, 80 Cal. 45, 22 Pac. 80; People v. Swalm, 80 Cal. 49, 22 Pac. 67.

[b] Intent is question for jury.—People v. Wilson, 119 Cal. 385, 51 Pac. 639.

§ 376. —— Place of Commission of Crime.

[a] Whether offense is committed in or out of county is question for jury.—People v. More, 68 Cal. 504, 9 Pac. 461, 463.

§ 377. —— Jeopardy.

[a] Under Penal Code, section 1151, it is the duty of a court before whom a plea of former jeopardy is entered to submit that issue to the jury, though the plea was incorporated in, and was the basis of, a motion to set aside the indictment for want of jurisdiction.—People v. Hamberg, 84 Cal. 468, 24 Pac. 298.

[b] Jeopardy is question of fact.—People v. Ammerman, 118 Cal. 28, 50 Pac. 15.

§ 378. —— Alibi.

[a] Defense of alibi is question for jury.—People v. Sears, 119 Cal. 270, 51 Pac. 325.

§ 379. —— Insanity.

[a] Section 1368, Penal Code, requiring court to submit question of insanity to jury when in doubt as to sanity of accused, construed.—People v. Lee Fook, 85 Cal. 301, 24 Pac. 654.

[b] Where a defendant charged with murder relies upon insanity as a defense, the atrocity of the murder and circumstances of inhumanity and barbarity may be evidence of insanity, but may also owe their existence to the promptings of a brutal and malignant spirit; and where a jealous rage appears to have been the motive of the crime, and, upon the general question of insanity, the evidence of experts is conflicting, the jury are sole arbiters of the question.—People v. Larrabee, 115 Cal. 158, 46 Pac. 922.

[c] Insanity is question of fact which must be proven.—People v. Hubert, 119 Cal. 220, 221, 16 Am. St. Rep. 72-n., 51 Pac. 329.

§ 380. —— Scientific Questions.

[a] Matters of science are matters of fact to be proven and court should not instruct in regard to them.—People v. Hubert, 119 Cal. 220, 221, 16 Am. St. Rep. 72-n., 51 Pac. 329.

§ 381. —— Identity of Accused.

[a] Identity of accused with person committing crime is question for the jury.—People v. Rogers, 71 Cal. 565, 12 Pac. 679.

§ 382. —— Weight and Effect of Evidence.

[a] It is for the jury, in a criminal case, to determine whether evidence introduced upon a given point amounts to proof of the fact sought to be proved.—People v. Strong, 30 Cal. 151.

[b] Circumstantial evidence is peculiarly within the province of the jury because it is always solemnly to be weighed and acted on by their understandings and consciences.—People v. Barry, 31 Cal. 357.

[c] The weight of evidence is for the jury.—(Cal. 1868) People v. Dick, 34 Cal. 663.

[d] If declarations are offered in evidence as against a person in whose presence they were made, and there is evidence tending to show that such person heard and understood them, it is for the jury to decide whether he understood them.—People v. Chin Mook Sow, 51 Cal. 597.

[e] Jury may consider that innocent men have been convicted and danger of convicting an innocent man, in weighing evidence to determine whether there is reasonable doubt as to guilt.—People v. Travers, 88 Cal. 237, 238, 26 Pac. 88.

[f] Weight or credibility of corroborating evidence is for jury.—People v. Barker, 114 Cal. 617, 46 Pac. 601.

[g] Province of jury in weighing evidence and determining degree of credibility of witnesses is exclusive.—People v. Durrant, 116 Cal. 200, 48 Pac. 75.

[h] Deduction to be drawn from circumstances is for jury, but when they are consistent with defendant's innocence, question is for court.—People v. Eagan, 116 Cal. 291, 48 Pac. 120.

[i] The value of a letter as evidence is to be determined by the jury, to whom the facts concerning it may be shown, but the application of the facts to the letter is to be made by the jury; and where there is no technical language requiring interpretation, it is proper for the court to refuse to permit a witness to tell the meaning of the letter.—People v. Yokum, 118 Cal. 437, 50 Pac. 686.

[j] A request for an instruction as to the weight and effect of evidence was properly refused. Judgment (1898) 51 Pac. 945, reversed.—People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[k] One H. was castrated early Monday morning in Santa Cruz. Defendant, a veterinary surgeon, hired by P. to commit the crime, traveled on the preceding Saturday from San Jose to Santa Cruz with P., P.'s wife, and others, for the purpose of executing it on the next morning. On Monday defendant exhibited H.'s members to several persons in San Jose, telling them that he did the castration, but in the trial he testified that in making said statements he lied. Defendant and

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various credible witnesses testified that defendant returned to San Jose on Sunday evening, which, if true, precluded his presence at the commission of the crime, and defendant further testified that P. gave him H.'s members in San Jose on Monday. Held, that as to whether or not defendant was present when the crime was committed was a question for the jury.—People v. Schoedde, 126 Cal. 373, 58 Pac. 859.

[l] Notwithstanding the expert evidence and the opinion evidence of the friends and acquaintances of the defendant may all have pointed toward the defendant's insanity, still it was the right and duty of the jury to measure and weigh such evidence in connection with the conduct and acts of the defendant as disclosed by all the circumstances in evidence, and to determine whether or not the insanity of the defendant was proved by a preponderance of evidence.—People v. Plyler, 126 Cal. 379, 58 Pac. 904.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 592, 593; 14 Cent. Dig., cols. 2437-2439, § 1713.

§ 383. —— Corroboration of Accomplice.

[a] Where, independent of the evidence of an accomplice, there is evidence tending to connect the defendant with the commission of the offense, the question of its sufficiency is for the jury.—People v. Kunz, 73 Cal. 313, 14 Pac. 836.

§ 384. —— Credibility of Witnesses.

[a] Jury are the exclusive judges of the credibility of an accomplice, as well as of other witnesses who testified in the cause.—People v. Gibson, 53 Cal. 601.

[b] It is province of jury to determine what evidence is entitled to credence.—People v. Bush, 68 Cal. 629, 10 Pac. 169.

[c] Jury may disregard testimony of impeached witness.—People v. Phillips, 70 Cal. 69, 11 Pac. 493.

[d] Jury are judges of credibility of witnesses.—People v. Samario, 84 Cal. 485, 24 Pac. 283.

[e] Jury are sole judges of credibility of witnesses.—People v. Clark, 84 Cal. 576, 24 Pac. 313.

[f] Jury are not bound to take testimony of any witness as true though uncontradicted.—People v. Murray, 86 Cal. 34, 24 Pac. 802.

[g] Where value and weight of evidence depend upon the credibility of the witnesses, it is a matter peculiarly for the jury to determine.—People v. Cesena, 90 Cal. 381, 27 Pac. 300.

[h] Where there is some evidence to sustain a verdict of conviction on every essential point, it is peculiarly within the province of the jury to determine the credibility of the prosecuting witness, and, unless the appellate court can plainly see that the verdict could only have been rendered through passion or prejudice, it will not disturb the verdict, although it is plausibly urged that the story told by the prosecuting witness is grossly improbable, and that the witness made contradictory statements, both in and out of court, and was contradicted by other witnesses.—People v. Ross, 115 Cal. 233, 46 Pac. 1059.

[i] The strength and credibility of the declarations of the accused as corroborating evidence of his guilt are for the jury.—People v. Whelan, 117 Cal. 559, 49 Pac. 583.

[j] The question of what degree of credibility shall be given to a witness, or whether his testimony is to be entirely rejected, is for the jury, under Code of Civil Procedure, section 1847, making the jury the sole judges of the credibility of a witness.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2442-2444, §§ 1719-1721.

§ 385. Credibility of Accomplices.

[a] Jury are exclusive judges of the credibility of accomplice, though corroborated.—People v. Gibson, 53 Cal. 601, 607.

§ 386. Credibility of Accused.

[a] Whether account accused gives of possession of stolen goods is true or reasonable is question for jury.—People v. Luchetti, 119 Cal. 505, 51 Pac. 707.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2444, 2445, § 1722.

§ 387. —— Inferences from Flight of Accused.

[a] Question whether the flight of defendant was to avoid arrest for some breach of the peace, or on account of offense charged, is for the jury; and they are not bound to attribute the consciousness of guilt indicated by flight to one disposing cause rather than the other.—People v. Armstrong, 114 Cal. 570, 46 Pac. 611.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2441, 2442, § 1718.

§ 388. —— Degree of Crime.

[a] Question of degree is one of fact, to be determined by jury from evidence; and drunkenness, as evidence of a want of premeditation, is not within the rule which excludes it as an excuse.—People v. Belencia, 21 Cal. 544.

[b] Degree of crime is question for jury.—People v. Russel, 81 Cal. 618, 23 Pac. 418.

[c] It is exclusively the province of the jury to determine the degree of crime when there is any evidence supporting the determination.—People v. Mahatch (Cal. Sup.), 82 Pac. 779.

[d] It is exclusively the province of the jury to determine the degree of crime when there is any evidence supporting the determination.—People v. Mahatch (Cal. Sup.), 82 Pac. 779.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2466-2468, § 1736.

§ 389. —— Extent of Punishment.

[a] Under Penal Code, section 190, which provides that one found guilty of murder in the first degree shall suffer death or imprisonment for life, "at the discretion of the jury," the court has no power to review the action of the jury in fixing the penalty.—People v. Leary, 105 Cal. 486, 39 Pac. 24.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 593; 14 Cent. Dig., cols. 2445-2447, § 1723.

§ 390. Direction of Verdict.

[a] Instruction not including every possible hypothesis of guilt cannot properly direct an acquittal.—People v. Stackem, 40 Cal. 601.

[b] Penal Code, section 1118, provides that, if the court deems the evidence insufficient to warrant a conviction, it may "advise" the jury to acquit, but that the jury are not bound by the advice. Held, that the court cannot "instruct" the jury that there is no evidence in support of an indictment.—People v. Daniels, 105 Cal. 262, 38 Pac. 720.

[c] Where the prosecution has adduced some evidence, and after an adverse ruling upon further evidence, the prosecution rested, the court, if it deems the evidence adduced insufficient to sustain a verdict of guilty, has the right to advise the jury to render a verdict of not guilty, but it is error summarily to direct the jury to acquit the defendant.—People v. Roberts, 114 Cal. 67, 45 Pac. 1016.

[d] Where the first information in a prosecution for robbery was invalid for the reason that it contained no allegation of the ownership of the property taken, which defect was patent and undisputed, it was not an invasion of the province of the jury, in a trial on a new information, to instruct them to find for the people on the issues of jeopardy and former acquittal.—People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

[e] Where there is no evidence to support plea of former jeopardy, it is not error to direct a finding for the prosecution on that issue. People v. Cummings, 123 Cal. 269, 55 Pac. 898.

[f] No exception lies to the refusal of a trial judge to advise the jury to acquit defendant under Penal Code, section 1118, which provides that the court may, if it deems the evidence insufficient to support a conviction, advise the jury to acquit defendant, but that the jury shall not be bound thereby.—People v. Lewis, 124 Cal. 551, 57 Pac. 470.

[g] It is error for the court in a criminal case to direct the jury to acquit; Penal Code, section 1118, merely authorizing the court to advise the jury to acquit, and providing that the jury is not bound by the advice.—People v. Stoll, 143 Cal. 689, 77 Pac. 818.

[h] The opening statement is not evidence, within Penal Code, section 1118, providing that, "at any time after the evidence on either side is closed," the court may advise the jury to acquit.—People v. Stoll, 143 Cal. 689, 77 Pac. 818.

[i] Although Penal Code, section 1118, only authorizes the court to advise the jury to acquit, and provides that they shall not be bound by his advice, yet, where there is no competent evidence of the corpus delicti, so that it becomes the duty of the court to advise an acquittal, the fact that counsel, moving orally at the close of the people's case, uses the word "instruct," instead of "advise," does not justify a denial of the motion.—People v. Ward, 145 Cal. 736, 79 Pac. 448.

[j] On a prosecution for assault with intent to commit murder, an instruction held not erroneous on the ground that it commanded the jury to find defendant guilty.—People v. Griffith, 146 Cal. 339, 80 Pac. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 594-596; 14 Cent. Dig., cols. 2449-2454, §§ 1727-1729.

§ 391. Instructions Invading Province of Jury.

[a] On a prosecution for murder, the defense did not claim that defendant was insane at the trial, and objected to a statement by the prosecution that the jury must find that defendant "is insane," in order to acquit. The court instructed that the jury should consider all defendant's acts "at the time of, before, and subsequent to the alleged commission of the offense," but should consider him as sane at the time of the trial. Held, that such instruction was not error, as taking from the jury the power to consider the question of his insanity at the time of the trial as bearing on his sanity at the time the offense was committed.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[b] Instruction "You may believe as men that certain facts exist, but as jurors you can act only upon evidence adduced" is erroneous. People v. Ammerman, 118 Cal. 30, 50 Pac. 15.

[c] Instructions invading the province of the jury in cautioning him against testimony of oral admissions and statements should be rejected. Any instruction given on that subject should be confined as nearly as possible to the language of subdivision 4 of section 2061 of the Code of Civil Procedure.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[d] An instruction that an admission or confession made by the prosecutrix that she had been guilty of sexual intercourse was not such a complaint as should be considered to corroborate her testimony in any particular was properly refused, where the evidence showed that the prosecutrix, on being asked, told her condition, since it was for the jury to determine whether such statements were a complaint, admission, or confession.—People v. Totman, 135 Cal. 133, 67 Pac. 51.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 596-611; 14 Cent. Dig., cols. 2456-2538, §§ 1731-1802.

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§ 392. —— Intent.

[a] On a trial for assault with intent to commit rape, a charge to the jury that, "if you believe the prosecutrix, it is your duty to render a verdict accordingly," was reversible error, as it took from the jury the question of defendant's intent.—People v. Johnson, 106 Cal. 289, 39 Pac. 622.

§ 393. —— Assuming Facts and Charging on Matters of Fact.

[a] Where, on trial of an indictment for murder, the only witness who saw the transaction testified that he and deceased met a number of their countrymen, Chinese, some of whom took them to a certain place and tied him, and then one struck deceased on the head with a sword, another pierced him in the back, when he fell, and witness then escaped, and has never seen deceased since, an instruction that, if the evidence of the witness were true, defendants were guilty of murder in the first degree, was erroneous, as it assumed the homicide, which was not proven by the witness.—People v. Ah Fung, 16 Cal. 137.

[b] Where, on trial for assault with intent to murder by shooting with a pistol, the defense being insanity, the defendant, as part of the proofs, "admitted the shooting as charged, and that it was done under circumstances that would have constituted murder if the defense set up is not good," and the court instructed the jury, that if the defendant was not insane at the time of the shooting, they ought to find him guilty as charged in the indictment. Held, that the charge was right; that, taking the whole admission together, the court had a right to assume the facts as therein admitted to be true.—People v. Hobson, 17 Cal. 424.

[c] Courts, in their charges, should not directly or indirectly assume the guilt of the accused, nor use equivocal phrases which may leave such an impression.—People v. Williams, 17 Cal. 142.

[d] Where the court charged the jury that if they believed certain dying declarations of the deceased which had been admitted in evidence were true, they should find the defendant guilty, the instruction was erroneous, being within the provision of the constitution which prohibits judges from charging on matters of fact.—People v. Ybarra, 17 Cal. 166.

[e] It is error for the court, in a criminal case, to assume in its instructions to the jury that the defendant has confessed the crime when he has not.—People v. Strong, 30 Cal. 151.

[f] It is better for the court in charging jury in a criminal case to avoid assuming any material fact as proved, however clear to mind of court such fact may seem to be established. People v. Dick, 32 Cal. 213.

[g] Expression of opinion as to evidence addressed to counsel, in determining motion, is not charge on matter of fact.—Reed v. Clark, 17 Cal. 200; People v. McLean, 84 Cal. 482, 24 Pac. 32.

[h] Under a statute providing that a jury, in ascertaining guilt or innocence of a prisoner, where they find him guilty of the crime of murder, should also determine whether he should suffer the extreme penalty of law, or imprisonment in the penitentiary, a charge assuming that the deceased was, in point of fact, not armed, and that the prisoner knew this to be a fact, where no evidence upon either of these points was offered by either party at the trial, was error justifying reversal.—People v. Atherton, 51 Cal. 495.

[i] In trial of criminal cause, if there be a substantial conflict in the evidence as to a material fact, and if in its charge to the jury court assumes the fact as proved, it is error.—People v. Buster, 53 Cal. 612.

[j] Court instructed jury that if they found from testimony that defendant, soon after time deceased was killed, if killed at all, concealed himself, or fled from the neighborhood where deceased was slain, then that circumstance might be considered by them with the other testimony in the case bearing upon the question of defendant's guilt. Held, that this instruction did not assume that the deceased had been killed, but left that fact as the substantial fact in the case for the jury to find.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

[k] It is error for court to assume existence of fact which is not in evidence or which is to be determined by the jury on evidence, however slight, or on a conflict of evidence. The jury are the exclusive judges of the credibility of witnesses, the weight of testimony, and of the facts established and the presumptions of fact deducible from them.—People v. Messersmith, 61 Cal. 246.

[l] Instruction, if otherwise unobjectionable, is not erroneous if the fact which is assumed in it is one not controverted by the evidence.—People v. Messersmith, 61 Cal. 246.

[m] Instruction assuming fact is not error where fact is admitted or there is no evidence in conflict with it.—People v. Phillips, 70 Cal. 68, 11 Pac. 493.

[n] In order to hold an instruction erroneous on the ground that it is a charge upon the weight of evidence, an invasion of the prerogative of the jury, and violative of the constitutional provision inhibiting charges with respect to matters of fact, it is necessary to show that there was a conflict of evidence upon the question on which the jury were instructed; and, in a prosecution for murder, the court, in charging the jury, may assume the fact of the killing by the defendant, if such fact as testified to is not contradicted.—People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

[o] The mere statement by the court in its instructions that there is a conflict in the evidence in certain respects is not an expression of opinion upon the weight of the evidence, or a charge with respect to matters of fact.—People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[p] Assumption of facts not justified by the evidence is error.—People v. Lee Chuck, 74 Cal. 36, 15 Pac. 322.

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[q] Instruction characterizing defendant's case as defense "attempted to be shown" is proper when evidence conflicts.—People v. Swarbrick, 77 Cal. 125, 19 Pac. 374.

[r] Comment on weight of evidence or credibility of witnesses or probability of their statements is charge with respect to matter of fact. People v. Fong Ching, 78 Cal. 173, 20 Pac. 396.

[s] Instruction assuming guilt is erroneous.—People v. Bishop, 81 Cal. 117, 22 Pac. 477.

[t] Instructions should not directly or indirectly assume or hypothetically suggest guilt of accused.—People v. Lanagan, 81 Cal. 144, 22 Pac. 482.

[u] In charging upon alibi the court spoke of the "place of the alleged murder," and immediately afterward of the "time and place of the murder." Held, the jury could not have considered the last phrase as an assumption that the crime had been proved.—People v. Chun Heong, 86 Cal. 329, 24 Pac. 1021.

[v] Charge on matters of fact cannot be sustained on ground that verdict was right.—People v. Chew Sing Wing, 88 Cal. 271, 272, 25 Pac. 1099.

[w] Defendant asked the court to instruct the jury that if, prior to the alleged seduction, the prosecutrix committed lewd acts, she was not at the time of the alleged seduction a female of previous chaste character, even though she did not actually have illicit intercourse. Held, that this was properly refused, as being a charge on the facts, contrary to Constitution, article 6, section 19.—People v. Samonset, 97 Cal. 448, 32 Pac. 520.

[x] On the trial for assault with intent to commit robbery, a charge that if "you have no doubt he aided and participated in the assault, and have a reasonable doubt as to the intent of the assault, you must give him the benefit of that doubt, and in that case you must find him guilty of simple assault," did not assume any fact.—People v. Mallon, 103 Cal. 513, 37 Pac. 512.

[y] Where defendant relies upon defense of alibi, instruction to effect that witness willfully false in one part of his testimony is to be distrusted in others, accompanied by a statement to effect that testimony of defendant as to his being with a particular person the whole of the day on which offense was alleged to have been committed was shown to be incorrect, and leaving it to jury to say whether the testimony was willfully false, or whether defendant was honestly mistaken, invades province of the jury, to prejudice of defendant's constitutional right, by charging the jury with reference to matters of fact.—People v. Lang, 104 Cal. 363, 37 Pac. 1031.

[z] The value of stolen goods alleged to have been knowingly received by the defendant is a question of fact for the jury, and is a material element of fact in the case, as bearing upon the presence of guilty knowledge in the mind of the defendant when purchasing the stolen articles; and, where various estimates of value were given by the witnesses, for the court to assume in its instruction any specific statement of value higher than the lowest estimate given by any witness is to charge the jury in respect to a matter of fact, and is violative of the constitution of the state.—People v. Hertz, 105 Cal. 660, 39 Pac. 32.

[aa] Though a judge may not instruct on a matter of fact, he may declare to a jury that certain persons were not accomplices, where there is no evidence that they were.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

[bb] Correct statement by judge to jury of theory of prosecution, and of defenses is not statement of facts.—People v. Worden, 113 Cal. 569, 45 Pac. 844.

[cc] Judge may not instruct upon matters of fact.—People v. Durrant, 116 Cal. 200, 48 Pac. 75.

[dd] Instruction herein held to be charge on question of fact.—People v. Ellenwood, 119 Cal. 170, 171, 51 Pac. 553.

[ee] An instruction that if defendants were not present at the time it "was alleged or proven that the crime was committed, ... and did not aid or abet in its commission," they should be found not guilty, is erroneous, as assuming a crime proven.—People v. Roberts, 122 Cal. 377, 55 Pac. 137.

[ff] Instructions are not chargeable with an improper assumption of facts, where it appears that, so far as assuming facts, they presented merely an abstract consideration of the crime and its elements, and were not directed to the particular circumstances of the case at bar, and that the court, when dealing with the evidence in the case, was careful to leave all questions of fact for the determination of the jury.—People v. Kehoe, 123 Cal. 224, 69 Am. St. Rep. 52, 55 Pac. 911.

[gg] In a prosecution for burglary, the court charged that the fact that a person is found in possession of property recently stolen, "if such be the fact, and established by the evidence beyond a reasonable doubt," is not sufficient to warrant conviction, but where the evidence establishes the fact, beyond a reasonable doubt, that the person who had recent possession of stolen property gives a false account of how he came by possession, it is a circumstance to be considered, and that the jury should not understand him as expressing any opinion on the facts or the weight of the evidence. Held not objectionable as a charge as to matters of fact.—People v. Neber, 125 Cal. 560, 58 Pac. 133.

[hh] An instruction which declares that there has been no evidence introduced in the case on trial which tends in the slightest degree to show any justification of the crime charged is improper, as charging upon matters of fact.—People v. Schoedde, 126 Cal. 373, 58 Pac. 859; People v. Plyer, 126 Cal. 379, 58 Pac. 904.

[ii] An instruction that evidence had been introduced "tending to show" a certain fact, and presenting the effect if the jury should find such fact, was not objectionable as a charge on the facts.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

[jj] Where, on a trial for murder, defendant requests an instruction which assumes that the

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main case of the prosecution rests on circumstantial evidence, when in fact the main proof is direct testimony of eyewitnesses, the instruction should be refused.—People v. Lem Deo, 132 Cal. 199, 64 Pac. 265.

[kk] An instruction on a trial for murder assuming that deceased went on plaintiff's land unarmed, where there is no evidence in the record disclosing that fact, and there is affirmative evidence that the deceased at the time he was killed had possession of a gun, which he was about to use, is reversible error. People v. Matthai, 135 Cal. 442, 67 Pac. 694.

[ll] Any assumption of a fact in dispute which must be found by the jury is an infringement of their province, and constitutes error, for which a conviction should be reversed.—People v. Matthai, 135 Cal. 442, 67 Pac. 694.

[mm] Where defendant had lived for years on the land before deceased appeared thereon, and was in possession of the same on the day of the homicide, the assumption in the instruction that deceased was in peaceable possession of the property, and unarmed, and murdered by a defendant, a hostile claimant of the land, was reversible error.—People v. Matthai, 135 Cal. 442, 67 Pac. 694.

[nn] There being evidence of defendant's good character, he is entitled to an instruction that such evidence is relevant to the question of guilty or not guilty, and is to be considered in connection with the other facts, this not being a violation of the provision of the constitution forbidding the charging of juries with respect to matters of fact.—People v. Hoagland, 137 Cal. 218, 69 Pac. 1063.

[oo] Instruction directed by section 2061, Code of Civil Procedure, "jury will receive with caution all evidence of oral admissions of defendant against himself," is charge on matter of fact.—People v. Wardrip, 141 Cal. 231-233, 74 Pac. 744.

[pp] In a prosecution for rape, an instruction that "the fact that the prosecutrix made prompt and early complaint of the wrong .... committed upon her person .... is independent and original evidence, ... and may be .... considered .... in corroboration of her other testimony," etc., is not objectionable as telling the jury that prosecutrix did in fact make prompt and early complaint.—People v. Keith, 141 Cal. 686, 75 Pac. 304.

[qq] The statement, in an instruction in a murder case, that it is no defense to a party associated with others in and engaged in a robbery "that he did not propose or intend to take life in its perpetration," or that he "regretted" that any person was thus slain by his associates, is a declaration of an abstract principle of law, not subject to the objection that it assumes the existence of a state of facts of which there is no evidence. People v. Lawrence, 143 Cal. 148, 76 Pac. 893.

[rr] A requested instruction that verbal admissions ought to be received with great caution, and that such evidence is subject to much imperfection, the party himself not having clearly expressed his own meaning, or the witness having misunderstood him, is properly refused, because violative of Constitution, article 6, section 19, prohibiting judges from charging juries with respect to matters of fact.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[ss] Instructions as to the object of evidence offered to show the bad reputation of deceased for peace and quiet are properly refused where they assume that defendant believed that it was necessary to kill in self-defense. People v. Thomson, 145 Cal. 717, 79 Pac. 435.

[tt] An instruction that an intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused, does not assume any fact.—People v. Crowl, 34 Pac. 860.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 601, 602; 14 Cent. Dig., cols. 2480-2495, §§ 1754-1764.

§ 394. —— Weight and Effect of Evidence.

[a] The court should not, in its instructions in a criminal case, pass upon the credibility and weight of circumstances in evidence.—People v. Barry, 31 Cal. 357.

[b] The court has no right to tell the jury that a circumstance is a "strong" circumstance. Whether strong or slight is a question for the jury.—People v. Ah Sing, 59 Cal. 400.

[c] Charge examined and held not to be on weight of evidence.—People v. Wong Ah Foo, 69 Cal. 182, 183, 10 Pac. 375.

[d] Charge examined and held not to be upon weight of evidence.—People v. Lee Gam, 69 Cal. 554, 11 Pac. 183.

[e] Instruction amounting to an argument in favor of prosecution on weight of evidence is erroneous.—People v. Travers, 88 Cal. 237, 26 Pac. 88.

[f] The charge should be entirely free from intimating any opinion as to the weight of evidence.—People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

[g] Where husband of defendant is allowed to testify as to her declarations, and to a conversation between them, to show that she was insane, the court may properly charge the jury that such declarations were only admissions to show the mental condition of the defendant, and that her declarations could not be regarded as proof of the facts stated or of her belief in them.—People v. Worthington, 105 Cal. 166, 38 Pac. 689.

[h] An instruction that evidence had been introduced tending to show that defendant had fled and resisted arrest, and that the flight and resistance to arrest of a suspect is a circumstance to be weighed, as tending in some degree to prove consciousness of guilt, was not objectionable, as being to the effect that the defendant actually had fled; as the language used was abstract, and left the jury to weigh the evidence.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

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[i] An instruction as to the relative value of direct and circumstantial evidence, stating that circumstantial evidence had this great advantage; that various circumstances from various sources are not likely to be fabricated, and that this species of evidence is not entitled to an inferior degree of credit, is improper, as the credit to be given to the evidence is to be determined by the jury.—People v. Verenesenecckockockhoff, 129 Cal. 497, 58 Pac. 156.

[j] The law declares nothing as to the relative probative force of direct and circumstantial evidence; and it is wholly matter for the jury to determine according to their convictions, from the evidence. An instruction to the jury that circumstantial evidence is not entitled to a less degree of credit than direct evidence, and that circumstances are not likely to be fabricated, is an instruction as to matter of fact within the prohibition of the constitution. (McFarland, J., Garoutte, J., and Van Dyke, J., dissenting.) People v. Verenesenecckockockhoff, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

[k] In a criminal case, refusal to charge that the jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence whether there is reasonable doubt as to his guilt, is proper.—People v. Machado, 130 Cal. xviii, 63 Pac. 66.

[l] Under Constitution, article 6, section 19, declaring that judges shall not charge juries with respect to matters of fact, an instruction in a criminal prosecution that, though error has sometimes been committed by a reliance on circumstantial evidence, yet this species of evidence is not only proper and necessary, but is sometimes even more satisfactory than the testimony of a single eyewitness, as eyewitnesses may speak falsely, was erroneous, and prejudicial to the defendant.—People v. O'Brien, 130 Cal. 1, 62 Pac. 297.

[m] An instruction as to the weight of certain evidence was properly refused, as the matter was a question for the jury.—People v. Grimes, 132 Cal. 30, 64 Pac. 101.

[n] The court cannot properly give an instruction as to the weight and conclusiveness of a dying declaration in a murder prosecution.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[o] An instruction, in a prosecution for attempting to obtain money under false pretenses, that there is nothing in the nature of circumstantial evidence that renders it any less reliable than the other class of evidence, and that a man may as well swear falsely to an absolute knowledge of the facts, as to a number of facts, from which, if true, the facts on which guilt or innocence depends must inevitably follow, is not erroneous as invading the province of the jury.—People v. Howard, 135 Cal. 266, 67 Pac. 148.

[p] Under Constitution, article 6, section 19, declaring that judges shall not charge juries with regard to matters of fact, it is proper, in a murder prosecution, to refuse to instruct that, if the evidence fails to show any motive, it is a circumstance in favor of innocence.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

[q] Notwithstanding the constitutional mandate that courts shall not charge as to matters of fact, an instruction correctly stating a rule of law applicable to the effect of evidence, such as the probative effect of the possession of goods recently stolen, is not ground for reversal.—People v. Farrington, 140 Cal. 656, 74 Pac. 288.

[r] In a prosecution for stealing a horse, defendant asked an instruction to disregard a robe, neck halter, and strap found in defendant's possession when arrested. Held, that it would have been an invasion of the province of the jury in deciding on the weight of the evidence concerning such articles, which had been admitted as relevant.—People v. Nunley, 142 Cal. 105, 441, 75 Pac. 676.

[s] The language of the court, in passing on the admissibility of evidence showing the flight of two of defendant's alleged co-conspirators in the commission of the crime charged, that "two persons who were claimed to have" run down a certain street, etc., was not a charge on the weight of the evidence.—People v. Donnolly, 143 Cal. 394, 77 Pac. 177.

[t] In a criminal prosecution it was not error for the court to charge that evidence of oral admissions should be viewed with caution.—People v. Tibbs, 143 Cal. 100, 76 Pac. 904.

[u] In a criminal prosecution, the main question being the identity of defendant with the person who committed the offense, held that an instruction that the identity of person is presumed from identity of name invaded the province of the jury.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 596, 597; 14 Cent. Dig., cols. 2462-2477, §§ 1732-1748.

§ 395. —— Credibility of Witnesses.

[a] In a prosecution for murder, an instruction as to the credibility of witnesses held not objectionable as invading the province of the jury.—People v. Waysman, 1 Cal. App. 246, 81 Pac. 1087.

[b] Instruction that, "though an accomplice was impeached, yet, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe him," was held erroneous, as taking from them their right to judge of the credibility of the evidence.—People v. Eckert, 16 Cal. 110.

[c] The court errs in instructing a jury in a criminal case that they may, in the exercise of their discretion, believe a part and disbelieve a part of the evidence, unless it instructs them further that such discretion must be conscientiously exercised upon consideration of all the facts and circumstances of the case.—People v. Strong, 30 Cal. 151.

[d] Penal Code, section 1111, providing that a conviction cannot be had on the testimony

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of an accomplice, unless corroborated by evidence tending to connect defendant with the commission of the offense, does not prevent the application to the testimony of an accomplice of the rule making the jury exclusive judges of the credibility of a witness; and an instruction, reciting such rule in a case where an accomplice is an important witness, is not erroneous.—People v. Gibson, 53 Cal. 601.

[e] A jury cannot lawfully be charged that a witness who has been convicted of burglary, and served out his term, is not entitled to full credit.—People v. McLane, 60 Cal. 412.

[f] Charge may properly call jury's attention to relationship between witness and accused.—People v. Wong Ah Foo, 69 Cal. 183, 10 Pac. 375.

[g] Instruction tending to discredit defendant's witnesses is ground for reversal.—People v. Christensen, 85 Cal. 573, 574, 24 Pac. 888.

[h] Instruction, "Defendant not proving statements of prosecuting witness to be false, you are bound to presume them to be true," invades province of jury.—People v. Murray, 86 Cal. 33, 24 Pac. 802.

[i] Two instructions quoted herein held to invade province of jury as to credibility of witnesses.—People v. Murray, 86 Cal. 34, 35, 24 Pac. 802.

[j] It is not error to charge that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness against the testimony of any greater number."—People v. Chun Heong, 86 Cal. 329, 24 Pac. 1021.

[k] Under Constitution, article 6, section 19, providing that judges shall not charge juries with respect to matters of fact, it is error to instruct the jury that the testimony of an accomplice, who was called as a witness by defendant, ought to be viewed with distrust.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

[l] Instruction upon credibility of witnesses for defendant, to effect that, in judging credibility of such witnesses, the jury are to take into consideration the fact that they were near akin or related to the accused, and that they could not be expected to say anything unfavorable to the defendant, is erroneous.—People v. Hertz, 105 Cal. 660, 39 Pac. 32.

[m] It is not proper for court to instruct jury that they should bear in mind the relationship or kinship between certain witnesses in behalf of the defense and the defendant, and that the jury may consider whether their position and interest may not affect their credibility.—People v. Shattuck, 109 Cal. 673, 42 Pac. 315.

[n] A charge that "you should carefully scrutinize all the testimony in this case, and in doing so consider all the circumstances under which each witness has testified, his degree of intelligence, his manner on the witness stand," and other enumerated matters, although improper, as invading the province of the jury, is not reversible error, as it merely tells the jury to do what they would do without being so told.—People v. Newcomer, 118 Cal. 263, 50 Pac. 405.

[o] Instructions as to credibility of witnesses or weight to be given to their testimony should not be given.—People v. Ellenwood, 119 Cal. 171, 51 Pac. 553.

[p] Requested instruction that the jury "are not permitted under the law to discredit or reject the testimony of the defendant, simply on the ground that he is accused and on trial on a criminal charge," is properly refused as being upon matter of fact, and not of law, and as invading the province of the jury, who are the sole judges of the credit to be given to the testimony of any witness.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[q] Where, on trial of a prosecution for rape, the court charged that the degree of credit due a witness should be determined by his conduct and character, his demeanor on the stand, relation to the parties and controversy, his hopes, fears, bias, and partiality, the reasonableness of his statements, and the strength or weakness of his recollection, viewed in the light of the testimony, the facts and circumstances of the case, the charge was not objectionable on the ground that the court invaded the province of the jury by telling them how they should determine the credibility of a witness.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[r] An instruction that, if the jury is convinced that a witness has willfully stated what is untrue with intent to deceive, the jury must treat all his testimony with distrust and suspicion, and reject it unless they are convinced that, notwithstanding his base character, he had in other respects sworn to the truth, was not objectionable as withdrawing the credibility of the witness from the jury.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 604-607; 14 Cent. Dig., cols. 2499-2515, §§ 1772-1785.

§ 396. —— Credibility of Accused.

[a] Upon a criminal trial, defendant testified. The court directed the jury to consider his situation, his relations to the trial, its consequences to him, and the inducements that he labored under, and added, "You should carefully determine the amount of credibility to which his evidence is entitled; if convincing, and carrying with it a belief in its truth, to act upon it; if not, to reject it." Held, that this instruction was unobjectionable.—People v. Morrow, 60 Cal. 142.

[b] It is proper to charge the jury to consider the circumstances under which defendant testifies.—People v. Wheeler, 65 Cal. 77, 2 Pac. 892.

[c] Defendant having testified in his own behalf, the court may tell the jury to con-

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sider the circumstances, consequences, inducements, and temptations likely to influence one in his situation.—People v. O'Neill, 67 Cal. 378, 7 Pac. 790.

[d] Instruction on credibility of defendant as witness upheld.—People v. Knapp, 71 Cal. 10, 11, 11 Pac. 793.

[e] An instruction that the jury should gather the intent with which the homicide was committed from all the circumstances surrounding it is not erroneous as precluding the consideration of defendant's testimony on the question of intent, where the jury are also instructed to weigh the testimony of all the witnesses and to judge the testimony of defendant fairly, and apply the same tests to his testimony, so far as applicable, that they would apply to that of other witnesses.—People v. O'Brien, 78 Cal. 41, 20 Pac. 359.

[f] Court may caution jury as to believing evidence of accused given in own behalf.—People v. Murray, 86 Cal. 35, 24 Pac. 802.

[g] It is not reversible error to charge that "the defendant, in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness," where the charge defines expressly the relation.—People v. Curry, 103 Cal. 548, 37 Pac. 503.

[h] Neither the constitution nor the existing statute prohibits an instruction as to the credibility of witnesses, and any instruction as to the credibility of the defendant as a witness will not be ground for reversal, if not more objectionable than others which have been sustained on appeal.—People v. Hitchcock, 104 Cal. 482, 38 Pac. 198.

[i] In a criminal case, where defendant is a witness, it is not error to charge as to the circumstances under which he testified, and as to his admission that he had previously been convicted of a felony.—People v. Johnson, 104 Cal. 418, 38 Pac. 91.

[j] Under Constitution, article 6, section 19, prohibiting instructions as to fact, an instruction that, in weighing defendant's testimony, "You are to consider what he has at stake. You are to consider the temptations brought to bear on a man in his situation to tell a falsehood," is erroneous.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

[k] An instruction that defendant has offered himself as a witness in his own behalf, and that the jury are not permitted to disregard or reject his testimony simply on the ground that he is accused and on trial on a criminal charge, is properly refused, as instructing on the credibility of testimony.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

§ 397. —— Opinion as to Facts.

[a] Judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of jury upon facts; and it is improper for court to review argumentatively circumstances tending to show the defendant's guilt, so as to reveal the opinion of the court as to matters of fact bearing upon the question of defendant's guilt.—People v. Hertz, 105 Cal. 660, 39 Pac. 32.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cent. Dig., cols. 2456-2462, § 1731.

§ 398. Inferences from Facts.

[a] No legal presumption of guilt arises from the fact of flight of the accused. Accordingly, an instruction that such circumstance was strong presumptive evidence of guilt held to contravene Constitution, article 6, section 18, as being "with respect to matters of fact," and not to be curable by a correct statement of the law in another part of the charge.—People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69.

[b] The rule is established that, where a legal presumption does not exist, it is error to instruct the jury that one fact should be inferred from another. So held as to an instruction that one's failure to pay over public money, if inexcusable, raised a presumption of felonious appropriation which would authorize a verdict of guilty.—People v. Carrillo, 54 Cal. 63.

[c] Upon the trial of an indictment for burglary, the court instructed the jury that the possession of the property by the defendant recently after it had been stolen, unless satisfactorily accounted for by the defendant, raised a presumption of his guilt. Held, that the instruction was in violation of the constitutional provision which prohibits the court from charging the jury with reference to matters of fact.—People v. Mitchell, 55 Cal. 236.

[d] Court cannot charge that any fact is an inference from any other fact.—People v. Riley, 75 Cal. 100, 16 Pac. 544.

[e] Instruction "When girl is taken to house of prostitution, fair and reasonable inference is that she is taken there for purpose of prostitution," should not be given.—People v. Slater, 119 Cal. 622, 51 Pac. 957.

[f] In a trial for arson, the court charged that if the jury should find that accused was informed by his accomplice of the object in going to the premises, and held the horse while he set fire to the house, they should find him guilty. Held, not to be a charge on the facts, but on the conclusion to be drawn from them.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

[g] Where, in a prosecution for rape, the court charged that if the mother of the prosecutrix was the first person she saw, in whom she was expected to place confidence, after the offense was alleged to have been committed, and that she communicated to her at the first opportunity that she had been outraged, they might consider such circumstance as corroborative of the testimony of the prosecutrix, the charge was not erroneous, as infringing the province of the jury.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[h] In homicide, an instruction, in the language of Code of Civil Procedure, section 1960, that an inference must be founded on a fact legally proved, and on such a deduc-

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tion from that fact as is warranted by a consideration of the usual propensities or passions of men, etc., was not subject to criticism.—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2525-2529, §§ 1790-1793.

§ 399. —— Determination Whether There is Evidence.

[a] The right to state evidence conferred on the judge by Constitution, article 6, section 17, includes the right to state that there is no evidence as to a specific fact.—(1865) People v. King, 27 Cal. 507, 87 Am. Dec. 95; (1868) People v. Dick, 34 Cal. 663.

[b] The court may state to the jury that there is or is not evidence of a particular fact, when the record shows such statement to be true, since whether or not there is any evidence at all as to a fact in issue is a question for the court.—People v. Welch, 49 Cal. 174; People v. Vasquez, 49 Cal. 560; People v. Perry, 65 Cal. 568, 4 Pac. 572.

[c] The judge, in his charge, told the jury that he denied a motion to dismiss for want of proof, "because there is testimony enough before you to sustain a conviction, provided you believe it; and it is for you to say what you believe about it." Held, not a charge as to the effect of the evidence.—People v. Johnson, 104 Cal. 418, 38 Pac. 91.

[d] Statement, in an instruction in a criminal trial, that evidence has been introduced tending to show certain facts is not in violation of Constitution, article 6, section 19, prohibiting courts from instructing with respect to matters of fact.—People v. Cummings, 113 Cal. 88, 45 Pac. 184.

§ 400. —— Application of Law to Facts.

[a] The constitution prohibiting the judge in his charge to the jury from expressing an opinion on the weight of the evidence does not preclude him, in stating the evidence to the jury, from declaring the law resulting from the facts proven.—People v. King, 27 Cal. 507, 87 Am. Dec. 95.

[b] An instruction to the jury which correctly states the issues under an indictment for forgery, and further states that, if the jury find beyond a reasonable doubt that the defendant testified under oath, as alleged in the indictment, and in fact did not see or hear the occurrences to which he testified, and was at the time ten miles distant from the place of the homicide, and that his testimony was knowingly and willfully false, that then the defendant was guilty, and that they should so find, is a proper instruction, and does not violate the constitutional requirement that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.—People v. Hitchcock, 104 Cal. 482, 38 Pac. 198.

[c] Court has a right to state the evidence for the purpose of pointing its instruction and making its pertinency apparent to the jury, if it assumes no fact as proven, and states nothing by way of argument thereon, nor calculated expressly or by implication to indicate a shifting of the burden of proof to the defendant.—People v. Brittan, 118 Cal. 409, 50 Pac. 664.

[d] On a prosecution for rape committed on a girl under the age of sixteen, an instruction that neither the question of force, nor of consent, has any application, as the prosecutrix could not consent, and the law resists for her, is not objectionable, as invading the province of the jury.—People v. Totman, 135 Cal. 133, 67 Pac. 51.

§ 401. —— Extent of Punishment.

[a] Discretion is given to the jury in regard to the punishment in case they find a defendant guilty of murder in the first degree; and the court cannot direct or advise them upon the subject further than to inform them of their province; and it is not error to refuse to instruct them as to how they should use the discretion given them.—People v. Kamaunu, 110 Cal. 609, 42 Pac. 1090.

§ 402. —— Instructing Jury as to Their Duty.

[a] Where a murder case has been three times previously tried, and on each trial the jury disagreed, it is not error to charge the jury that they must in no sense consider such fact, but render a verdict according to the evidence in the case, and consider no other matters except the evidence and the instructions of the court.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[b] Instruction is not erroneous which calls jury's attention to importance of having laws properly executed, and of a careful consideration of the evidence and the law, so that they may reach a result which will be "just to both sides, regardless of what may be the consequences."—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[c] Instructions telling the jury of their duty to convict if the evidence satisfies them of defendant's guilt, though not erroneous, are better omitted.—People v. Crowl, 34 Pac. 860.

[d] It is not error to instruct the jury in a criminal case that "it is the duty of every juror to reason with his fellow jurors to the end that he may join in a lawful verdict."—People v. Richards (Cal. App.), 82 Pac. 691.

G. NECESSITY AND SUFFICIENCY OF INSTRUCTIONS.

DUTY OF COURT, § 403.
SCOPE OF INSTRUCTIONS IN GENERAL, § 404.
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§ 403. Duty of Court.

[a] Judges ought to confine their instructions to jury to few plain principles of law, when counsel do not ask for charges.—People v. Gibson, 17 Cal. 283.

[b] Court is bound to instruct as to law bearing on each class of facts presented in evidence, leaving jury to determine which was true state of facts.—People v. Buelna, 81 Cal. 138, 22 Pac. 596.

[c] Instruction should not be hostile to defendant.—People v. Travers, 88 Cal. 235, 26 Pac. 88.

[d] It is not incumbent upon court to instruct jury that it is safer to err in acquitting.—People v. Durrant, 116 Cal. 222, 48 Pac. 75.

[e] Instructions should not ignore any findings of fact which jury might reasonably make upon evidence before them.—People v. Newcomer, 118 Cal. 274, 50 Pac. 405.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 611-613; 14 Cent. Dig., cols. 2539-2548, §§ 1803-1811.

§ 404. Scope of Instructions in General.

[a] Instruction to jury that they have a right to take into consideration all the surrounding circumstances in making up their verdict is to be understood as limited to the circumstances in evidence.—People v. Kelly, 28 Cal. 423.

[b] Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given.—People v. Taylor, 36 Cal. 255.

§ 405. Issues and Theories of Case.

[a] Instructions should always be given with reference to facts proved before the jury.—People v. Byrnes, 30 Cal. 206; People v. Roberts, 6 Cal. 214; People v. Honshell, 10 Cal. 83.

[b] Introductory statements in charge commended the jurors for their careful and patient attention to the testimony and arguments, which was said to be an assurance that their remaining duties would be discharged with conscientious fidelity, and were to the effect that no man accused of felony could be tried without counsel, or be convicted except by a verdict of twelve disinterested men chosen from the people; and that no man is denied a fair trial, whether native or foreign; and that the court had the fullest confidence that the deliberations of the jury would be conducted with decorum and propriety. Held proper.—People v. Chaves, 122 Cal. 134, 54 Pac. 596.

[c] In giving hypothetical instructions, it is the duty of the court to caution the jury that they are not to assume the existence or nonexistence of any of the facts therein stated.—People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

[d] It is not error for the court to read the information in a criminal case in the opening of its instructions.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 611, 612; 14 Cent. Dig., cols. 2541-2546, §§ 1806, 1807

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§ 406. Elements of Offense.

[a] When robbery is clearly proved, instruction that offense of larceny is included in charge need not be given.—People v. Winthrop, 118 Cal. 91, 50 Pac. 390.

[b] Where the only ground on which the absence of malice could be based was insanity, the expression "reasonable doubt" was improperly included in a requested instruction relating to malice.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[c] It was proper for court to instruct jury as to nature of offense charged in information, and that charge was not an accusation of an extortion committed.—People v. Brennan, 121 Cal. 495, 53 Pac. 1098.

[d] Where, in a prosecution for robbery, the prosecutor's ownership of the property taken was not controverted, an instruction requiring a verdict of guilty if the jury believed from the evidence facts hypothetically stated, which included all the facts constituting the offense except that the property taken from prosecutor was his property, was not error.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 614, 615; 14 Cent. Dig., cols. 2549-2554, §§ 1812-1817.

§ 407. Insanity.

[a] On a trial for murder, to justify an instruction that, if accused has shown that he was insane at any time before the killing, the jury will presume that he was insane at the time of killing unless the contrary is shown, there must be some evidence showing accused's general insanity, as contradistinguished from mere temporary aberration, since it is only habitual insanity, when proved once to have existed, that the law presumes to continue until the contrary be shown.—People v. Francis, 38 Cal. 183.

[b] Where defense of insanity is set up instruction, given for purpose of impressing upon jury importance of special care and circumspection in considering evidence tending to establish insanity of defendant at time of commission of offense charged, is proper.—People v. Dennis, 39 Cal. 625.

[c] An instruction to the effect that, if the jury find that the defendant was insane at the time of committing a crime, they should find him not guilty, without regard to the degree of insanity, is properly refused.—People v. Best, 39 Cal. 690.

[d] It is not improper for court, in its charge to the jury in a criminal case where defense of insanity is set up, to caution jury to be careful that no pretended case of insanity should be allowed to shield defendant from the ordinary consequences of his act.—People v. Bumberger, 45 Cal. 650.

[e] Instruction: "Insanity, as used in this sense, means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged" is correct.—People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651.

[f] It is not error to state, in a charge upon the defense of insanity, that "the law rejects the doctrine of what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off when it is committed."—People v. Kernaghan, 72 Cal. 609, 14 Pac. 566.

[g] Where a defense of insanity was interposed on a trial for assault with intent to kill, and the court charged that defendant was not responsible unless he was conscious of his act at the time it was committed, it was not error to refuse to charge that, although defendant may have felt an impulse to do the act while conscious, if such consciousness did not exist up to and at the time the act was committed, the jury should acquit.—People v. Clendennin, 91 Cal. 35, 27 Pac. 418.

[h] Instructions as to partial insanity which introduce the word "delusion" as a synonym of "insanity," although the word "delusion" has no proper application to the facts of the case, cannot mislead the jury.—People v. Schmitt, 106 Cal. 48, 39 Pac. 205.

[i] The court properly refused to charge that though defendant, at the time of the homicide, was able to distinguish right from wrong, yet, if he "did not possess the power to avoid the wrong and do the right, he is irresponsible, and you must acquit."—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[j] It is proper to instruct the jury that while the defense of insanity is to be weighed fully, fairly, and justly, and, when satisfactorily established, must commend itself to the sense of humanity and justice of the jury, they must examine it with care lest a mere counterfeit of this mental infirmity shall furnish immunity to guilt.—People v. Larrabee, 115 Cal. 158, 46 Pac. 922.

[k] It is proper to instruct the jury that they are to consider the defendant sane at the time of trial; and that the burden of proving the defense of insanity at the time of the alleged homicide is upon the defendant.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[l] In a proper case the jury may be instructed that they should thoroughly and carefully weigh the defense of insanity, and examine into it with great care, lest an ingenious counterfeit of the malady furnish protection to guilt; but in giving such instruction, when essential, the court should be careful to follow approved language; but it should be rarely given, and, in most cases, it is better not to give it, though it can do no harm where the defense of insanity is lacking in material substance.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[m] To caution the jury to examine with care the defense of insanity, lest a counterfeit of the infirmity furnish immunity from punishment, is not error.—People v. Kloss, 115 Cal. 567, 47 Pac. 459.

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[n] Instructions requested by the defendant in relation to the plea of insanity are properly refused, where they confuse intoxication and insanity, and where the whole law of insanity, as applicable to the case, was fully and clearly given in the charge of the court.—People v. Kloss, 115 Cal. 567, 47 Pac. 459.

[o] Instruction cautioning jury in regard to defense of insanity upheld.—People v. Allender, 117 Cal. 83, 48 Pac. 1014.

[p] It was proper to refuse to charge that if the jury believed the testimony of experts that defendant, at the time of the homicide, was affected with mental disease, that impaired his will, and rendered him likely at any time to commit such an act as he did, he must be acquitted, such instruction not constituting a sufficient definition of legal insanity.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[q] Conflicting instructions concerning insanity produced by intoxication, which do not emphasize the distinction between insanity induced by the voluntary act of a sane person in becoming intoxicated, and general insanity resulting from chronic alcoholism, and which leave the subject confused and confusing, are erroneous.—People v. Fellows, 122 Cal. 233, 54 Pac. 830.

[r] An instruction that, where accused pleads insanity, "we hear everything that he says, consider everything that he does, we observe his conduct on the stand, we don't check him in stating his testimony, because one of the purposes is to see whether he is a sane man or not," is not prejudicial as authorizing the jury to infer that the issue was accused's insanity at the time of trial, and not when committing the assault, where the jury had in various forms been told that the question was whether or not accused was insane at the time of committing the crime.—People v. Burgle, 123 Cal. 303, 55 Pac. 998.

[s] An instruction that the fact that defendant attempted to commit suicide is to be taken as evidence of insanity is properly refused, as it makes such fact of itself evidence of insanity, whereas it is only one phase of the evidence, to be considered together with all the other evidence.—People v. Owens, 123 Cal. 482, 56 Pac. 251.

[t] On the issue of the insanity of one charged with assault with intent to commit murder, testimony was received to show that the prosecuting witness had oppressed accused to such a degree in financial transactions as to drive him to insanity. The jury was instructed that this testimony was admitted solely on the question of insanity, and was irrelevant for any other purposes, and then charged that, where a man pleads insanity, his testimony is heard, his acts are considered, his conduct on the stand observed, and he is not checked in testifying, because one of the purposes is to ascertain whether he is sane or not, but, if the jury should "conclude that he is a sane man, ... those things drop out of the case." Held, that the instruction was not erroneous as directing the jury to disregard accused's testimony entirely if they found him sane, the words "those things" referring solely to the evidence admitted on the issue of insanity.—People v. Burgle, 123 Cal. 303, 55 Pac. 998.

[u] An instruction, where defendant set up a defense of insanity, that "the defense of insanity is one which may be resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction seems hopeless"; that, therefore, while insanity was a defense to be weighed fully and justly, and, where satisfactorily established, must recommend itself to the favorable consideration of the jury, they should examine it with care, lest an ingenious counterfeit should furnish immunity for guilt—is not erroneous.—People v. Hettick, 126 Cal. 425, 58 Pac. 918.

[v] Instruction designed to caution jury against being imposed upon by "ingenious counterfeit of insanity," though not prejudicial error, should not be given.—People v. Manoogian, 141 Cal. 598, 75 Pac. 177.

[w] An instruction as to the care with which defense of insanity should be examined, though held not to be erroneous under former decisions of this court, would be better omitted, in view of the danger that the jury may take it as an intimation by the judge of his opinion of the case on trial. People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

[x] While the burden of proving insanity as a defense in a criminal case rests on the defendant, a preponderance of the evidence is all that is required, and an instruction that the defense must be "clearly established by satisfactory proof" is erroneous.—People v. Wells, 145 Cal. 138, 78 Pac. 470.

[y] An instruction as to the showing necessary to make out the defense of insanity on a criminal prosecution held proper.—People v. Griffith, 146 Cal. 339, 80 Pac. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 616, 617; 14 Cent. Dig., cols. 2559-2567, §§ 1821-1828.

§ 408. Intoxication.

[a] Charge, in case of assault with intent to kill, that evidence of drunkenness on part of accused, while clearly admissible under the law, should be received with great caution, was not erroneous.—People v. Ferris, 55 Cal. 588.

[b] The intent with which a building is entered being a necessary element to constitute the crime of burglary, it is proper for the jury to take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act, and an instruction to the jury to the effect that they could not consider such evidence for any other purpose than that of determining the degree of the crime is prejudicially erroneous, there being no question as to the degree of the

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crime, the evidence showing without conflict that the building was entered in the night-time.—People v. Phelan, 93 Cal. 111, 28 Pac. 855.

[c] On a trial for murder there was evidence that, shortly before the homicide, accused drank some liquor, and the inference was justified that he had drank a great deal. Several witnesses testified that he was drunk within an hour of the homicide, and it was shown that between that time and the homicide he drank at least twice. Held to be sufficient proof of intoxication to require giving a requested charge thereon, under Penal Code, section 22, providing that, where intent is a necessary element of the crime charged, the jury may consider the fact that accused was intoxicated.—People v. Hill, 123 Cal. 47, 55 Pac. 692.

[d] On a prosecution for assault with intent to commit murder, held proper for the court to instruct, on the subject of voluntary intoxication, that the jury might distinguish it from alcoholic insanity.—People v. Griffith, 146 Cal. 339, 80 Pac. 68.

[e] In a prosecution for murder, an instruction on voluntary intoxication as furnishing no excuse for crime should contain the phrase "when sane and responsible."—People v. Trebilcox (Cal. Sup.), 86 Pac. 684.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 618; 14 Cent. Dig., cols. 2568-2574, §§ 1829-1832.

§ 409. Alibi.

See, also, post, § 409.

[a] Upon a criminal trial it is error to instruct the jury that an unsuccessful attempt to prove an alibi is always a circumstance of great weight against the prisoner.—People v. Malaspina, 57 Cal. 628.

[b] Instruction to a jury to scrutinize testimony offered in support of an alibi with care, and avoid being imposed upon by a fabricated defense, and also stating the effect of proving an alibi, not amounting to an instruction upon the weight of the evidence, are not erroneous.—People v. Lee Gam, 69 Cal. 552, 11 Pac. 183.

[c] An instruction as to evidence to establish an alibi, that persons may, perhaps, fabricate such evidence with greater hopes of success, or less fear of punishment, than most other kinds of evidence, and honest witnesses often mistake dates and periods of time, and identity of people seen, and other things about which they testify, is not erroneous.—People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

[d] On a trial for arson, where the judge charged that it was for the jury to decide as to the truth of an alibi interposed as a defense, "giving the defendant the benefit of every reasonable doubt," and has further fully charged on the burden of proof, and the subject of reasonable doubt, a verdict of guilty will not be set aside because he also charged that the proof offered to sustain the alibi should be subjected to a rigid scrutiny.—People v. Levine, 85 Cal. 39, 24 Pac. 631.

[e] Instruction that "when defendant undertakes to establish an alibi, evidence which he offers, taken with other evidence, must account for him during whole period," is not erroneous in ignoring doctrine of reasonable doubt, if other portions of instructions fully cover that doctrine.—People v. Worden, 113 Cal. 569, 45 Pac. 844.

[f] An instruction on the question of alibi that such a defense is as legitimate, if proved, as any other defense, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give him the benefit of the doubt; in other words, he is not bound to prove an alibi beyond a reasonable doubt, it being sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged,—is correct.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[g] In a prosecution for rape, an instruction on the defense of alibi held objectionable as misleading the jury to believe that such defense was one to be proved by a preponderance of the evidence, etc.—People v. Morris (Cal. App.), 84 Pac. 463.

[h] In a prosecution for rape, the court's refusal to require that a conviction should be based on the jury's belief that the act occurred at or near a certain hour of the day in question held error.—People v. Morris (Cal. App.), 84 Pac. 463.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 619, 620; 14 Cent. Dig., cols. 2574-2581, §§ 1833-1837.

§ 410. Character.

[a] In homicide, charge on presumption that defendant was of good character held properly refused.—People v. Lee, 1 Cal. App. 169, 81 Pac. 969.

[b] Good character of prisoner, when proven, is itself fact in the case; it is a circumstance tending in a greater or less degree to establish his innocence, and it is not to be put aside by the jury, in order to ascertain if the other facts and circumstances considered by themselves do not establish his guilt beyond a reasonable doubt.—People v. Ashe, 44 Cal. 288.

[c] An instruction which practically tells the jury, in a criminal case, that evidence of defendant's good character is valuable only in a doubtful case, is erroneous.—People v. Ashe, 44 Cal. 288; People v. Fenwick, 45 Cal. 287.

[d] It is not sufficient for the court to instruct the jurors that the good character of the defendant is a circumstance for their consideration, for this is only equivalent to the admission of the testimony as to character.—People v. Bell, 49 Cal. 485.

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[e] There may be cases where guilt is so clearly proved that no evidence of good reputation can create a doubt, while there may be other cases in which a good reputation will create a reasonable doubt; but the prisoner has a right to have the jury pass on the question.—People v. Bell, 49 Cal. 485.

[f] In a prosecution for murder, where there was evidence tending to show the previous good reputation of the defendant as a quiet and peaceable citizen, an instruction to the jury in the following words, given on the request of the prosecution, was erroneous, viz: "No inference can be drawn by a jury of the intention which induced the commission of the offense, from the previous character of the prisoner. His intention can only be determined by his acts. The law will imply a malicious intention."—People v. Casey, 53 Cal. 360.

[g] Where the character of defendant, in a criminal case, has not been attacked, no special instructions as to presumption of good character can be demanded beyond the general instruction of the presumption of innocence in the absence of evidence of guilt.—People v. Johnson, 61 Cal. 142.

[h] One on trial for a crime is entitled to a charge that his good reputation, if proved, is entitled to weight, and "may be sufficient" to raise reasonable doubt of guilt.—People v. Doggett, 62 Cal. 27.

[i] It is not error to instruct jury that if they believe defendant guilty of offense charged they should so find, notwithstanding his good character.—People v. Samsels, 66 Cal. 99, 4 Pac. 1061.

[j] On the trial of an indictment for robbery, it is not error for the court to add to the following instruction, given at the request of the defendant. "Proof of such good character may be sufficient to justify an acquittal, although without it no acquittal would have been had," the clause, "unless, in spite of such good character, the evidence yet convinces you beyond a reasonable doubt of defendant's guilt."—People v. Kalkman, 72 Cal. 212, 13 Pac. 500.

[k] An instruction, on a trial for murder, that "the defendant has introduced evidence tending to show his good character as a man of peace and quiet, and for honesty and integrity," and that, "if . . . . the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain any reasonable doubt of the defendant's guilt, then it is your duty to acquit him,"—contains all that defendant is entitled to have on the point.—People v. Bowman, 81 Cal. 566, 22 Pac. 917.

[l] When, in an answer to a question asked for the sole purpose of contradicting a previous statement of defendant, he admits that he has been convicted of larceny, it is erroneous to charge the jury as to that admission, and also that "as to how much credit such a man is entitled to is for you to determine."—People v. Murray, 86 Cal. 31, 24 Pac. 802.

[m] It is error for the court, in instructing the jury, to speak of the prosecuting witness as leading a dissolute life, where the evidence establishes that fact without conflict, and the court bases its statement upon admissions made by defendant's counsel in his address to the jury.—People v. Ross, 115 Cal. 233, 46 Pac. 1059.

[n] Where accused has offered no evidence of character, an instruction that an accused's character cannot be assailed, unless he himself has put it in issue by calling witnesses in its support, is erroneous, as raising the inference that the people, had they been permitted, might have shown that accused's character was bad.—People v. Gleason, 122 Cal. 370, 55 Pac. 123.

[o] An instruction is not erroneous, which, after fully stating the rule as to the weight of evidence of good character, further states: "If, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, ... the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character."—People v. Mitchell, 129 Cal. 584, 62 Pac. 187.

[p] On a prosecution for assault with intent to commit murder, the refusal of an instruction that defendant was presumed to be a man of good character held not erroneous.—People v. Griffith, 146 Cal. 339, 80 Pac. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 20 L. R. A. 609, note. See, also, 12 Cyc. 620, 621; 14 Cent. Dig., cols. 2582-2593, §§ 1838-1845.

§ 411. Effect of Evidence.

[a] Where evidence tending to show defendant guilty of other offenses is admitted, an instruction to the jury that they are not to convict him because the evidence shows him a man of bad character in having committed other offenses, and that they are only to consider the evidence in connection with the offense on trial, is sufficient.—People v. Rogers, 71 Cal. 565, 12 Pac. 679.

[b] The fact that witnesses have testified that, in their opinion, a letter offered in evidence by a defendant is genuine, while there is no direct testimony in rebuttal, does not require the court to instruct the jury that they must consider the letter as genuine, where the evidence of the prosecution tends to establish other facts which disprove its genuineness.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[c] It is proper to refuse a request to instruct as to the "weight" of certain evidence.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

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[d] A court is not, on any state of the facts, authorized to instruct the jury that a defendant's innocence conclusively appears. People v. Streuber, 121 Cal. 431, 53 Pac. 918.

[e] An instruction that the jury is not at liberty to disregard the testimony of a witness corroborated by other competent evidence is erroneous, because, if "disregard" be used as synonymous with "refuse to consider," it implies that the testimony of an uncorroborated witness need not be considered.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[f] An instruction that it is against all experience and reason to suppose that a man will imperil his own life, and inflict on another a brutal crime, without a motive, and in the mere wantonness of depravity, and that the question of motive is of great importance, when the question is as to whether defendant committed the crime, was properly refused, as involving a question as to the probative force of certain evidence.—People v. Verenesseneckockockhoff, 129 Cal. 497, 58 Pac. 156.

§ 412. Presumptions and Burden of Proof.

[a] In a prosecution for robbery committed on a Chinaman, the court charged that certain rules of evidence had been established which must be adhered to in "all ordinary cases," but that these rules were not entirely unyielding; that, in the present case, the victim of the robbery would be the best witness to prove it, but, since the law precluded his testimony because a Chinaman, what would be secondary testimony in ordinary cases becomes the best evidence in the case at bar. Held, that this charge was erroneous, as indicating that defendant might be convicted on less testimony or different testimony than would be required if the crime had not been committed on a Chinaman.—People v. Jones, 31 Cal. 565.

[b] An instruction, in a prosecution for assault with intent to commit rape, that a presumption is a deduction which the law expressly directs to be made from particular facts, and unless this is controverted by other facts, the presumption will control, and that among such presumptions is one that an unlawful act was done with an unlawful intent, is proper, the instruction not relating to deductions of fact to be drawn by the jury.—People v. Crowl, 84 Pac. 860.

[c] Refusal to instruct on burden of proof and rule as to reasonable doubt is reversible error.—People v. Cohn, 76 Cal. 386, 18 Pac. 410.

[d] A charge that "it is not a matter of the number of witnesses, but the preponderance; and you may, if you retain a reasonable doubt, give the defendant the benefit of it,"—while not specially clear and perspicuous, is yet not erroneous.—People v. Christensen, 85 Cal. 568, 24 Pac. 888.

[e] Statement that "defendant may establish any fact essential to his defense by mere preponderance" should be left out of charges in criminal cases.—People v. Tarm Poi, 86 Cal. 228, 24 Pac. 998.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 621, 622; 14 Cent. Dig., cols. 2593-2618, §§ 1846-1857.

§ 413. —— Innocence.

[a] Instruction that "where there are two presumptions, one in favor of innocence, and the other in favor of a criminal course," the former must prevail, is properly refused, as there can be but one presumption of innocence in a criminal case.—People v. Douglass, 100 Cal. 1, 34 Pac. 490.

[b] Instruction "presumption of innocence goes with you in your retirement to consider your verdict and you must examine evidence in light of that presumption," is good.—People v. Winthrop, 118 Cal. 92, 50 Pac. 390.

[c] The court's instruction that the accused was presumed to be innocent, and was not required to prove himself innocent until the prosecution had proven his guilt beyond a reasonable doubt, does not deprive accused of the presumption of innocence at some time in the trial, where it was further stated that the presumption abided with accused throughout the trial of the case, until the evidence convinced the jury to the contrary beyond all reasonable doubt.—People v. Arlington, 131 Cal. 231, 63 Pac. 347.

[d] In a prosecution for robbery, the modification of an instruction that the law presumes the defendant innocent; that the presumption attends him throughout the entire case; that such presumption might be sufficient to acquit the defendant, and was sufficient unless the jury was satisfied beyond a reasonable doubt, from the evidence, that defendant was guilty of the crime charged—by omitting the words "such presumption is to be considered as a matter of evidence in favor of defendant," was not error.—People v. Linares, 142 Cal. 17, 75 Pac. 308.

[e] An instruction in a criminal case on the presumption of the innocence of accused held not to comply with Penal Code, section 1096. People v. Maughs (Cal. Sup.), 86 Pac. 187.

§ 414. —— Intent.

[a] On an indictment for burglary, a charge by the court that "it was not possible to give any direct intent of any person in the commission of any act, and that the prosecution could never, unless the defendant himself saw fit to speak, give any direct or positive proof of the intent," etc., is not erroneous, as suggesting that any presumption should be indulged against the defendant because he did not give evidence as a witness in the cause.—People v. Morton, 72 Cal. 62, 13 Pac. 150.

[b] An instruction that a malicious intent need not be proved by direct testimony, and that, if the jury found that the natural and probable results of an act would be to injure or destroy the property of another, no motive

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appearing from the evidence, malice may be implied, if the circumstances show a wicked, depraved and wanton spirit, is not misleading, especially when followed by others, treating the subject fully and liberally.—People v. Keeley, 81 Cal. 210, 22 Pac. 593.

[c] A charge relating to presumptions, as follows: "That an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act. The effect of these rules is that when the doing of an act is proven which, if there be guilty intent, would be a violation of law, the burden of proving the act to have been without such intent is in most cases upon the accused,"—held erroneous.—People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082.

[d] Code of Civil Procedure, section 1962, provides: "The following presumptions . . . . are deemed conclusive: (1) A malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another." Held, that an instruction "that a malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another, is a conclusive presumption, under our law," substantially conforming to the language of the statute.—People v. McGlade, 139 Cal. 66, 72 Pac. 600.

§ 415. —— Insanity.

[a] In a criminal trial, where insanity is relied on as a defense, it is proper to refuse to instruct the jury that, if the defendant was insane a short time before the commission of the act, the presumption is that he was insane when he committed it.—People v. Smith, 57 Cal. 130.

[b] Defendant asked the court to charge that if defendant was insane at a period before the homicide, it is presumed to have continued. The court gave the instruction after adding the words, "up to the time of the homicide, providing the exciting cause of such insanity also exists up to the time of the homicide." Held, that where the evidence tended to show defendant insane a year before the killing, and it all showed that his condition gradually grew worse up to the homicide, such instruction, as modified, even if erroneous was not prejudicial.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

§ 416. —— Alibi.

[a] In a trial for murder, it is error to charge that, if the jury find the defendant to have been at another place at the time of this alleged shooting, and if his being there then creates a reasonable doubt of his having been present at the place of the alleged crime at the time of its alleged commission, he should have the benefit of that reasonable doubt and be acquitted, as it compelled the jury to find as a fact that he was at another place at the time of the shooting, and did not therefore give defendant the benefit of any mere doubt which might be raised in the minds of the jury upon the question of alibi.—People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233.

[b] Where there is testimony tending to prove an alibi, it is not error to charge that the accused "may establish any fact essential to his defense by merely a preponderance of evidence," when accompanied by a further charge that "if, from the whole case, and a consideration of all the testimony, the evidence [as to alibi] be sufficient to create a reasonable doubt as to whether defendant was present at the time and place of the murder, he should be acquitted."—People v. Tarm Poi, 86 Cal. 225, 24 Pac. 998.

§ 417. —— Flight.

[a] An instruction that if defendant fled from the scene of the crime, and was captured twenty miles away two days thereafter, it was a circumstance to be considered as tending to prove consciousness of guilt, was not error.—People v. Giancoli, 74 Cal. 642, 16 Pac. 510.

[b] An instruction that flight is not an inference of guilt, and the timid might seek safety thereby, while innocent, was properly refused.—People v. Giancoli, 74 Cal. 642, 16 Pac. 510.

[c] Where, upon the trial of a defendant for assault with a deadly weapon, the evidence is conflicting as to the character of his flight immediately after delivering the blow, it is error for the court to instruct that such flight "is a circumstance tending to establish his guilt," to be taken into consideration with all the other circumstances and testimony.—People v. Choy Ah Sing, 84 Cal. 276, 24 Pac. 379.

[d] An instruction that defendant's flight might be considered as in some degree tending to prove a consciousness of guilt held not error.—People v. Easton (Cal. Sup.), 82 Pac. 840.

§ 418. —— Shifting of Burden.

[a] In a murder case, where the only claim of the defense was that defendant had inherited such an impaired mind, and this had been so further weakened by liquor, that he was incapable of the malice requisite for murder in the first degree, or that at least the jury should in their discretion make his punishment a life sentence instead of death, there being no claim of insanity, there was no prejudicial error in charging that the burden of proving insanity was on defendant; the jury being clearly charged that as to all other matters, including defendant's said claim, they must give him the benefit of every reasonable doubt, and that as to such matters the burden of proof was not on him.—People v. Eubanks, 86 Cal. 295, 24 Pac. 1014.

[b] The court charged the jury that, "if there be any reasonable hypothesis, not a mere possible one—any reasonable hypothesis upon which the conduct of the defendant [in entering the house] can be explained consistently with his innocence—then the testimony is such as ought to leave a reasonable doubt upon your minds." Held, that the jury could not have understood the court to mean that it devolved on defendants to explain his con-

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duct.—People v. Winters, 93 Cal. 277, 28 Pac. 946.

[c] An instruction that a person accused of crime is presumed to be innocent until proven guilty, and that this presumption goes with him all through the case "until it is submitted" to the jury, is erroneous, in intimating that the presumption ceases at that time, whereas in fact it continues until a verdict is reached.—People v. McNamara, 94 Cal. 509, 29 Pac. 953.

[d] An instruction that, when the doing of an act is proven which, if done with guilty intent, would be a violation of the law, the burden of proving the act to have been without such intent is, to the extent of creating a reasonable doubt of the defendant's guilt, thrown in most cases upon the accused, is erroneous.—People v. Perini, 94 Cal. 573, 29 Pac. 1027.

§ 419. Testimony of Accomplices.

[a] The court instructed the jury: "If you believe that an accomplice has testified in this case, and you believe beyond all reasonable doubt from his testimony, to a moral certainty, that the defendant is guilty of the alleged offense in the information mentioned, and then in connection therewith you believe there is evidence outside of that which tends to connect the defendant with the commission of the offense,—outside of showing the commission of the offense itself and the circumstances thereof,—then it would be your bounden duty to convict him." Held, that this was consistent with Penal Code, section 1111, providing that a "conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence." People v. Clough, 73 Cal. 348, 15 Pac. 5.

[b] An instruction to the jury to the effect that they could not convict the defendant accused of receiving stolen goods upon the testimony of the thief unless corroborated by other evidence which, in itself, without the aid of the testimony of the thief, "tends to impute" to the defendant a knowledge that the goods were stolen, is not erroneous because of the expression "tends to impute" instead of "imputes."—People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082.

[c] Where the jury has been fully instructed as to the weight and effect of the testimony of an accomplice, it is not error to refuse to charge that, if defendant committed the crime, a certain witness was an accomplice, as this would be a charge "with respect to matters of fact."—People v. Sansome, 98 Cal. 235, 33 Pac. 202.

[d] In a criminal prosecution, where the only evidence to justify a verdict against the defendant was the testimony of an admitted accomplice and that of a third person as to the defendant's oral admissions, the refusal of the court to instruct the jury that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution," is prejudicial error.—People v. Bonney, 98 Cal. 278, 31 Pac. 45.

[e] Subdivision 4 of section 2061 of the Code of Civil Procedure, providing that the court shall instruct the jury in a criminal prosecution "on all proper occasions" that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution," does not require the court to charge the jury with respect to matters of fact; and though it is not a proper occasion for such an instruction where it would discredit one of the defendant's witnesses, it is a proper occasion therefor when the testimony therein referred to is offered for the people against the defendant. People v. Bonny, 98 Cal. 278, 33 Pac. 98.

[f] A requested instruction that the evidence of an accomplice is to be viewed with "caution and distrust" is not bad, though Code of Civil Procedure, section 2061, subdivision 4, declares only that it should be viewed with "distrust."—People v. Sternberg, 111 Cal. 11, 43 Pac. 201.

[g] An instruction to the effect that evidence in corroboration of an accomplice "need not tend to establish the precise facts testified to by the accomplice," and that "it is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime charged," is incorrect in not taking into account the essential condition that the corroborative evidence, standing alone, "without the aid of the testimony of the accomplice," must tend to connect the defendant with the commission of the crime.—People v. Compton, 123 Cal. 403, 56 Pac. 44.

[h] People v. Compton, 123 Cal. 403, 56 Pac. 44, affirmed as to the instructions to the jury therein held to be erroneous, relating to the disregard of corroborated evidence, the attempt to pass forged instruments, the corroboration of an accomplice, and the aiding and abetting of a felony.—People v Davis, 124 Cal. 42, 56 Pac. 1131.

[i] The treasurer of a corporation was indicted for embezzling funds which he had withdrawn from a certain bank under orders of the corporation. Other funds had been withdrawn from other banks in pursuance of the same order, and a witness for the state had participated in the withdrawal of all such sums. Held, that an instruction that if the defendant and witness had embezzled the sum charged, or if the witness had aided or abetted the defendant in the commission of an embezzlement, he would be an accomplice, and his testimony must be corroborated, was properly refused, as not requiring the witness to be an accomplice in the commission of the specific crime charged.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[j] In homicide, the court would have been justified in refusing to charge on the subject of accomplices where, under the evidence, the only witness to whom the charge could have referred was neither an accomplice nor an accessary.—People v. Balkwell, 143 Cal. 259, 79 Pac. 1017.

[k] In homicide, a charge in the language of Penal Code, section 1111, providing that

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a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence which in itself tends to connect defendant with the commission of the offense, etc., and, in concluding, declared that the corroborative evidence was sufficient "if it tended to connect defendant with the commission of the offense," was proper.—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017.

[l] On a murder trial, the court, on evidence fully authorizing it, submitted to the jury the question as to whether or not a certain witness for the state was an accomplice. The only corroborative evidence was given by the wife of such witness, who testified to certain oral confessions. Held, that it was error to refuse to charge that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of defendants ought to be viewed with caution, under Code of Civil Procedure, section 2061, which directs such instructions to be given "on all proper occasions."—People v. Strybe, 36 Pac. 3.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 627, 628; 14 Cent. Dig., cols. 2620-2631, §§ 1859-1863.

§ 420. Testimony of Experts.

[a] Instruction to effect that value of testimony of experts depends upon truth of facts upon which founded is correct.—People v. Barthleman, 120 Cal. 13, 52 Pac. 112.

§ 421. Admissions and Confessions.

[a] Instruction that confessions are to be weighed by the jury like any other evidence, and may be accepted in part and rejected in part, is not erroneous.—People v. Wyman, 15 Cal. 70.

[b] Under Code of Civil Procedure, section 2061, subdivision 4, declaring that evidence of the oral admissions of a party is to be viewed with "caution," it is not error to refuse an instruction that it be viewed with "distrust"—People v. Sternberg, 111 Cal. 11, 43 Pac. 201.

[c] Instruction to the effect that extrajudicial admissions of defendant are to be received and considered with great caution, is correct, and should be given when applicable. People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[d] Requested instruction that verbal admissions of party should be received with "great caution" is properly modified by striking out word "great."—People v. Van Horn, 119 Cal. 332, 51 Pac. 538.

[e] Court may properly instruct jury in relation to statements or admissions of defendant, and in reference to weight to be given to the testimony of defendant in his own behalf.—People v. Totman, 135 Cal. 133, 67 Pac. 51.

[f] A requested instruction that verbal admissions ought to be received with great caution, that such evidence is subject to much imperfection, the party himself not having clearly expressed his own meaning or the witness having misunderstood him, is properly refused, because going beyond Code of Civil Procedure, section 2061, subdivision 4, providing that the jury is to be instructed that evidence of oral admissions of a party ought to be received with caution.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 628-630; 14 Cent. Dig., cols. 2631-2643, §§ 1864-1871.

§ 422. Rules of Evidence and Determination of Sufficiency.

[a] In a criminal trial, it is not necessary that the judge, in stating testimony to the jury, should instruct them that they are exclusive judges of the fact.—People v. Boggs, 20 Cal. 432.

[b] An instruction to the jury that the defendant is not required to produce evidence to rebut such evidence, on the part of the prosecution, as merely tends to prove the fact in question, is erroneous.—People v. Kelly, 28 Cal. 423.

[c] It is error for the court to instruct the jury, in a criminal case, that they may in their discretion believe a part and disbelieve a part of the evidence. The discretion of the jury is not an unlicensed discretion, but is to be conscientiously exercised upon a consideration of all the facts.—People v. Strong, 30 Cal. 151.

[d] If two are jointly indicted for murder, and one is tried separately, and there is evidence of a conspiracy, an instruction to the jury that if there was a conspiracy, and the deceased was murdered by either of the conspirators in pursuance of the conspiracy, the verdict should be guilty, is not erroneous. If the instruction is not sufficiently explicit about preponderating evidence on the question of conspiracy, the defendant should ask the court to make it more specific.—People v. Geiger, 49 Cal. 643.

[e] An instruction distinguishing between direct and circumstantial evidence held to state correctly the rule of law applicable to the distinction.—People v. Anthony, 56 Cal. 397.

[f] An instruction to "determine the amount of credibility to which the evidence is entitled; if convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it"—is proper, being no more than an instruction to believe what is true, and reject what is false.—People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

[g] An instruction that it is the duty of the jury to make a reasonable and conscientious endeavor to reconcile the facts and evidence with defendant's innocence is properly refused, since the jury should reconcile conflicting evidence if they can, regardless of the conclusions to which it may lead.—People v. Madden, 76 Cal. 521, 18 Pac. 402.

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[h] Instruction: "The effect of statutory rules of evidence is that when doing of act which, if coupled with a guilty intent, would be a violation of the law is proven, the burden of proving the act to have been done without intent, to the extent of creating a reasonable doubt of the defendant's guilt upon the whole case, is in most cases thrown upon the accused," is erroneous.—People v. Perini, 94 Cal. 573, 29 Pac. 1027.

[i] Where, on a trial for murder, the expert testimony was that of a doctor, as to whether blood found on clothes was human blood, and his testimony was mainly as to the manner of determining the character of blood, and there was nothing to arouse suspicion as to his capacity or impartiality, it was not error to refuse to charge that expert evidence should be received with great caution.—People v. Smith, 106 Cal. 73, 39 Pac. 40.

[j] On a prosecution for murder, an instruction as to the belief of guilt which must be entertained by the jury in order to authorize a conviction held proper.—People v. Murphy, 146 Cal. 502, 80 Pac. 709.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2652-2658, §§ 1877-1882; 45 L. R. A. 136, note.

§ 423. Circumstantial Evidence.

[a] In a prosecution for murder, a statement by the court during the examination of a juror on his voir dire that only one in ten thousand are wrongfully convicted on circumstantial evidence held not reversible error.—People v. Olsen, 1 Cal. App. 17, 81 Pac. 676.

[b] It was not error to refuse to instruct the jury in these words: "In the application of circumstantial evidence, the utmost caution should be used. It is always insufficient to convict, when, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true."—People v. Shuler, 28 Cal. 490.

[c] True rule is that, to authorize a verdict of guilty, the proof must be inconsistent with any other hypothesis compatible with such proof.—People v. Shuler, 28 Cal. 490.

[d] Where circumstantial evidence alone is relied on, the court may properly refuse to charge that it is always insufficient to convict "when, conceding all to be proved that the evidence tends to prove, some other hypothesis than that of the defendant's guilt may be true"; the true rule being that the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion.—People v. Strong, 30 Cal. 151.

[e] It is not error to instruct the jury that, "in order to convict, circumstantial evidence must be such as to produce nearly the same degree of certainty as that which arises from direct testimony and to exclude a rational probability of innocence."—People v. Cronin, 34 Cal. 191.

[f] An instruction that, "where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been," is correct.—People v. Daniels, 34 Pac. 233, following People v. Cronin (1867), 34 Cal. 191.

[g] A charge that "there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence" correctly states the law.—People v. Urquidas, 96 Cal. 239, 31 Pac. 52, following People v. Morrow (1882), 60 Cal. 142.

[h] It is not error to charge a jury, upon a criminal trial, that there is no inherent difference between direct and circumstantial evidence, and that there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence; this statement being accompanied by proper explanations and qualifications.—People v. Morrow, 60 Cal. 142.

[i] At a trial for burglary, an instruction which, after directing the jury that circumstantial evidence must exclude to a moral certainty every other hypothesis than that of guilt, states that, "to convict upon circumstantial evidence, it should be such as to produce nearly the same degree of certainty as that which arises from direct testimony," is not erroneous.—People v. Eckman, 72 Cal. 582, 14 Pac. 359.

[j] It was error for the trial court, after charging that a mere preponderance of evidence was not sufficient to convict defendant, to add that "it is not required that the inculpatory facts shall be incompatible with the innocence of the accused," since, in order to convict an accused person, the facts proven must be inconsistent with any reasonable hypothesis of his innocence.—People v. Gosset, 93 Cal. 641, 29 Pac. 246.

[k] On a trial for grand larceny, it was reversible error to instruct, on the subject of circumstantial evidence, that the jury should be regulated by the superior number of probabilities on the one side or the other, whether the amount of such probabilities be expressed in words or arguments, or by figures and numbers.—People v. Dilwood, 94 Cal. 89, 29 Pac. 420.

[l] Instruction upon circumstantial evidence, stating that "such evidence may consist of admissions by defendant, plans laid for commission of crime, such as putting himself in position to commit it, in short, any act, declarations, or circumstances admitted in evidence tending to connect defendant with commission of crime," cannot be construed as telling the jury that defendant could be convicted solely upon his own admissions.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[m] Instruction properly embodying law relating to circumstantial evidence should not, at the request of the defendant, be modified

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so as to involve and cloud it or detract from its perspicuity.—People v. Smith, 106 Cal. 73, 39 Pac. 40.

[n] A charge that, "to justify the inference of legal guilt from circumstantial evidence, the existence of inculpatory facts must be established absolutely and to a demonstration incompatible with the innocence of the accused," demanded a greater degree of certainty than the law required.—People v. Bellamy, 109 Cal. 610, 42 Pac. 236.

[o] It is not proper for the court to read from the opinion of a court on the question of circumstantial evidence, and then instruct the jury that the part quoted is not the law in this state; but the court should instruct only affirmatively as to what the law is, not what it is not; and it is ambiguous and might be misleading to instruct the jury "that all the circumstances should tend to establish the guilt of the defendant, and be inconsistent with any other hypothesis," since all the circumstances taken together must do something more than tend to establish such guilt; they should establish the guilt of the defendant.—People v. Paulsell, 115 Cal. 6, 46 Pac. 734.

[p] Where two witnesses testified to seeing accused in the act of removing a ring from the cravat of a sleeping person, though they could not see the ring on account of accused's hand being in the way, but had seen it on the cravat, and noticed afterward that it was gone, it cannot be said that the prosecution relied entirely or mainly on circumstantial evidence; and instructions based on such an assumption were properly refused.—People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[q] An instruction that, "where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been," though inexact and illogical, in intimating that a conviction may be had on less satisfactory evidence where it is circumstantial than would be required where it is direct, was corrected by special instructions to the effect that every fact essential to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, must be fully proved. Judgment (1898), 51 Pac. 945, reversed.—People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[r] An instruction in a criminal prosecution that, when direct evidence cannot be introduced, minds will form their judgments on circumstances, and act on the probabilities of the case, was erroneous, since the law requires the jury to be convinced of the defendant's guilt before convicting, and they are not at liberty to "act on probabilities." People v. O'Brien, 130 Cal. 1, 62 Pac. 297.

[s] On a trial for murder, based on circumstantial evidence, an instruction authorizing the jury, if they have a reasonable doubt as to which of two opposing conclusions the chain of circumstances leads, they should give accused the benefit of such doubt, is properly refused, where both of the opposing conclusions might lead to accused's guilt. People v. Clarke, 130 Cal. 642, 63 Pac. 138.

[t] In a prosecution for larceny, an instruction that there is nothing in the nature of circumstantial evidence rendering it less reliable than other evidence, and that a man may as well swear falsely to an absolute knowledge of facts as to a number of facts on which, if true, guilt or innocence depends, though of doubtful accuracy as a statement of law, is not prejudicially erroneous.—People v. Wilder, 134 Cal. 182, 66 Pac. 228.

[u] Where the evidence was largely direct and positive, it was not prejudicial error to charge that, where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of defendant, but inconsistent with any other rational conclusion, the jury must convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been.—People v. Dole, 51 Pac. 945.

FOR AUTHORITIES FROM OTHER STATES:

See 69 L. R. A. 193, note. See, also, 12 Cyc. 633-636; 14 Cent. Dig., cols. 2659-2677, §§ 1883-1888.

§ 424. Credibility of Witnesses.

[a] Jury may be instructed as to the law applicable to credibility of a particular witness, or of an interested party.—People v. Cronin, 34 Cal. 191.

[b] Instruction that if jury "believed any witness had, upon the stand, willfully sworn falsely in respect to any matter material to the issue on trial, they should disregard his testimony altogether," was properly refused. People v. Hicks, 53 Cal. 354.

[c] An instruction that "if any witness has, in the opinion of the jurors, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution," is not erroneous. The omission or insertion of the word "willfully" before "sworn falsely" would not change the effect of the language.—People v. Righetti, 66 Cal. 184, 4 Pac. 1185.

[d] Instruction "witness false in one statement, is to be distrusted in others" upheld.—People v. Treadwell, 69 Cal. 238, 10 Pac. 502.

[e] Court may allude to fact of relationship of some of witnesses to accused as affecting their credibility.—People v. Bush, 71 Cal. 602, 12 Pac. 781.

[f] Where a certain witness has testified falsely upon particular point, court need not specifically direct attention of jury to such evidence, or instruct them that it is material, and if they believe it to be false, to distrust the entire testimony of the witness. General instruction to distrust entire evidence of any witness whom they find to have willfully sworn falsely upon any mate-

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rial point is sufficient.—People v. Demousset, 71 Cal. 611, 12 Pac. 788.

[g] An instruction to the jury, requested by the defendant, that "every witness, the defendant included (if called as a witness) is presumed to speak the truth, and the jury are bound to remember such presumption in determining the facts admitted to them for their consideration," is properly qualified by the court by adding that "this presumption is a disputable one, and is not conclusive upon you. You are the sole and exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each. In determining the weight of the testimony, you have the right to take into consideration the interest, if any, which the witness may have in the result of the trial, his conduct on the stand, his general appearance and demeanor before you, and whether or not it is such as convinces you that he is speaking the truth, or otherwise."—People v. Dolan, 96 Cal. 315, 31 Pac. 107.

[h] The courts, in giving an instruction upon the subject of the distrust of a witness who is false in one part of his testimony, should carefully use the exact language of section 2061 of the Code of Civil Procedure, which provides "that a witness false in one part of his testimony is to be distrusted in others."—People v. Paulsell, 115 Cal. 6, 46 Pac. 734.

[hi] Instruction to effect that testimony of experts should be scrutinized and received with caution, and that jury could reject it if they deemed it not well-founded in fact, is correct.—People v. Barthleman, 120 Cal. 13, 52 Pac. 112.

[i] Giving an instruction that "a witness who has willfully sworn falsely in one part of his testimony is to be distrusted in others," in lieu of one that, "if any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence," was error, since the former omits the element that the testimony must be on a material matter, and the latter follows the Code provisions (Code Civ. Proc., sec. 2061, subd.. 3).—People v. Plyler, 121 Cal. 160, 53 Pac. 553.

[j] A requested charge that, if a witness named swore falsely in one place, the jury could believe his entire testimony false, was properly modified to read, "any witness." People v. Patterson, 124 Cal. 102, 56 Pac. 882.

[k] An instruction that, "You understand, of course, that a witness ascertained or appearing to be willfully false in one part of his testimony as to the truth or falsity of a given proposition of fact is to be distrusted in other parts," is good.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[l] An instruction upon the subject of the distrusting of a witness in other parts of his testimony, who is false in one part thereof, is not made erroneous by explanatory remarks as to what is meant by the rule, where there is nothing in such remarks contrary to law or prejudicial to the defendant. People v. Sternberg, 127 Cal. 511, 59 Pac. 942.

[m] Where testimony of experts in regard to the authorship of a libelous letter was introduced in a criminal prosecution, it was not error to refuse to instruct that the testimony of experts should be received and weighed with great caution, and that the evidence of a witness who is brought on the stand to support a theory by his opinion is testimony exposed to a reasonable degree of suspicion, which there is great reason to believe is in many instances the result of employment, and his bias arising out of it.—People v. Storke, 60 Pac. 420, order reversed (1900), 128 Cal. 486, 60 Pac. 1090.

[n] An instruction in a criminal case which, in substance, tells the jury that they are not to disregard the testimony of convict witnesses merely because they are convicts, but that they are to consider and weigh their testimony according to the rules of evidence, is not open to objection.—People v. Puttman, 129 Cal. 258, 61 Pac. 961.

[o] Under the Code of Civil Procedure, section 2061, subdivision 3, authorizing the court to instruct that a witness false in any part of his testimony is to be distrusted in others, the court cannot single out a particular witness, and apply such section to him.—People v. Arlington, 131 Cal. 231, 63 Pac. 347.

[p] Under Code of Civil Procedure, section 2061, subdivision 3, authorizing the court to instruct that a witness false in one part of his testimony is to be distrusted in others, it is not error for the court, after instructions in the language of such subdivision, to add that if the jury find that any witness has willfully testified falsely to any material matter, they have a right to entirely disregard his testimony.—People v. Arlington, 131 Cal. 231, 63 Pac. 347.

[q] Instruction upon subject of distrust of a witness who has willfully sworn falsely as to a material matter, is not affected by an added statement that it "is duty of jury to scan closely" and distrust the entire evidence of such witness. It is the duty of jury to "scan closely" all evidence placed before them. People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[r] It is not error to instruct that a witness who willfully testifies falsely as to one fact is to be distrusted in other parts of his testimony, and that, if the jury find a witness has deliberately testified falsely in part, they have the right to reject the whole of his testimony which is not shown by other evidence to be true.—People v. Wilder, 134 Cal. 182, 66 Pac. 228.

[s] An instruction that the presumption as to witnesses speaking the truth might be repelled by interest in the case, or bias or prejudice against one of the parties,—there being no reference to any particular witness—is proper.—People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[t] Where a witness who had participated as a police officer in the preparation of a case for the prosecution, testified that he was no more than ordinarily interested in the case, and as to experiments made by him, it was not error to instruct the jury that the

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police officer was under no obligation to assist the defense of any of the parties to the crime by making any experiment.—People v. Eaton, 136 Cal. xix, 68 Pac. 583.

[u] Under Code of Civil Procedure, section 2061, subdivision 3, declaring that a witness false in one part of his testimony is to be distrusted in others, a charge in a criminal case that "if any witness . . . . has willfully sworn falsely as to any material matter, it is your duty to distrust the entire evidence of such witness," was proper.—People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014.

[v] An instruction that "a witness who testifies falsely as to one fact . . . . is to be distrusted in other parts of his testimony," etc., being substantially in the language of Code of Civil Procedure, section 2061, subdivision 3, is not improper, though not to be commended as a full or clear exposition of the meaning of the section.—People v. Dobbins, 138 Cal. 694, 72 Pac. 339.

[w] An instruction that the jury is not bound to believe the uncontroverted statement of a witness, in a prosecution against a defendant, as to a fact, and that the jury was not bound to take the testimony of any witness as true, was objectionable, as limited to the testimony on one side of the case.—People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

[x] Instruction, "If any witness has sworn falsely, it is your duty to distrust his entire evidence," is correct.—People v. Stevens, 141 Cal. 492, 75 Pac. 62.

FOR AUTHORITIES FROM OTHER STATES:

Instructions to jury to disregard evidence of witnesses who are competent to testify: 86 Am. Dec. 328, note. See, also, 12 Cyc. 636, 637; 14 Cent. Dig., cols. 2677-2682, §§ 1889-1894.

§ 425. Credibility of Accused.

[a] An instruction to a jury, in a criminal case, that what was said by the accused in his own behalf during a certain conversation, proved, must be taken as true, if what he at the same time said against himself is taken as true, is erroneous.—People v. Graham, 21 Cal. 261.

[b] Where court instructed jury in respect to weight and effect proper to be given to defendant's evidence, who had testified at trial in his own behalf that "in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, and the consequences to him relating from the results of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. . . . . If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." Held, that there was no error.—People v. Cronin, 34 Cal. 191; People v. Morrow, 60 Cal. 142; People v. Nichols, 62 Cal. 518; People v. O'Neal, 67 Cal. 378, 7 Pac. 79.

[c] The statute allowing an accused to testify in his own behalf does not make it obligatory that when a defendant in a criminal case becomes a witness in his own behalf, and gives testimony tending to exonerate himself, the court must of its own motion instruct the jury as to the credit to be given to his own testimony. In declaring that the credit to be given to a defendant's testimony must be "left solely to the jury under the instructions of the court" it does not establish a new rule in requiring instructions as to defendants in criminal cases, but simply applies to them a rule which exists as to other witnesses.—People v. Rodundo, 44 Cal. 538.

[d] A defendant, however incredible his testimony may be, is entitled to an instruction based on the hypothesis that his testimony was entirely true.—People v. Keefer, 65 Cal. 232, 3 Pac. 818.

[e] Where defendant in a criminal prosecution has been examined as a witness in his own behalf, it is not error to instruct the jury that he had a right to do so, and that they were to consider his testimony as they would that of any other witness; but that they should bear in mind the position of the defendant, the manner in which he would be affected by their verdict, and the very great interest he must feel in the result of the trial, and how it might affect his credibility or color his testimony.—People v. Faulke, 96 Cal. 17, 30 Pac. 837.

[f] Instruction to jury directing their attention to fact that defendant had offered himself as a witness on his own behalf, and saying to them that in considering the weight and effect to be given to his evidence, in addition to noticing his manner and the probability of his statements, they could consider his relation to the case, and the circumstances under which he gave his testimony, the consequences to him resulting from the verdict in the case, and all the inducements and temptations which would ordinarily influence a person in his situation, having been sanctioned under the old constitution, must be considered as a part of a similar provision of the constitution of 1879, and cannot be held erroneous. It would be better, however, to entirely omit such instruction from those asked and given on behalf of the prosecution in the future.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

[g] Instruction is proper as to weight to be given by jury to testimony of a defendant as a witness in his own behalf, if in line with like instructions approved by this court.—People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

[h] Fact that code does not contain express reference to instructions of court in connection with testimony of defendant, which was contained in former statutes, does not effect a change of law upon that subject, the constitutional provision permitting such instructions remaining unaffected.—People v. Hitchcock, 104 Cal. 482, 38 Pac. 198.

[i] An instruction as to the defendant's testimony which is not a departure from instructions that have been allowed to pass

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by this court does not furnish sufficient ground for reversal; but attention is called to the criticism of similar instructions in recent cases decided by this court.—People v. Anderson, 105 Cal. 32, 38 Pac. 513.

[j] Instruction to jury bearing upon credibility of a defendant's testimony is not looked upon with favor by this court, and must be limited within the strictest lines; and the principle of such an instruction cannot be applied to the relatives of the defendant. People v. Hertz, 105 Cal. 660, 39 Pac. 32.

[k] A requested instruction, in a prosecution for arson, that the jury should give the same weight to defendant's testimony as they would give to that of any other witness, was properly refused.—People v. Hiltel, 131 Cal. 577, 63 Pac. 919.

[l] Instruction requested as to testimony of defendant, in exact language of the instruction in People v. Cronin, 34 Cal. 191, 195, is sustained with reluctance. Justice would be more surely accomplished if no such instructions were given, and the credibility of the defendant were left entirely to the jury. People v. Boren, 139 Cal. 210, 72 Pac. 899.

[m] An instruction that, in addition to noticing defendant's manner as a witness in his own behalf, and the probability of his statements taken in connection with the evidence in the case, the jury should consider his relation to the proceeding, the consequences to him of the results of the trial, and all the inducements and temptations which would ordinarily influence a person in his situation, but, if convincing, the jury should act on his evidence, otherwise they should reject it, was not reversible error.—People v. Tibbs, 143 Cal. 100, 76 Pac. 904.

[n] Judgment of conviction in a criminal case in which the defendant was a witness in his own behalf will not be reversed because of an instruction that, in weighing his testimony, the jury may properly consider his interest in the case, and whether it might not affect his credibility or color his testimony. People v. Wells, 145 Cal. 138, 78 Pac. 470.

[o] Language in an instruction as to weight and effect to be given defendant's testimony held not erroneous.—People v. Hill (Cal. App.), 82 Pac. 398.

[p] An instruction on the weight of the testimony of accused, testifying in his own behalf in a criminal case, held erroneous.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 637, 638; 14 Cent. Dig., cols. 2683-2689, §§ 1895-1901.

§ 426. Failure of Accused to Testify.

[a] It is error, in a criminal case, to instruct that the evidence is to be estimated, not only by its own intrinsic weight, but according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, that if less satisfactory evidence is offered, when more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, though it is based on Code of Civil Procedure, section 2061, subdivisions 6, 7, where there is no suggestion that any important witness who could have been produced by defendant was not produced, but it was applicable to defendant, in that he did not become a witness, but stood on his constitutional right of not testifying and requiring the state to prove the case beyond a reasonable doubt.—People v. Cuff, 122 Cal. 589, 55 Pac. 407.

FOR AUTHORITIES FROM OTHER STATES:

See 54 C. C. A. 373, note. See, also, 12 Cyc. 638, 639; 14 Cent. Dig., cols. 2689-2693, §§ 1902, 1903.

§ 427. Failure to Produce Evidence.

[a] An instruction requested by the defendant to the effect that the failure of the prosecution to introduce any other evidence to rebut the testimony of defendant's witnesses that a letter received by the defendant accompanying the draft alleged to have been forged was in the handwriting of the person whose name was signed to the draft, made it the duty of the jury to treat and consider the letter as written by him, is properly refused, where there was other evidence for the prosecution tending to show that it was impossible for the letter to have been written by him.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

§ 428. Reasonable Doubt and Degree of Proof.

[a] Defendant held not entitled to object to an instruction on reasonable doubt, in that it included only such facts as were inconsistent with guilt.—People v. Waysman, 1 Cal. App. 246, 81 Pac. 1087.

[b] Where the doctrine of reasonable doubt was correctly charged, it was not necessary that it should have been repeated with reference to other instructions.—People v. Waysman, 1 Cal. App. 246, 81 Pac. 1087.

[c] Where the court instructs fully on the doctrine of reasonable doubt in a criminal case, it is not necessary to repeat the doctrine in every instruction.—People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734.

[d] In a prosecution for murder, defendant held not entitled to object to an instruction that each and every fact and circumstance relied on to establish guilt must be proved by evidence beyond a reasonable doubt, etc. People v. Olsen, 1 Cal. App. 17, 81 Pac. 676.

[e] In a prosecution for murder, an instruction that if the jury believed, under rules governing circumstantial evidence charge that defendant committed the crime beyond a reasonable doubt, they should convict, though the act was surrounded in a degree by a doubt, held not error.—People v. Olsen, 1 Cal. App. 17, 81 Pac. 676.

[f] Defendant is entitled to instruction, based upon reasonable doubt as to a material fact, notwithstanding general instruction as

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to reasonable doubt.—People v. Eckert, 19 Cal. 604.

[g] When evidence against accused is entirely circumstantial, and is conflicting in relation to material fact going to make up chain of circumstances, an instruction to the effect that "if the jury entertain a reasonable doubt as to the existence of such fact, the defendant must be acquitted," is pertinent and appropriate, and should be given.—People v. Phipps, 39 Cal. 326.

[h] Instruction that jury must convict, "although they may not be entirely satisfied from evidence that defendant, and no other" or different person, committed the offense, is erroneous. (Per Crockett, J.)—People v. Phipps, 39 Cal. 326.

[i] An instruction defining reasonable doubt was as follows: "If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there does not remain a reasonable doubt, within the meaning of the law." Held erroneous.—People v. Ah Sing, 51 Cal. 372.

[j] A useless instruction that, if the jurors as men believe the defendant guilty, they should as jurors believe him guilty, held not to be ground for reversal.—People v. Whitney, 53 Cal. 420.

[k] Following instruction is erroneous: "You are not legally bound to acquit the defendant because you may not be entirely satisfied that the defendant, and no other person, committed the alleged offense."—People v. Brown, 56 Cal. 405, 59 Cal. 345.

[l] Instruction is erroneous where it tends to deprive defendant of doctrine of reasonable doubt. It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor, and that if, upon the whole evidence, including that of the defense as well as that of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt.—People v. Flanagan, 60 Cal. 2, 44 Am. Rep. 52.

[m] Court below charged jury: "You must be satisfied that defendant is guilty beyond reasonable doubt. As I have often stated to juries before, a reasonable doubt does not mean every possible doubt; it must be something reasonable, and that cannot give any satisfactory solution of the question except upon the reasonable basis that the defendant may be innocent. That is what reasonable doubt is." Held, the instruction is meaningless, and could not have conveyed to the jury any ideas which might mislead them. People v. De Los Angeles, 61 Cal. 188.

[n] An instruction that before the jury can convict they must be satisfied beyond reasonable doubt that defendant is guilty of the crime as alleged; that a charge of this nature is one peculiarly hard for a defendant to clear himself of; that from the nature of the case the prosecutrix and defendant are usually the only witnesses; that the jury should be perfectly satisfied from the case made out by the witnesses, and corroborating evidence, if any, before finding the defendant guilty; that, if not satisfied, they should acquit; and that the "reasonable doubt" mentioned is as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, by not the mere preponderance of evidence, but by evidence entirely convincing to the jury; and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal," is sufficient. People v. Lenon, 79 Cal. 625, 631, 21 Pac. 967.

[o] A charge on the subject of reasonable doubt that "it would not be sufficient to justify a conviction if the jury should be satisfied of the guilt of the defendant to such a moral certainty as would influence their minds in the important affairs of life," should be refused, as calculated to confuse the jury.—People v. Lenon, 79 Cal. 625, 631, 21 Pac. 967.

[p] It is not error to instruct jury that their opinion must approach absolute certainty.—People v. Ferry, 84 Cal. 35, 24 Pac. 33.

[q] Instruction, in effect, that guilt must be proved to entire satisfaction of juror, unless they seriously believe accused guilty, is erroneous.—People v. Ferry, 84 Cal. 35, 24 Pac. 33.

[r] Instruction on reasonble doubt upheld. People v. Choy Ah Sing, 84 Cal. 278, 24 Pac. 379.

[s] Instruction on reasonable doubt criticised but sustained.—People v. Chun Heong, 86 Cal. 332, 24 Pac. 1021.

[t] It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself."—(1890) People v. Bemmerly, 87 Cal. 117, 25 Pac. 266; (1891) People v. Wohlfrom, 26 Pac. 236.

[u] A statement, in an instruction, that if, on full consideration of all the evidence, you are "fairly and clearly satisfied" of defendant's guilt, is equivalent to saying that the jury must be "entirely satisfied."—People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082.

[v] In order to convict defendant charged with crime, facts proven must not only be consistent with the hypothesis of his guilt, but inconsistent with any reasonable hypothesis of his innocence; and an instruction to the jury upon the subject of reasonable doubt, after telling the jury that a mere preponderance of evidence was not sufficient that "on the other hand it is not required that the inculpatory facts shall be incompatible with the innocence of the accused," is erroneous.—People v. Gosset, 93 Cal. 641, 29 Pac. 246.

[w] "If one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore, if you have any reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would be thereby created, and you should give the defendant the benefit of the doubt, and acquit

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him," states the law correctly.—People v. Dolan, 96 Cal. 315, 31 Pac. 107.

[x] An instruction to the jury that "their opinion of the guilt of the defendant, based upon the evidence in this case, must nearly approach absolute certainty; that is, a condition of their minds so perfect, complete, and unconditional as to exclude the possibility of a doubt"—is properly refused, as belief beyond a reasonable doubt of the guilt of the accused is alone required.—People v. Smith, 105 Cal. 676, 39 Pac. 38.

[y] Instruction that if jury believed from evidence beyond reasonable doubt that, at time and place alleged in indictment, defendant was a deputy county assessor as alleged in indictment, and that, as such deputy county assessor, he collected from the persons named in indictment sum for personal property tax therein alleged, and that he did not pay over said money to assessor of county, but that he fraudulently appropriated same or any part thereof to his own use, they should find defendant guilty as charged, does not pass upon the weight of the evidence or invade the province of the jury, and sufficiently states the guilty intent in the language of the statute, and does not omit to state that the facts must be found by the jury beyond a reasonable doubt.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[z] Court should not depart in its charge from the common and usual instruction upon the subject of reasonable doubt.—People v. Webster, 111 Cal. 381, 43 Pac. 1114.

[aa] A correct instruction upon subject of reasonable doubt is not rendered erroneous or misleading by adding thereto the sentence, "juror is not at liberty to disbelieve as a juror what he believes as a man."—People v. Worden, 113 Cal. 569, 45 Pac. 844.

[bb] The jury should not be debarred by an instruction from considering evidence of the death of the person whose signature was claimed to be forged, together with all of the evidence in the case, because the death might not have been proved to their satisfaction beyond a reasonable doubt; but if the jury believed from the evidence that the defendant was not guilty unless it were proved that he was dead and that defendant knew of his death, then it would be incumbent on the prosecution to establish each of those facts beyond a reasonable doubt.—People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[cc] An instruction based upon evidence of the defendant's that the draft described in the information was genuine, to the effect that he is not required to establish that fact beyond a reasonable doubt, or by a preponderance of evidence, but that if the evidence is such as to create a reasonable doubt as to whether the signature to the alleged draft is a forgery, the jury should give defendant the benefit of the doubt, and find him not guilty, should be given. People v. Sanders, 114 Cal. 216, 46 Pac. 153.

[dd] It is error to refuse an instruction requested by the defendant defining what is a reasonable doubt in the language adopted by Chief Justice Shaw in the Webster case, and approved by this court; and it is also error to instruct the jury that a reasonable doubt must be based upon common sense.—People v. Paulsell, 115 Cal. 6, 46 Pac. 734.

[ee] A charge on reasonable doubt, stating that "the doubt must be supported by reason, and not by mere conjecture and idle supposition, irrespective of evidence," is not objectionable.—People v. Ross, 115 Cal. 233, 46 Pac. 1059.

[ff] Instruction on reasonable doubt upheld. People v. White, 116 Cal. 19, 47 Pac. 771.

[gg] Where the ordinary definition of reasonable doubt is correctly given, the omission to tell the jury that the guilt of the defendant should be inconsistent with every other rational hypothesis is not erroneous, in the absence of a request that it be given.—People v. Brittan, 118 Cal. 409, 50 Pac. 664.

[hh] Where a request for instructions as to reasonable doubt contained a clause giving defendant the benefit of any doubt created by argument of counsel, such clause was properly eliminated.—People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

[ii] It is not reversible error to define a "reasonable" doubt as a "fair" doubt.—People v. Hubert, 119 Cal. 216, 16 Am. St. Rep. 72-n, 51 Pac. 329.

[jj] There is no error in instructing jury that after weighing evidence they must decide according to their consciences.—People v. Hubert, 119 Cal. 224, 16 Am. St. Rep. 72-n, 51 Pac. 329.

[kk] Defendant requested an instruction that: "Those facts . . . . must be established in your minds to a moral certainty, and beyond a reasonable doubt; that is, it must entirely satisfy you of the guilt of defendant, before you can convict. If you are not entirely satisfied, you should acquit him." The court gave it as requested, except that it struck out the word "entirely" in both places. Held no error.—People v. Kaiser, 119 Cal. 456, 51 Pac. 702.

[ll] Chief Justice Shaw's definition of reasonable doubt approved.—People v. Barthleman, 120 Cal. 13, 52 Pac. 112.

[mm] It was proper to refuse an instruction that if one chain of circumstances had two opposing conclusions, one pointing to the guilt, the other to the innocence, of defendant, and the jury have any reasonable doubt as to which of such conclusions the chain of circumstances leads, a reasonable doubt is thereby created, and defendant must be acquitted.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[nn] No injury can result from the court changing an instruction that the jury must be convinced of the guilt of defendant beyond "all" reasonable doubt, to "a" reasonable doubt.—People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[oo] It is not error for the court to read forms of verdict to the jury, nor in a murder trial to read first the form for murder in the first degree.—People v. Chaves, 122 Cal. 134, 54 Pac. 596.

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[pp] On a criminal trial, defendant was entitled to an instruction that "if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror .... not to vote for a verdict of 'guilty,' nor to be influenced into voting for the single reason that a majority of the jury should be in favor of a verdict of 'guilty.'" Judgment (1898) 51 Pac. 945, reversed.—People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[qq] Where an instruction on the law of reasonable doubt contains a full statement of the law, a statement in the instruction in form, "You are instructed that the doubt which acquits a defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned, and no other," is not objectionable.—People v. Winters, 125 Cal. 325, 57 Pac. 1067,

[rr] An instruction that, "in case of a reasonable doubt whether defendant's guilt is satisfactorily shown, he is entitled to an acquittal," shows no error.—People v. Wynn, 133 Cal. 72, 65 Pac. 126.

[ss] An instruction that "if, after careful and impartial consideration of all the evidence, the jury can say and feel that they are morally convinced of the defendant's guilt, and are fully satisfied of the truth of the charge, that then they are convinced beyond a reasonable doubt, and the verdict should be conviction," is not a sound legal instruction.—People v. Schoedde, 126 Cal. 373, 58 Pac. 859.

[tt] Where instructions repeatedly stated that the defendant must be acquitted if the jury had a reasonable doubt of his guilt, or of a single fact necessary to establish his guilt, an instruction that the jury must be "satisfied" of the truth of a certain fact presented in defense was not reversible error.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

[uu] It was not error to refuse an instruction that defendant could not be convicted unless each of the jury was satisfied from the evidence that he was guilty beyond all reasonable doubt, and in determining such question it was the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinons of others.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[vv] Instruction as to reasonable doubt which complies in substance with the definition thereof laid down by this court is not objectionable.—People v. Davis, 135 Cal. 162, 67 Pac. 59.

[ww] Where the court, in a prosecution for robbery, in charging the jury, defined a reasonable doubt as "that state of the case which, after the entire comparison and consideration of all the evidence in the cause, leaves the minds of the jurors," etc., an objection to the instruction on the ground that a reasonable doubt obviously is not a "state of the case," but rather a condition of the mind, is untenable.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[xx] An instruction concerning intent, as an element in the commission of crime, is not objectionable because it omits to state that a conclusion adverse to defendant must be one that does not admit of a reasonable doubt where the jury were elsewhere fully instructed as to the doctrine of reasonable doubt.—People v. Gilmore, 53 Pac. 806.

FOR AUTHORITIES FROM OTHER STATES:

Reasonable doubt, what is and instructions concerning: 48 Am. St. Rep. 566, note. See, also, 12 Cyc. 622-627; 14 Cent. Dig., cols. 2693-2726, §§ 1904-1922.

§ 429. —— Moral Certainty.

[a] The charge was that, "before conviction, the persuasion of guilt produced by the evidence ought to amount to almost a certainty, or such a moral certainty as convinces the minds of the jury as reasonable men." Held not erroneous.—People v. Beck, 58 Cal. 212.

[b] Where one is entitled to a charge that certain facts must be established to a moral certainty, he cannot demand a charge that the facts must be established to an absolute moral certainty.—People v. Davis, 64 Cal. 440, 1 Pac. 889.

[c] Instruction, "If from evidence you believe" need not add "to a moral certainty" unless requested.—People v. Sheldon, 68 Cal. 438, 9 Pac. 457.

[d] There was no error in refusing an instruction that the jury must return a verdict of not guilty, unless convinced to an "absolute moral certainty" of defendant's guilt.—People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403.

[e] An instruction that moral certainty is that degree of proof which the law requires of moral evidence, and is described as a state of impression produced by facts in which a reasonable mind feels coercion or necessity to act in accordance therewith, is not error.—People v. Burns, 138 Cal. 159, 70 Pac. 1087, 60 L. R. A. 270.

[f] Instruction defining moral certainty criticised.—People v. Lee Fook, 141 Cal. 548, 549, 75 Pac. 188.

§ 430. Law Applicable to Case.

[a] Judge is not bound to instruct on history, object, or purpose of the law. He does his duty by saying what the law is, without an exposition of its reasons.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

[b] Under section 1126, Penal Code, it is not error for court to charge that jury "should receive the law as I state it to be, notwithstanding you may firmly believe that I am wrong, and that law is or should be otherwise." People v. Worden, 113 Cal. 569, 45 Pac. 844.

[c] Refusal of an instruction stating the object of the law in permitting persons charged with crime to testify held not error.—People v. Hill (Cal. App.), 82 Pac. 398.

[d] On a trial for murder, where the killing is admitted, it is not error for the court to read to the jury section 1105 of the Penal Code, placing the burden of proof in such case

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on the defendant, where the jury is properly instructed as to the measure of proof required. People v. Richards (Cal. App.), 82 Pac. 691.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 613; 14 Cent. Dig., cols. 2540-2548, §§ 1803-1811.

§ 431. Grade of Offense.

[a] Where the trial of an indictment charging both burglary and grand larceny is conducted on the theory that the defendant is on trial for burglary, it is erroneous for the court to recall the jury, after they have retired, and charge them that the indictment covers two offenses, burglary and grand larceny; that burglary is the higher and includes the latter; and that they could find a verdict of guilty of grand larceny.—People v. Garnett, 29 Cal. 622.

[b] It is proper to refuse an instruction on a lower offense where the evidence tends to prove only the greater.—People v. Turley, 50 Cal. 469; People v. Wright, 93 Cal. 564, 29 Pac. 240.

[c] Refusal to instruct that jury may render verdict for simple assault is proper where evidence shows that, if guilty at all, accused is guilty of higher offense.—People v. Madden, 76 Cal. 523, 18 Pac. 402.

[d] Upon trial of defendant charged with an assault with intent to commit robbery, it is not error for the court to refuse to instruct the jury "that under the charge they might find him guilty of simple assault," where the evidence tends to show that he was either guilty of the crime charged or of no offense at all.—People v. Barry, 90 Cal. 41, 27 Pac. 62.

[e] Court should inform jury of all offenses which are necessarily included in offense charged.—People v. Church, 116 Cal. 303, 48 Pac. 125.

[f] Under information charging assault with intent to commit mayhem, court shall instruct jury that defendant may be found guilty of simple assault, and, where court has omitted to give an instruction to that effect of its own motion, it is error for the court to refuse so to instruct the jury when asked to do so by counsel for the defendant.—People v. Demasters, 105 Cal. 669, 39 Pac. 35.

[g] Where crime is rape or nothing, court need not instruct on lesser offenses included in charge.—People v. Keith, 141 Cal. 689, 75 Pac. 304.

[h] When evidence is such that if defendant is guilty at all he is guilty of greater offense, instructions on lesser offense need not be given. People v. Stevens, 141 Cal. 491, 75 Pac. 62.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 639-641; 14 Cent. Dig., cols. 2727-2732, §§ 1923-1927.

§ 432. Punishment.

[a] There is no error, in a trial for murder, in giving section 37 of the act concerning crimes and punishments as an instruction to the jury, where the language of the statute is used.—People v. Henderson, 28 Cal. 465.

[b] Court should not, in charging on degrees of crime, give punishment which court would be bound to impose for each.—People v. Dice, 120 Cal. 202, 52 Pac. 477.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 641, 642; 14 Cent. Dig., cols. 2733-2737, §§ 1928-1934.

§ 433. Admonishing Jury on Separations.

[a] Court should always admonish jury on their separations occurring at adjournments and recess during trial.—People v. Thompson, 84 Cal. 606, 24 Pac. 384.

§ 434. Manner of Arriving at Verdict.

[a] The court should direct the jury to return their verdict in proper form.—People v. Ah Gow, 53 Cal. 627.

[b] Where counsel has read from cases of convictions of innocent persons on circumstantial evidence, the court may properly caution the jury against attaching too much importance to such cases.—People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347.

[c] Direction as to form of verdict, held not erroneous.—People v. Lewis, 64 Cal. 401, 1 Pac. 490.

[d] Right of juror to refuse to concur in a verdict unsatisfactory to him is a matter of such common knowledge that it is not error to refuse to instruct jurors as to such right.—People v. Hill, 116 Cal. 569, 48 Pac. 711.

[e] It is not proper for court to instruct jury as to ways and methods by which they must exercise their power to weigh testimony of witnesses.—People v. Newcomer, 118 Cal. 269, 50 Pac. 405.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 643, 644; 14 Cent. Dig., cols. 2738-2745, §§ 1938-1946.

§ 435. Definition of Terms Employed.

[a] Instructions should define legal or statutory terms employed.—People v. Byrnes, 30 Cal. 207.

[b] A defendant is entitled to have a definition of corroborative evidence given the jury, though they are instructed, in the language of Penal Code, section 1111, that evidence of an accomplice is not sufficient to convict, unless he is corroborated by other evidence, which in itself, and without his testimony, tends to convict defendant of the commission of the crime. People v. Sternberg, 111 Cal. 11, 43 Pac. 201.

[c] On a trial for arson, an instruction that "malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive," is correct; Penal Code, section 7, subdivision 4, providing that "the words 'malice'

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and 'maliciously' import a wish to vex, annoy or injure another person, or an intent to do a wrongful act.''—People v. Daniels, 34 Pac. 233.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 613; 14 Cent. Dig., cols. 2546-2548, §§ 1808-1810.

§ 436. Oral Instructions.

[a] Giving of oral instructions to a jury, in a criminal case, without consent of defendant, is error.—People v. Beeler, 6 Cal. 246; People v. Payne, 8 Cal. 341; People v. Demint, 8 Cal. 423; People v. Ah Fong, 12 Cal. 345; People v. Woppner, 14 Cal. 437; People v. Trim, 37 Cal. 274; People v. Prospero, 44 Cal. 186; People v. Max, 45 Cal. 254.

[b] Section 1 of the act of 1855, requiring instructions to be written amendatory to the act regulating criminal proceedings, is mandatory and not directory.—People v. Beeler, 6 Cal. 246.

[c] Verbal modification of written instructions to jury in criminal cases is erroneous.—People v. Payne, 8 Cal. 341.

[d] A jury, in a murder case, returned a general verdict of guilty as charged in the indictment; whereupon the court directed them orally to return and "to find" in what degree. Held, that this was not a charge which was required to be in writing.—People v. Bonney, 19 Cal. 426.

[e] The court may correct the error of giving an oral charge to the jury by withdrawing the instructions as orally given, and afterward reducing them to writing, and then reading them, with the direction to disregard those first given.—People v. Garcia, 25 Cal. 531.

[f] It is error to give oral instructions to the jury, in a criminal case, without the consent of the defendant, although he is present and does not object.—People v. Chares, 26 Cal. 78.

[g] Court may, by express consent of defendant, or by the mutual consent of the parties, charge jury orally.—People v. Kearney, 43 Cal. 383.

[h] Section 1093, Penal Code, requiring reporters to take down charge if not given in writing, is mandatory.—People v. Hersey, 53 Cal. 575.

[i] Oral instructions may be given if taken down by reporter.—People v. Ferris, 56 Cal. 442.

[j] In giving instruction, court read certain sections of Penal Code, and designated them by their numbers only. Held, to be compliance with law requiring instructions to be in writing.—People v. Mortier, 58 Cal. 262.

[k] Giving oral instructions to jury, which are not reduced to writing, either by the judge or any other person, nor taken down by the shorthand reporter, is error.—People v. Carrillo, 70 Cal. 643, 11 Pac. 840.

[l] Oral charge taken down by stenographer is equivalent to written charge.—People v. Curtis, 76 Cal. 59, 17 Pac. 941.

[m] Giving of oral charge is proper.—People v. Johnson, 88 Cal. 175, 25 Pac. 1116.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2746-2750, §§ 1948-1952.

§ 437. Formal Requisites of Instructions.

[a] If judge in his charge to jury undertakes to state a portion of testimony, the safer way is to recite language of witness as taken down by the reporter, or in judge's notes; but when the language of the district judge is in substance and effect a repetition of the testimony, the defendant cannot complain.—People v. Doyell, 48 Cal. 85.

[b] Instruction which goes to the whole case must be broad enough to cover all essential facts.—People v. Smallman, 55 Cal. 191, 209.

[c] It is proper to instruct that case must be decided by reference to evidence bearing upon the issues, and that it is of no consequence whether defendant is married or single.—People v. Young, 65 Cal. 225, 3 Pac. 813.

[d] In stating testimony court should be careful to give very words of witnesses or their substance.—People v. Phillips, 70 Cal. 68, 11 Pac. 493.

[e] Mere grammatical errors in charge otherwise correct will not vitiate it if not thereby rendered misleading.—People v. Alsemi, 85 Cal. 435, 24 Pac. 810.

[f] Practice of giving charge in nature of a hypothetical question, embracing practically prosecution's theory of case, and including a large portion of evidence, is not to be commended.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[g] Charge to the jury should be a plain statement of the law bearing upon the facts of the case, and should be so fair, impersonal and well balanced that the jurors will be unable to deduce therefrom the opinion of the judge as to the guilt or innocence of the accused.—People v. Stanton, 106 Cal. 139, 39 Pac. 525.

[h] Correct instruction which addresses itself to a theory permissible under the evidence should be given.—People v. Hecker, 109 Cal. 451, 42 Pac. 307.

[i] From an instruction asked, "You may believe as men that certain facts exist," but as jurors you must act only upon evidence introduced, etc., it was proper to strike the quoted words, since to have left them in would have made the charge confusing.—People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

[j] It is not reversible error to use the word "testimony" instead of "evidence" in instructing a jury.—People v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72-n, 51 Pac. 329.

[k] An instruction to the effect that the mere possession of stolen goods by the defendant

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is not sufficient of itself alone to justify his conviction, but that "if there is any other evidence tending to show guilt, taken in connection with the possession of the stolen property, the rule is different," though concluding with an inapt and somewhat ambiguous expression, would be naturally understood by the jury as importing in its conclusion that there might be other evidence which, taken in connection with the circumstance of the possession of stolen property, would be sufficient to convict; and where the charge to the jury was on the whole correct, and favorable to the defendant, the inapt expression, "the rule is different," could not have influenced the jury prejudicially. People v. Childs, 127 Cal. 363, 59 Pac. 768.

[l] Each sentence of a charge to the jury in a criminal case need not contain all the conditions and limitations to be gathered from the entire text.—People v. Neber, 125 Cal. 560, 58 Pac. 133.

[m] Where the court marked one of defendant's requested instructions, "Not given; given in instruction 37," and drew several lines across the instruction, and afterward erased what he had written, except the word "Given," and the instruction went to the jury in that condition, after being read to them as a part of the charge, the defendant could not complain.—People v. Shears, 133 Cal. 154, 65 Pac. 295.

[n] Where charge, as a whole, is correct and clear, the fact that a selected passage may state a proposition without at the same time and in the immediate connection stating the exceptions or qualifications to which it is subject, and which appear elsewhere in the charge, does not render the charge erroneous.—People v. Meadenhall, 135 Cal. 344, 67 Pac. 325.

[o] The word "claim," in an instruction on a trial for murder, following the statement that defendant admitted the killing, and excused himself on the ground of self-defense; that the court would give "a number of instructions based on this claim," was not prejudicial to defendant.—People v. Glover, 141 Cal. 233, 74 Pac. 745.

[p] An instruction in a criminal prosecution defining "alibi," and stating that accused was not required to prove the defense beyond a reasonable doubt, or even a preponderance of the evidence, but was entitled to acquittal if the evidence on that point raised a reasonable doubt, was not erroneous, as discrediting a witness, because of the use of the word "attempt" in the statement that accused's attempt to prove an alibi did not shift the burden of proof.—People v. Lang, 142 Cal. 482, 76 Pac. 232.

[q] The court should not charge in the disjunctive that a defendant is guilty if he "aided, abetted, or assisted" any other person to commit the crime, but such instruction is not cause for reversal of a conviction.—People v. Dole, 51 Pac. 945.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 645; 14 Cent. Dig., col. 2751, § 1958.

§ 438. Repetition.

[a] Court is not bound to state the law to jury more than once.—People v. Hong Ah Duck, 61 Cal. 387.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2788-2790, § 1991.

§ 439. Argumentativeness.

[a] Argumentative instructions are properly refused.—People v. McNamara, 94 Cal. 509, 29 Pac. 953.

[b] Charge should not be argumentative, or give a résumé of the evidence, or encroach upon the right of the jury by passing upon matters of fact. The judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts. People v. Choynski, 95 Cal. 640, 30 Pac. 791.

[c] An instruction that "it is better that a hundred guilty persons escape punishment than that one who is innocent be punished" is uncalled for in a murder case.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

[d] In a criminal prosecution, an instruction that the jury, in weighing the evidence to determine whether there was a reasonable doubt as to defendant's guilt, were entitled to consider that innocent men had been convicted, together with the danger of convicting an innocent man, was properly refused, such proposition being permissible in argument only.—People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

[e] Accused requested an instruction prefaced with the maxim that "it is better that many guilty persons should escape than one innocent person should suffer," and followed by a statement of the danger of "destroying liberty upon evidence that does not produce conviction," and that "where there is a reasonable doubt as to the defendant's guilt the jury have a right to consider that innocent men have been convicted." Held, objectionable as argumentative and an invasion of the province of the jury.—People v. Nunley, 142 Cal. 105, 441, 75 Pac. 676.

[f] Argumentative instructions held properly refused.—People v. Trebilcox (Cal. Sup.), 86 Pac. 648.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 647; 14 Cent. Dig., cols. 2751-2754, §§ 1959, 1960.

§ 440. Quoting Authorities and Statutes.

[a] In instructions, sections of code may be identified otherwise than by the numbers.—People v. Lewis, 64 Cal. 401, 1 Pac. 490.

[b] Practice of reading opinions in other cases to the jury as part of charge of court in a criminal case is a dangerous one, and is advised against. But where the evidence does not appear in the record, and there is nothing to show whether the defendant was benefited or prejudiced by such practice, the judgment will

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not be reversed therefor.—People v. McNabb, 79 Cal. 419, 21 Pac. 843.

[c] The method of stating a rule in a charge of the jury as having been held in a cited decision of the highest court of another state is not to be commended.—People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[d] It is better to use words of statute in charge when court is endeavoring to state principle announced in statute.—People v. Newcomer, 118 Cal. 269, 271, 50 Pac. 405.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., col. 2548, § 1811.

§ 441. Ambiguity.

[a] In a trial for murder, an instruction was asked, "that if defendant believed decedent to have seduced his wife, and such belief was the result of deprivation of the reasoning faculties, and also believed that he would be justified in shooting decedent, he is entitled to such verdict as will transfer him from the category of sane to insane criminals." The same instruction appeared to have been substantially given before, and this was accordingly refused, whereupon defendant sought a reversal of judgment by reason of such refusal. Held, that the instruction asked was so ambiguous and obscure as, under the circumstances, to justify the refusal.—People v. Hobson, 17 Cal. 424.

[b] Instruction which is so ambiguous that conclusions clearly prejudicial to the defendant may be drawn therefrom by the jury is erroneous.—People v. Maxwell, 24 Cal. 14.

[c] In a trial for robbery, defendants asked the court to instruct the jury that "any fact in favor of a defendant is sufficiently established when proven by a preponderance of evidence, and even though as to such fact the jury have some doubt if it has been proven by a preponderance of evidence, they must acquit." Held, that the instruction asked for was too obscure to warrant a reversal for its refusal.—People v. Carroll, 92 Cal. 568, 28 Pac. 600.

[d] An instruction that, if the jury believed that "such mental difficulty" existed as would preclude the exercise of malice, they must find defendant not guilty was properly refused, as obscure and uncertain.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

§ 442. Inconsistency or Contradiction.

[a] When one part of an instruction is repugnant to another part, the instruction is erroneous.—People v. Phipps, 39 Cal. 326.

[b] Where a charge to a jury is contradictory and likely to confuse, a conviction should be set aside.—People v. Messersmith, 57 Cal. 575.

[c] Instructions herein held contradictory.—People v. Pearne, 118 Cal. 158, 159, 50 Pac. 376.

[d] In a prosecution for homicide, instructions held not conflicting.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 649; 14 Cent. Dig., cols. 2754-2762, §§ 1961-1968.

§ 443. Confused or Misleading Instructions.

[a] On prosecution for homicide, charge as to intent of defendant held not objectionable as argumentative, misleading, or suggestive.—People v. McRoberts, 1 Cal. App. 25, 81 Pac. 734.

[b] Charge which requires explanation or qualification, or which has a tendency to mislead and confuse the jury, should be refused. People v. Maxwell, 24 Cal. 14; People v. Best, 39 Cal. 690; People v. Strange, 61 Cal. 496.

[c] Instruction quoted in opinion held misleading.—People v. Edson, 68 Cal. 550, 10 Pac. 192.

[d] Misleading and confusing instructions are properly refused.—People v. Lee Gam, 69 Cal. 555, 11 Pac. 183.

[e] On the trial of an indictment, a charge as follows: "There is a proposition of law which may or may not be involved in this case, as you determine the facts, but it is eminently proper that I should give it to you, and that is," etc., is not misleading, as leaving to the jury to say whether or not the rule of law as given was applicable to the facts of the case in hand.—People v. Morton, 72 Cal. 62, 13 Pac. 150.

[f] Charge held not misleading.—People v. Huff, 72 Cal. 119, 13 Pac. 168; People v. Ross, 77 Cal. 417, 19 Pac. 691.

[h] On an indictment for robbery, the only witnesses for the state testified that while one of them was paying money to the other, defendant grabbed it and ran away. Witnesses for defendant testified that at the time of the alleged robbery he was sick and confined to his bed. The court charged that there might be "another corroborating circumstance in the evidence of flight," and that flight was "a corroborating circumstance which with other evidence, might be sufficient to justify a verdict against defendant." Held, that this was misleading, as the witnesses were not corroborated by evidence of defendant's flight, because no other witness than they testified to his flight.—People v. Hong Tong, 85 Cal. 171, 24 Pac. 726.

[i] A charge that accused is presumed to be innocent until the contrary is proved, and, in case of reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal, is not confused and contradictory.—People v. Chaves, 122 Cal. 134, 54 Pac. 596.

[j] Where the court instructed on the subject of reasonable doubt, and the principles applicable to the case, and that the jury should bring their intelligence to the consideration of the case, and let their common sense and best judgment control in its determination, it was not prejudicial to defendant, as giving the jury the impression that they could disregard the instructions previously given.—People v. Kelly, 132 Cal. 430, 64 Pac. 563.

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[l] In a criminal prosecution, an instruction: "Moral certainty is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it," is defective as confusing. People v. Huntington, 138 Cal. 261, 70 Pac. 284.

[m] Instructions should be so formulated as to obviate danger of law being misunderstood. People v. Glover, 141 Cal. 239, 74 Pac. 745.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 647-649; 14 Cent. Dig., cols. 2754-2762, §§ 1961-1968.

§ 444. Singling Out Particular Facts.

[a] It is not error to refuse an instruction which singles out, and gives prominence to, certain portions of the evidence.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[b] In a trial for murder, where evidence has been given to show ill-will between defendant and deceased, and threats of the former against the latter, it is not error to call the attention of the jury to such evidence, where the evident purpose is to warn them against giving much importance to the same.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[c] In a prosecution for rape, an instruction that prosecutrix's prompt complaint of the wrong is original evidence, and may be considered in corroboration of her other testimony, is not objectionable as singling out the testimony of a particular witness for comment.—People v. Keith, 141 Cal. 686, 75 Pac. 304.

[d] In a prosecution for rape, defendant requested instructions that he was a competent witness, and the jury were as much bound to consider his evidence as that of any other witness, and to give it all the weight they believed it entitled to; and also that, if from all the testimony, including defendant's, there remained a probability of his innocence, it was sufficient to raise a reasonable doubt, and entitled him to an acquittal. Held, that as these instructions singled out the testimony of a particular witness for comment, it was not error to refuse them.—People v. Keith, 141 Cal. 686, 75 Pac. 304.

[e] An instruction isolating a single item of evidence, and telling the jury that the fact alone of its admission was insufficient to enable it to draw conclusions in connection with other facts as to the facts it tended to establish, was error.—People v. Reed, 52 Pac. 835.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 649; 14 Cent. Dig., cols. 2762-2767, §§ 1969-1973.

§ 445. Appeals to Prejudice.

[a] In a trial for murder, it is improper for the judge, in his charge to the jury, to speak of the deceased as "the victim."—People v. Williams, 17 Cal. 142.

[b] In a trial for murder, the judge spoke in his charge of a robbery, in which it was alleged the defendant had been engaged, as an outrage. Held, that the defendant could not have been prejudiced thereby.—People v. Pool, 27 Cal. 572.

[c] Where the court, after charging in strong language as to the presumptions surrounding defendant, and the certainty of proof required, calls the jury's attention to the fact that the law should be fearlessly administered, and that, if they are satisfied beyond a reasonable doubt of defendant's guilt, they will be derelict in duty if they fail to convict, there is no prejudice, but merely bad taste.—People v. Bowers, 18 Pac. 660.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 650, 651; 14 Cent. Dig., cols. 2767-2769, §§ 1974-1978.

§ 446. Abstract Instructions and Instructions Abstractly Correct.

[a] An instruction that evidence of defendant's cohabitation with M. prior to his marriage with N. is not sufficient to warrant a finding that defendant was ever married to M. may be refused, where there is much other evidence tending to show such marriage, though the instruction is true as an abstract proposition.—People v. Hartman, 130 Cal. 487, 62 Pac. 823.

[b] A charge that the plea of insanity is sometimes resorted to where aggravated crimes have been committed under circumstances which render hopeless all other means of evading punishment, and while such proof, when satisfactorily established, should be viewed as a full and complete defense, yet it should be examined into with great care, while not prejudicial to defendant, is purely abstract, and should not have been given.—People v. Methever, 132 Cal. 326, 64 Pac. 481.

[c] Where, on a trial for murder in the first degree, the prosecution claims that accused shot and killed decedent, instructions containing statements that it is no offense for one to go and see a fist fight or a crime committed are properly refused.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[d] The refusal to give requested instructions containing abstract propositions of law which have no bearing on the crime charged is not error.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[e] The refusal to give instructions on mere abstract propositions having no relation to the facts of the case is not error.—People v. Donnolly, 143 Cal. 394, 77 Pac. 177.

[f] In a prosecution for homicide, an instruction that the mere possession of any article, etc., was not of itself sufficient to convict

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accused held properly refused as abstract.—People v. Weber (Cal. Sup.), 86 Pac. 671.

[g] Requests to charge in a criminal case, based on a suppositious state of facts, to the existence of which there was no evidence, held properly refused.—People v. Trebilcox (Cal. Sup.), 86 Pac. 684.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 651; 14 Cent. Dig., cols. 2769-2772, § 1979.

§ 447. Necessity that Instructions Conform to and be Sustained by Evidence.

[a] Instruction based upon facts not in evidence is erroneous.—People v. Roberts, 6 Cal. 214.

[b] A charge which is abstract, and not applicable to the evidence, is properly refused.—People v. Hurley, 8 Cal. 390; People v. Sanchez, 24 Cal. 17; People v. Kelly, 46 Cal. 356; People v. Murphy, 47 Cal. 103; People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[c] No instruction should be given which is not predicated upon some theory logically deducible from at least some portion of the testimony.—People v. Sanchez, 24 Cal. 17.

[d] Refusal of instructions is not error where they are not required by any part of the testimony, or founded thereon.—People v. Juarez, 28 Cal. 380.

[e] If there is no conflict in testimony as to the venue of crime for which defendant is on trial, instructions upon the subject are out of place.—People v. Williams, 32 Cal. 280.

[f] In a prosecution for homicide where the fact of killing is admitted by the defendant, it is not error to refuse an instruction on the question of reasonable doubt, framed so broadly as to include the fact of the killing, as such an instruction would be misleading in that it would tend to distract the minds of the jury from the true points of the controversy.—People v. Williams, 32 Cal. 280.

[g] Although the judge, in charging, presents facts hypothetically, and does not assume their existence, yet, unless there is evidence tending to establish the circumstances recited as possible facts, the charge is erroneous.—People v. Bird, 60 Cal. 7.

[h] Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as an hypothesis in the theory of the prosecution, and an instruction based upon such a theory becomes irrelevant and immaterial. There was nothing in the case to warrant such an instruction, and therefore it was proper for the court to refuse it.—People v. Gilbert, 60 Cal. 108.

[i] Instruction not warranted by evidence is properly refused.—People v. Lee Gam, 69 Cal. 555, 11 Pac. 183.

[j] Court should not give instruction which is not justified by any evidence.—People v. Oldham, 111 Cal. 648, 44 Pac. 312.

[k] It is error to give instruction inapplicable to case, and which assumes existence of evidence not given.—People v. Thompson, 115 Cal. 160, 46 Pac. 912.

[l] Instruction based on inadmissible evidence is erroneous.—People v. Lambert, 120 Cal. 176, 52 Pac. 307.

[m] An instruction is properly refused which is based upon a state of facts of which there is no evidence.—People v. Matthews, 126 Cal. xvii, 58 Pac. 371.

[n] Where, in a prosecution for murder, the actual existence of defendant's own danger was unquestioned, failure to impress the jury that apparent danger would have justified the homicide is not erroneous.—People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

[o] Where no dying declaration of deceased is introduced, the court will be justified in refusing an instruction that evidence of an oral declaration should be viewed with distrust where the prosecution has a written declaration in its possession.—People v. Brown, 130 Cal. 591, 62 Pac. 1072.

[p] Where a defense to a prosecution for embezzlement was insanity at the time of the offense, caused by long-continued over-indulgence in intoxicating liquors, and there was evidence tending to support it; an instruction that settled insanity, produced by such use of liquor, affected responsibility in the same way as insanity produced by any other cause, but that it must be settled insanity, and not a mere temporary condition, was not improper as misleading and inapplicable to the evidence.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[q] Where, in answer to defendant's affidavit for a continuance, counsel for the prosecution admitted that an absent witness, if present, would testify to facts set out in the affidavit of another witness, there was no error in rejecting an instruction based on the theory that the testimony of said absent witness "was conceded and admitted to be true by the prosecution."—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[r] On a trial for murder, where defendant had not testified that he saw or apprehended any danger, but only that he knew nothing of what occurred after deceased struck him until the gun was taken from him after the killing, it was proper to refuse an instruction as to a justifiable killing.—People v. Shears, 133 Cal. 154, 65 Pac. 295.

[s] Where there is no evidence in a prosecution for embezzlement to show that a certain witness for the state was an accomplice, except certain suspicious circumstances, and the case is not tried by either party on the theory that the witness was an accomplice, it is not error to refuse to instruct that if the jury believed that the witness was an accomplice there could be no conviction, unless his testimony was corroborated.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

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[t] Instruction which has no foundation in the evidence is properly refused.—(Cal. 1901) People v. Ross, 134 Cal. 256, 66 Pac. 229.

[u] Where there is no evidence in a criminal case which tends to show that a witness for the state has been offered any immunity from punishment if he testifies in such case, it is proper to refuse an instruction that if such witness was offered any such immunity it should be considered in determining the weight which should be given his testimony.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[v] A requested instruction in a prosecution for an assault with intent to murder was contained, in substance, in an instruction given; but the former was more specific, and would have been more favorable to the defendant in a case in which the evidence tended to show that defendant was too drunk at the time of the commission of the deed to know what he was doing, or was insane. Held, that refusal of the requested instruction was not erroneous, in the absence of evidence of intoxication or insanity. Judgment (1901) 63 Pac. 675, reversed.—People v. Mendenhall, 135 Cal. 344, 67 Pac. 325.

[w] Where the evidence shows that defendant approached the cart in which deceased was sitting, and he placed his gun across the shafts, the gun being uncocked, and not pointing toward the body of either of the occupants of the cart, an instruction of the court purporting to recite the facts, stating that defendant came up to the cart with a gun in his hands, and placed the muzzle close to the body of the deceased, in a position to use the same immediately with the intent to kill deceased if he did not leave the premises, is reversible error. People v. Matthai, 135 Cal. 442, 67 Pac. 694.

[x] Instructions in a criminal case without evidence to sustain them are properly denied, though abstractly correct.—People v. Morine, 138 Cal. 626, 72 Pac. 166.

[y] Where there is direct evidence that accused committed the crime charged, it is not error to refuse a charge assuming that a conviction must necessarily be based on circumstantial evidence.—People v. Clark, 145 Cal. 727, 79 Pac. 434.

[z] On a trial for assault with intent to murder the refusal to permit the jury to consider a hypothetical result, held not error.—People v. Owens (Cal. App.), 86 Pac. 980.

[aa] On a trial for assault with intent to murder, a requested instruction held properly refused under the evidence.—People v. Owens (Cal. App.), 86 Pac. 980.

[bb] On a trial for homicide, an instruction relating to self-defense held erroneous under the evidence.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

§ 448. Applicability to Case or Issues.

[a] Where, in a prosecution for murder, defendant's sole defense was that he did not commit the act, it was error to instruct that, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation or excuse devolved on him, since it was not applicable to the case.—People v. Tapia, 131 Cal. 647, 63 Pac. 1001.

[b] Reading a city ordinance prohibiting the police court clerks from accepting bail bonds outside the city hall is error in a prosecution of such a clerk for filing a false bail bond, under Penal Code, section 115, making it criminal to prosecute or offer any false or forged instrument for registration.—People v. Kelly, 133 Cal. 1, 64 Pac. 1091.

[c] Defendant in a murder prosecution, having been convicted of manslaughter on a former trial on the same information, pleaded former acquittal of murder and former jeopardy for the same offense, and the court instructed to find for defendant on such pleas. The court further instructed as to the elements of crime constituting murder in the first and murder in the second degree, and as to the distinction between these and between murder and manslaughter, and that it was for the jury to determine the grade of crime. Held, that such latter instruction was erroneous, as being outside the issues.—People v. McFarlane, 134 Cal. 618, 66 Pac. 865.

[d] Where, on a prosecution for grand larceny, there was evidence connecting defendant with the commission of the crime other than the mere fact of his presence and failure to interfere with the commission thereof, the refusal to instruct that the mere fact that one is present when a larceny is committed, and makes no attempt to prevent it, does not render him guilty of the crime, was not prejudicial error.—People v. Felix, 136 Cal. xix, 69 Pac. 220.

[e] A prosecution for murder was conducted on the theory that accused, a physician, was knowingly attempting to produce an abortion on decedent, which attempt resulted fatally, and defendant on the theory that accused was ignorant of her pregnancy, and that she died under a surgical operation, probably from the anæsthetic. Held, that it was error for the court to inject an alien issue by instructing, after evidence and argument were closed, that accused might be convicted of manslaughter, if death resulted in the course of legitimate medical treatment from an act done "without due caution or circumspection."—People v. Huntington, 138 Cal. 261, 70 Pac. 284.

[f] Where in prosecution for grand larceny, charged to have been committed by defendant stealing certain money from the prosecutor's person, the only circumstantial evidence introduced was corroborative of the direct testimony of the prosecuting witness, it was not error for the court to refuse requested instructions which assumed that the case was one of circumstantial evidence.—People v. Lonnen, 139 Cal. 634, 73 Cal. 586.

[g] Where accused was jointly indicted with another for the crime charged, it was not error to refuse a charge that the jury could not find him guilty unless they were satisfied that he committed the crime alone.—People v. Clark, 145 Cal. 727, 79 Pac. 434.

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[h] A charge that a verdict of acquittal should be rendered on a certain phase of the evidence, regardless of whatever else might be developed in the case, is properly refused.—People v. Clark, 145 Cal. 727, 79 Pac. 434.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 651-654; 14 Cent. Dig., cols. 2772-2776, §§ 1980-1984.

§ 449. Construction of Instructions.

[a] Charge must be construed in connection with the facts.—People v. Hobson, 17 Cal. 424.

[b] Practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of instructions to jury.—People v. Bruggy, 93 Cal. 476, 29 Pac. 26.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 654; 14 Cent. Dig., col. 2781, § 1988.

§ 450. Construction and Effect of Instructions as a Whole.

[a] That isolated instructions are erroneous or misleading is no ground for reversal where instructions as a whole present case properly.—People v. Cleveland, 49 Cal. 578; People v. Kennedy, 55 Cal. 201; People v. De Silvera, 59 Cal. 592; People v. Turcott, 65 Cal. 126, 3 Pac. 461; People v. Biggins, 3 Pac. 853; People v. Carleton, 4 Pac. 763; People v. Prather, 6 Pac. 315; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719; People v. Clark, 84 Cal. 573, 24 Pac. 313; People v. Anderson, 105 Cal. 32, 38 Pac. 513; People v. Wallace, 109 Cal. 611, 42 Pac. 159.

[b] A charge to a jury must be taken and considered as a whole, and it is not necessary to set out in each separate instruction all the exceptions, limitations, and conditions which are applicable, provided their reference thereto, when considered as a whole, was intelligible.—People v. Welch, 49 Cal. 174.

[c] The judge presiding at a trial for murder, the defense being insanity, instructed the jury that a tendency to commit suicide does not prove insanity. Held that, standing alone, this was error; but that, as qualified by telling the jury that, with other facts and circumstances, it was matter for their consideration, it became unobjectionable.—People v. Messersmith, 61 Cal. 246.

[d] Although, standing alone, certain instructions given to a jury may be inaccurate, yet, if taken together, they are substantially correct, and it is apparent that there could have been no misconception, no ground for reversal is shown. Each instruction may be explained and qualified by another.—People v. Morine, 61 Cal. 367.

[e] Charge of trial court must be taken together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, the appellate court will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.—People v. Hurtado, 63 Cal. 288.

[f] The sentences or separate parts of a charge should be read in connection with the context and the instructions as a whole, and, if when so read, it appears that the jury was correctly instructed the judgment will not be reversed because there is an apparent conflict between certain isolated sentences.—People v. Turcott, 65 Cal. 126.

[g] Where the court, in instructing the jury as to the meaning of the words "reasonable doubt," used some expressions which were weak and ambiguous, but others so strong and clear that the jury could not possibly have been misled, an assignment of error, based on the ambiguous portion of the charge, should not be sustained.—People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

[h] An instruction that the jury must be "satisfied" of defendant's guilt is not erroneous because it omits the words "beyond a reasonable doubt," when the whole of the instructions, taken together, clearly inform the jury that they cannot convict the defendant unless they are satisfied of his guilt beyond a reasonable doubt.—People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[i] If law is fairly stated in whole instructions, fact that one instruction is subject to criticism is immaterial.—People v. Lee Chuck, 78 Cal. 339, 20 Pac. 719.

[j] Omission of limitations from some instructions is immaterial if all instructions considered together as one charge are fair, harmonious and correct.—People v. Clark, 84 Cal. 583, 24 Pac. 313.

[k] It is sufficient that all instructions taken together state law fairly and favorably to defendant.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[l] Charge is to be construed as a whole, and is sufficient where it covers the whole case fairly and correctly, and in a manner to leave no misapprehension in the minds of the jury.—People v. Leary, 105 Cal. 486, 39 Pac. 24; People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678.

[m] Instructions to the jury must be read as a whole, and, if the entire charge fairly presents the law of the case, the judgment will not be reversed for minor and unimportant defects, or because the court refuses to repeat itself.—People v. Anderson, 105 Cal. 32, 38 Pac. 513.

[n] Instructions given are to be construed together.—People v. Hecker, 109 Cal. 451, 42 Pac. 307.

[o] The charge of the court is to be taken as a whole, and it is not necessary that each paragraph should contain all the conditions and limitations expressed in the others.—People v. Armstrong, 114 Cal. 570, 46 Pac. 611.

[p] Accused, defending on the ground of insanity, was not prejudiced by the giving of an instruction which left the condition of defendant's mind at the time of committing the assault out of consideration, where the court had,

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in other portions of the charge, repeatedly told the jury that, if accused was insane in committing the assault, he was incapable of forming the necessary intent.—People v. Burgle, 123 Cal. 303, 55 Pac. 998.

[q] Where a specific charge, taken in connection with the context, is correct, the fact that standing alone it may justify an erroneous inference is immaterial.—People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

[r] Where the court instructed as to the flight of a person immediately after "the crime has been committed with which he knows he is charged," an objection to the next sentence of the charge, that it leaves out the proposition of the knowledge of the defendant "either of the fact of the killing of the deceased, or that he (the defendant) was accused of the same," should be overruled; the whole instruction being clearly based on the condition.—People v. Lem Deo, 132 Cal. 199, 64 Pac. 265.

[s] The giving of an instruction in a criminal case which states a general proposition of law, without stating the exceptions and qualifications of such proposition in its application to the particular case, is not erroneous, if the instructions as a whole correctly state the law applicable to the case. Judgment (1901) 63 Pac. 675, reversed.—People v. Mendenhall, 135 Cal. 344, 67 Pac. 325.

[t] Instruction must be construed as a whole and with reference to other instructions on same proposition.—People v. Glover, 141 Cal. 242, 74 Pac. 745.

[u] In an instruction defining reasonable doubt accused cannot complain of the omission of a part relating to the burden of proof, where it is elsewhere fully given and repeated, and the essential feature of the definition was not destroyed or materially weakened.—People v. Nunley, 142 Cal. 105, 441, 75 Pac. 676.

[v] An instruction to the jury in a prosecution for forgery that, "if the prosecution does not show or establish by proof sufficient to convince you beyond a reasonable doubt that the defendant had no authority to sign the name" of the prosecutor, "then you must acquit the defendant," taken in connection with other instructions implying that the jury must also be satisfied as to the false character of the signature and that it was made by defendant, is not erroneous, as assuming that defendant made the signature in question.—People v. Lapique, 67 Pac. 14, judgment reversed, 69 Pac. 226.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 654; 14 Cent. Dig., cols. 2783-2788, § 1990.

§ 451. Errors Cured by Other Instructions.

[a] An instruction is not objectionable by reason of omitted elements plainly stated in other instructions.—People v. Davis, 1 Cal. App. 8, 81 Pac. 716; Id. (Cal. Sup.), 718.

[b] Where court gives erroneous instructions defining murder in the first degree, and subsequently defines the crime clearly and accurately, the error is not a sufficient ground for a new trial.—People v. Moore, 8 Cal. 90.

[c] An erroneous charge, which is not withdrawn, is not cured by a subsequent correct charge on the same point.—People v. Anderson, 44 Cal. 65; People v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Marshall, 112 Cal. 422, 44 Pac. 718.

[d] An error in refusing to give an instruction to the jury is cured if the instruction refused is thereafter substantially given in the charge to the jury.—People v. Turley, 50 Cal. 469.

[e] In a prosecution for murder, it is not ground for a reversal that instructions were given to the jury in the absence of defendant, if, subsequently, the same instructions were repeated to them during his presence.—People v. Soto, 65 Cal. 621, 4 Pac. 664.

[f] Subsequent instruction explaining inadvertent error in prior one cures that error.—People v. Williams, 75 Cal. 307, 17 Pac. 211.

[g] To charge that, if the evidence is "sufficient to satisfy the minds of the jury" that the circumstances relied on to excuse or mitigate the offense existed, they should find the defendant guilty of a simple assault, will not be held prejudicial error, as leading the jury to believe that they must find him guilty unless satisfied of those facts, where, at the end of the charge, they were instructed that they might find the defendant not guilty "in case of reasonable doubt . . . . as to the facts offered in evidence being sufficient to establish his guilt."—People v. Choy Ah Sing, 84 Cal. 276, 24 Pac. 379.

[h] Where the defense is an alibi, a charge that, while defendant's guilt must be proved beyond a reasonable doubt, he can establish any fact essential to his defense by a preponderance of evidence, if erroneous, is cured by a charge that he must be acquitted if there is a reasonable doubt of his presence at the commission of the crime.—People v. Chun Heong, 86 Cal. 329, 24 Pac. 1021.

[i] Error in charging upon matters of fact is not cured by subsequent charge that jury should utterly disregard any intimation as to testimony.—People v. Chew Sing Wing, 88 Cal. 272, 25 Pac. 1099.

[j] On a trial for burglary, the error of the court in charging that, "in every crime or public offense, there must exist a union or joint operation of act or intent or criminal negligence," is cured by a subsequent charge that the jury must believe from the evidence, beyond a reasonable doubt, that defendant entered the house with intent to commit larceny.—People v. Winters, 93 Cal. 277, 28 Pac. 946.

[k] Error of court in saying to jury that he cannot understand how they can fail to agree is not cured by his afterward saying that they are the sole judges of all questions of fact and the credibility of witnesses.—People v. Kindleberger, 100 Cal. 367, 34 Pac. 852.

[l] An instruction plainly erroneous is not cured by a correct instruction in some other

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part of the charge.—People v. Westlake, 124 Cal. 452, 57 Pac. 465.

[m] In a prosecution for theft of calves, the jury was erroneously instructed that the distinction between an accessory before the fact and a principal in case of felony had been abrogated, and all persons concerned in its commission, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals; but this was followed by a correct instruction that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid or abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed; and the jury were further instructed that the burden was on the prosecution to prove that the calves were stolen by defendant alone, or by defendant and another person or persons, who had conspired together to do so, or that they were stolen by some other person or persons, while defendant aided and abetted in stealing them. Held, that the error in the first instruction was cured.—People v. Warren, 130 Cal. 683, 63 Pac. 86.

[n] Error in an instruction that all persons who aid or abet in the commission of a crime, though not present, shall be prosecuted and punished as principals, was cured where the jury were elsewhere told that all persons who "aid and abet in the commission of a crime are principals," and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." People v. Warren, 130 Cal. 678, 63 Pac. 87.

[o] On a prosecution under Penal Code, section 507, for the embezzlement of property by a bailee, the court instructed substantially in the language of Civil Code, section 1572, which defines "fraud." Held, that though the section defines "fraud" within the meaning of the chapter relative to contracts, and had no application, there was no prejudice to defendant, the instruction being followed by one stating that the question was whether defendant intended permanently to deprive the owner of his property.—People v. Klee, 137 Cal. xix, 69 Pac. 696.

[p] On a prosecution under Penal Code, section 507, making it embezzlement for one to convert property intrusted to him as a bailee, the question whether it was error to fail to instruct that defendant must have "feloniously" intended to appropriate the property was immaterial on appeal; the jury having been instructed that the test to be applied for determining the guilt or innocence of defendant was whether he intended to permanently deprive prosecutor of his property.—People v. Klee, 137 Cal. xix, 69 Pac. 696.

[q] In a prosecution for robbery defendant pleaded insanity, and there was evidence to support such defense. After retiring, the jury returned for further instruction, and in response to questions propounded the court erroneously stated that the law of the state did not recognize transitory mania or temporary insanity, and repeated such statement in a formal instruction, which was then re-read to the jury. Held, that such error was prejudicial, and was not cured by other instructions on the subject, which, standing alone, were free from error.—People v. Ford, 138 Cal. 140, 70 Pac. 1075.

[r] On a prosecution for murder, an instruction held not erroneous, in view of the instructions on reasonable doubt.—People v. Murphy, 146 Cal. 502, 80 Pac. 709.

[s] An incorrect instruction in a criminal case held not cured by a correct one.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 656, 657; 14 Cent. Dig., cols. 2791-2801, §§ 1992-1995.

H. REQUESTS FOR INSTRUCTION.

NECESSITY FOR REQUESTS, § 452.
—— FURTHER OR MORE SPECIFIC INSTRUCTIONS, § 453.
—— CAUTIONARY INSTRUCTIONS, § 453½.
—— CHARACTER, § 454.
—— CIRCUMSTANTIAL EVIDENCE, § 455.
—— GRADE OF OFFENSE, § 456.
—— MALICE, § 457.
—— PRESUMPTION OF INNOCENCE, § 458.
—— REASONABLE DOUBT, § 459.
TIME TO MAKE REQUEST, § 460.
NECESSITY FOR WRITTEN REQUEST, § 461.
CHANGE OR MODIFICATION OF REQUESTED INSTRUCTION, § 462.
REFUSAL OF REQUESTS—DUTY OF COURT, § 463.
—— ASSIGNING REASON, § 464.
—— INSTRUCTIONS SUBSTANTIALLY INCLUDED ON THOSE GIVEN, § 465.
—— REQUESTS WHOLLY OR PARTLY ERRONEOUS, INAPPLICABLE OR MISLEADING, § 466.
NOTING DISPOSITION OF REQUEST, § 467.

§ 452. Necessity for Request.

[a] Trial court is not required to give instructions on particular points, where no request therefor is made.—People v. Haun, 44 Cal. 96; People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Marks, 72 Cal. 46, 13 Pac. 149; People v. Fice, 97 Cal. 459, 32 Pac. 531.

[b] Omissions by the court to instruct the jury "that no presumption of guilt follows from [defendant's] failure to testify in his own behalf," and to define the phrase "reasonable doubt," as used in some of the instructions, are not erroneous, where defendant's counsel did not request such instructions at the proper time.—People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[c] Error cannot be predicated on a failure to instruct on a certain point, where there was no request to instruct.—People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

[d] Omission to charge on any point is not error, where the party wishing an instruction did not ask for it.—People v. Appleton, 130 Cal. 250, 52 Pac. 582; People v. Oliveria, 127 Cal. 376, 59 Pac. 772.

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[e] Where there was evidence indicating that the defendant was drunk at the time of the commission of the offense, and no error is alleged in the instructions given on that subject, the defendant cannot object that further instructions were not given in relation thereto, in the absence of a request made therefor by the defendant.—People v. Oliveria, 127 Cal. 377, 59 Pac. 772.

[f] Under Penal Code, sections 1093, 1127, providing that the court must state all matters of law necessary for the information of the jury, and must charge on any points pertinent to the issue if requested, it was error to fail to instruct that in determining whether there was sufficient evidence of the corpus delicti the asserted confession or other evidence, which did not tend to prove the corpus delicti, but merely tended to connect defendant with the crime charged, could not be considered, though the instructions requested on such question were not correctly drawn.—People v. Tapia, 131 Cal. 647, 63 Pac. 1001.

[g] Defendant cannot object that evidence was not restricted to a particular purpose where he made no request to charge that the evidence be so restricted.—People v. Monroe, 138 Cal. 97, 70 Pac. 1072.

[h] The failure of accused's counsel to ask additional instructions did not preclude reversal for the further error in omitting to instruct that the law exacts only ordinary and reasonable care and skill on the part of a physician.—People v. Huntington, 138 Cal. 261, 70 Pac. 284.

[i] On a prosecution for robbery, where evidence was admitted as to property taken from prosecutor and found on defendant, defendant held not entitled to complain on appeal of the absence of an order limiting the effect of the evidence.—People v. Castile (Cal. App.), 86 Pac. 745.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 658-660; 14 Cent. Dig., cols. 2801-2809, §§ 1996-2004.

§ 453. —— Further or More Specific Instructions.

[a] If instruction is not sufficiently clear, defendant should ask for further instructions.—People v. De Witt, 68 Cal. 587, 10 Pac. 212.

[b] Failure to request more specific instruction waives failure to give it.—People v. Olsen, 80 Cal. 128, 22 Pac. 125.

[c] An objection that an instruction as to reasonable doubt, given by the court on its own motion, in a murder trial, "would exclude from the consideration of the jury a doubt founded upon a knowledge of natural laws inconsistent with the hypothesis contended for by the prosecution," is not available, where defendant made no request for a more specific charge, and it does not appear from the record that the prosecution contended for any hypothesis claimed to be inconsistent with any natural law, or that evidence of any natural law would have been relevant or material.—People v. Donguli, 92 Cal. 607, 28 Pac. 782.

[d] Where defendant thinks instructions are not full enough, he should request more specific one.—People v. White, 116 Cal. 19, 47 Pac. 771.

[e] Where the definition of reasonable doubt was correctly given, the omission, in that connection, to tell the jury that "the guilt of defendant should be inconsistent with every other rational hypothesis," was not error, in the absence of a request to give the language quoted.—People v. Brittan, 118 Cal. 409, 50 Pac. 664.

[f] If the instructions on self-defense given in the language of the code are not sufficiently full to satisfy defendant, he should propose proper instructions.—People v. Dobbins, 138 Cal. 694, 72 Pac. 339.

[g] In homicide, where an accomplice was defined in a charge as one who in some manner aided or assisted or participated in the criminal act, defendant, had she desired a fuller instruction on the subject, should have asked for it.—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017.

[h] In absence of any request for further instruction setting forth defendant's theory of case, an objection that such theory is omitted or not set forth with sufficient prominence is not available.—People v. Wong Chow, 4 Pac. 763.

[i] An objection to an instruction in a criminal case that it is not sufficiently full is unavailable unless a fuller instruction is requested.—People v. Weber (Cal. Sup.), 86 Pac. 671.

[j] On a prosecution for robbery, a charge defining the crime in the general terms of the statute is sufficient, in the absence of a request for an instruction more particularly charging the elements of the offense.—People v. Castile (Cal. App.), 86 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 661; 14 Cent. Dig., cols. 2809-2812, § 2005.

§ 453½. —— Cautionary Instruction.

[a] If defendant requires cautionary instruction, he should ask it.—People v. McLean, 84 Cal. 482, 24 Pac. 32.

§ 454. —— Character.

[a] In the absence of a request to charge as to the good character of defendant, the failure of the court to do so on its own motion is not reversible error.—People v. McNutt, 93 Cal. 658, 29 Pac. 243.

§ 455. —— Circumstantial Evidence.

[a] Where the trial court, in a prosecution for arson, was not requested to define circumstantial evidence to the jury, it was not

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error to omit to do so.—People v. Hiltel, 131 Cal. 577, 63 Pac. 919.

[b] Defendant in homicide, who asked for no instruction on the nature and value of circumstantial evidence, cannot complain of the court's failure to instruct thereon.—People v. Balkwell, 143 Cal. 259, 76 Pac. 1017.

§ 456. —— Grade of Offense.

[a] A defendant cannot complain of a failure to give instructions as to the right to convict for a lesser degree of the crime charged, unless such instructions are specially requested.—People v. McNutt, 93 Cal. 658, 29 Pac. 243.

[b] In a prosecution for attempt to rape, defendant, if he wishes the attention of the jury called to the lesser offense of simple assault, must request an instruction therefor.—People v. Barney, 114 Cal. 554, 47 Pac. 41.

[c] Failure to instruct on lesser or other offense included in charge is not error when there is no request for such instruction.—People v. Winthrop, 118 Cal. 91, 50 Pac. 390.

[d] Where defendant on a prosecution for grand larceny did not request an instruction that he might be convicted of petit larceny, failure to give to the jury a form of verdict permitting them to find him guilty of petit larceny was not erroneous, especially under evidence showing that defendant was guilty of larceny from the person or grand larceny if he was guilty of anything.—People v. Clark, 145 Cal. 727, 79 Pac. 434.

[e] In a prosecution for robbery, it was not error, in the absence of a request, to omit to charge that defendant, under the information, might be convicted of petit larceny.—People v. Modina, 146 Cal. 142, 79 Pac. 842.

§ 457. —— Malice.

[a] In a prosecution for murder, it is not error to fail to give to the jury the definition of malice contained in Penal Code, section 188, no special instruction having been requested.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

§ 458. —— Presumption of Innocence.

[a] Where defendant did not request an instruction that he was presumed innocent, as provided by Penal Code, section 1096, the failure of the court to charge on the subject was not erroneous, though section 1127 requires the court to instruct the jury on all matters of law necessary for their information.—People v. Matthai, 135 Cal. 442, 67 Pac. 694.

§ 459. —— Reasonable Doubt.

[a] Failure of court in its instructions to define the meaning of the words "reasonable doubt" is not erroneous, if no specific instruction upon that subject was requested by the defendant.—People v. Flynn, 73 Cal. 511; People v. Christensen, 85 Cal. 568; People v. Ahern, 93 Cal. 518, 15 Pac. 102.

[b] Where the definition of a "reasonable doubt," as given in the charge of the court, has been repeatedly approved, if a defendant wants a more satisfactory one he should ask for it.—People v. Winters, 93 Cal. 277, 28 Pac. 946.

§ 460. Time to Make Request.

[a] Courts have the right to make a rule, in criminal cases that written instructions must be handed to the court before the argument of the case commences.—People v. Sears, 18 Cal. 635.

[b] Where injustice would be done a defendant by refusing to consider instructions because not offered before the argument, as where such instructions may be necessary in consequence of the propositions or argument of the district attorney, the court should either give the instructions asked by defendant, or so explain its own as to put the law correctly before the jury.—People v. Sears, 18 Cal. 635.

[c] A rule of court requiring parties who desire instructions to be given to present them to the court before argument may be proper and beneficial as a general rule, when applied to doubtful and controverted questions of law; but rules of court are only a means to accomplish the ends of justice and may be departed from when the purposes of justice require it; and such general rule should not be allowed to prevent the court from giving an instruction upon request of the counsel of the defendant which is usually given by courts of their own motion, and a refusal to give such instruction is ground for a new trial.—People v. Demasters, 105 Cal. 669, 39 Pac. 35.

[d] The rule of court that instructions requested must be presented before argument does not apply to the instruction that "the testimony of an accomplice is to be viewed with distrust," which Code of Civil Procedure, section 2061, declares is to be given on all proper occasions.—People v. Silva, 121 Cal. 668, 54 Pac. 146.

[e] A rule of court that requested instructions must be submitted before argument should be adhered to, if no essential point has been omitted in the instructions given.—People v. Lang, 142 Cal. 482, 76 Pac. 232.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 662; 14 Cent. Dig., cols. 2813, 2814, § 2008.

§ 461. Necessity for Written Request.

[a] Rule of court requiring instructions to be handed up in writing before argument begins is proper, and is designed to give the court an opportunity to determine the correctness and propriety of the instruction, so as to prevent error and promote justice; but when

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its strict observance would defeat or impede justice, the court may suspend the rule, and it is its duty to do so.—People v. Silva, 121 Cal. 668, 54 Pac. 146.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 662; 14 Cent. Dig., col. 2813, § 2007.

§ 462. Change or Modification of Requested Instruction.

[a] Proper instruction should be given in the very words asked.—People v. Williams, 17 Cal. 142.

[b] A judge, in instructing a jury, is not required to use the very words of the counsel asking the instruction, and if he thinks that, by altering the words without altering the sense, they can be made more intelligible to the jury, he is at liberty to do so.—People v. Dodge, 30 Cal. 448; People v. Cadd, 60 Cal. 640; (1892) People v. Lemperle, 94 Cal. 45, 29 Pac. 709.

[c] Giving a charge requested by accused, with an addition to it, which does not change or modify the sense, but states a further principle germane to the point of the instruction, is not error.—People v. Kelly, 46 Cal. 355.

[d] It is not error for the court, in a criminal case, to give an instruction requested by the defendant, with an addition to it, which does not change or modify the sense, but states a further principle germane to the point of the instruction.—People v. Davis, 47 Cal. 93.

[e] The court, before giving instruction asked by the defendant, may strike therefrom a clause which is irrelevant and not connected with remainder of instruction.—People v. Cotta, 49 Cal. 166.

[f] A trial judge may, of his own motion, give a charge in explanation and modification of those requested, so as to make them conform to his own views of the law.—People v. Hall, 94 Cal. 595, 30 Pac. 7; People v. Sherman, 32 Pac. 879.

[g] On a murder trial, where there is evidence that defendant and others were together when deceased was shot, it is proper to modify an instruction that if the jury find that the evidence points as clearly to the commission of the crime by another as by defendant, and if they entertain a reasonable doubt as to defendant's guilt, they should acquit him, by adding, unless they find that such other person is the guilty party, and that defendant aided and abetted him in committing the crime.—People v. Ah Len, 98 Cal. 133, 32 Pac. 880.

[h] Proper amendments may be made to instructions asked.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[i] Amendment to instruction requested by defendant, which states law correctly, is not prejudicial to defendant, because appended to such requested instruction.—People v. Barney, 114 Cal. 554, 47 Pac. 41.

[j] Changing an instruction so as to read "a reasonable doubt" instead of "all reasonable doubt" is not assignable as error.—People v. Ashmead, 118 Cal. 508, 50 Pac. 681.

[k] Where the testimony as to the robbery was direct and not circumstantial, a requested instruction that the jury must consider that innocent persons have been convicted, and consider the danger of convicting an innocent person in weighing the testimony to determine whether there is a reasonable doubt, is not improperly modified by adding that they must also consider that guilty persons have been sometimes acquitted, and consider the danger to society of acquitting a guilty person. The instruction and the modification do not constitute propositions of the law, but merely direct the jury to consider matter of common knowledge.—People v. Sternberg, 127 Cal. 511, 59 Pac. 942.

[l] Where defendant, who was charged with murder, pleaded insanity as a defense, it was proper, in a charge respecting the responsibility of insane persons, to insert after the words "insane persons" the words "as 'insanity' is defined in these instructions."—People v. Methever, 132 Cal. 326, 64 Pac. 481.

[m] A charge that an insane person was incapable of committing crime, and that if the jury were satisfied beyond a reasonable doubt that defendant, when he killed deceased, was either a lunatic or an insane person, he should be acquitted, was properly modified by eliminating the words, "beyond a reasonable doubt."—People v. Methever, 132 Cal. 326, 64 Pac. 481.

[n] An instruction substantially covering instructions requested by defendant in a rape case that, "if the jury believe that any witness has willfully sworn falsely to any material matter, then it is your duty to scan closely and distrust the entire evidence of such witness," is not objectionable on account of the words "to scan closely."—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[o] Where defendant, in a prosecution for sending a forged telegram, submitted numerous instructions correctly announcing the law therein, none of which were directed to the question of his credibility as a witness, it was error for the court, in giving them, to add repeated modifications that "in this connection" it is the duty of the jury to consider these facts in determining the credibility of defendant as a witness.—People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

[p] Under Penal Code, sections 1093 (6), 1127, a requested instruction modified by the court becomes the court's instruction, and, if erroneous, is subject to the same exception as if given without any request.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

[q] Where accused requested that the jury be told that he was entitled to the independent judgment of every juryman, it was proper for the court to modify the instruction

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so as to read that each side was entitled to the independent judgment, etc.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 664; 14 Cent. Dig., cols. 2824-2829, §§ 2013, 2014.

§ 463. Refusal of Requests—Duty of Court.

[a] Better practice is for court never to refuse instruction asked on behalf of defendant in a criminal case, to which there is no valid objection, although the jury may have been already fully instructed on the point. A district attorney ought never to object to such instructions.—People v. Lachanais, 32 Cal. 433.

[b] It is better to give an instruction in a criminal case, which in the main states the law correctly, with modifications if required, than to refuse it, although no error may be committed in refusing it.—People v. Williams, 32 Cal. 280.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 666; 14 Cent. Dig., cols. 2831-2833, §§ 2017, 2018.

§ 464. —— Assigning Reason.

[a] If instruction be refused for reason that it has already been given, the reason of the refusal should be stated, so as not to mislead the jury.—People v. Hurley, 8 Cal. 390; People v. Ramirez, 13 Cal. 172; People v. Williams, 17 Cal. 142.

[b] When instructions are incorrect, the reason for refusing them is immaterial.—People v. Sears, 18 Cal. 635.

[c] Court need not instruct that certain instructions asked by defendant were refused because already given in other instructions.—People v. Barthleman, 120 Cal. 11, 52 Pac. 112.

[d] Jury can consider only those instructions which have been given and have no knowledge of those which have been refused.—People v. Barthleman, 120 Cal. 11, 52 Pac. 112.

§ 465. —— Instructions Substantially Included in Those Given.

[a] Error of refusing a proper instruction is not cured by the fact that it was in substance given by the court.—People v. Ramirez, 13 Cal. 172.

[b] Requested instructions, which are already substantially given and covered by the general charge, or special instructions, are properly refused.—People v. Williams, 32 Cal. 280; People v. Hope, 62 Cal. 291; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Righetti, 66 Cal. 184, 4 Pac. 1063; People v. McCoy, 71 Cal. 395, 12 Pac. 272; People v. Rogers, 71 Cal. 565, 12 Pac. 679; People v. Giancoli, 74 Cal. 642, 16 Pac. 510; People v. O'Brien, 78 Cal. 41, 20 Pac. 359; People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595; People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[c] Where the court assumed that the evidence was circumstantial, it was error to refuse to instruct the jury that, in order to convict the defendant, it was necessary, not only that all the circumstances should concur to show that he committed the crime charged, but that they should all be inconsistent with any other rational conclusion, and should exclude to a moral certainty every other hypothesis but the one of guilt, though the general charge comprehended the legal proposition contained in some of the instructions requested and refused, but not in the instructions set forth.—People v. Dick, 32 Cal. 213.

[d] Where an instruction asked has already been given substantially by the court, it is not error to refuse it; but in a criminal case, the better course is to give it.—(1866) People v. Strong, 30 Cal. 151; People v. Murray, 41 Cal. 66.

[e] When legal principle has been once announced in the instructions of the court there can be no necessity for its repetition, and there can be no error in refusing to give it in a second instruction.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

[f] Requested instructions included in general charge are properly refused.—People v. Wong Ah Foo, 69 Cal. 182, 10 Pac. 375; People v. Phillips, 70 Cal. 69, 11 Pac. 493; People v. Barthleman, 120 Cal. 10, 13, 52 Pac. 112; People v. Burns, 121 Cal. 529, 53 Pac. 1096; People v. Benc, 130 Cal. 159, 62 Pac. 404; People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People v. Castile (Cal. App.), 86 Pac. 746.

[g] Requested instructions contained in other requested instructions are properly refused.—People v. Treadwell, 69 Cal. 237, 10 Pac. 502.

[h] Instructions already given need not be repeated.—People v. Madden, 76 Cal. 522, 18 Pac. 402; People v. Doane, 77 Cal. 562, 20 Pac. 84; People v. Fine, 77 Cal. 149, 19 Pac. 269; People v. O'Brien, 78 Cal. 44, 20 Pac. 359; People v. Swalm, 80 Cal. 51, 13 Am. St. Rep. 96, 22 Pac. 67; People v. Adams, 85 Cal. 235, 24 Pac. 629; People v. Sternberg, 111 Cal. 11, 43 Pac. 201; People v. Barney, 114 Cal. 554, 47 Pac. 41; O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130; People v. Elliott, 119 Cal. 593, 51 Pac. 955; People v. Chaves, 122 Cal. 134, 54 Pac. 596; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; People v. Nunley, 142 Cal. 105, 441, 75 Pac. 676; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Donnolly, 143 Cal. 394, 77 Pac. 177; People v. Moran, 144 Cal. 48, 77 Pac. 777; People v. Eldridge, 147 Cal. 782, 82 Pac. 442; People v. Feld (Cal. Sup.), 86 Pac. 1100; People v. Fernandez (Cal. App.), 86 Pac. 899.

[i] It is proper to refuse instructions requested by the defendant upon the subject of reasonable doubt, upon the ground that they are given elsewhere, if the charge contains all

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that is correct in the instructions asked.—People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

[j] It is not necessary that the court should repeat instructions in every possible connection in which reference can be made to the degrees of the offense; but it is sufficient if such instruction is once clearly and explicitly given.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[k] It is not error to refuse a proposed instruction upon the law of self-defense, where that law has been adequately set forth in the instructions given.—People v. Roemer, 114 Cal. 51, 45 Pac. 1003.

[l] Instructions already substantially given may be refused.—People v. Durrant, 116 Cal. 222, 48 Pac. 75; People v. Elliott, 119 Cal. 594, 51 Pac. 955; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; People v. Prather, 120 Cal. 660, 53 Pac. 259 People v. Chaves, 122 Cal. 134, 54 Pac. 596; People v. Burgle, 123 Cal. 303, 55 Pac. 998; People v. Solomon, 125 Cal. xix, 58 Pac. 55; People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Bene, 130 Cal. 159, 62 Pac. 404; People v. Lem Deo, 132 Cal. 199, 64 Pac. 265; People v. Grimes, 132 Cal. 30, 64 Pac. 101; People v. Ross, 134 Cal. 256, 66 Pac. 229; People v. Amaya, 134 Cal. 531, 66 Pac. 794; People v. Mendenhall, 135 Cal. 344, 67 Pac. 325, reversing 63 Pac. 675; People v. Wardrip, 141 Cal. 236, 74 Pac. 744; People v. Keith, 141 Cal. 691, 75 Pac. 304; People v. Jailles, 146 Cal. 301, 79 Pac. 965; People v. Castile (Cal. App.), 86 Pac. 745.

[m] Where a fair and full instruction requested by the defendant as to the consideration of his testimony by the jury was given, it was not error to refuse another instruction requested by him upon the same subject, which was substantially covered by the instruction given.—People v. Holmes, 126 Cal. 462, 58 Pac. 917.

[n] On trial for perjury, an instruction was given that there must be direct testimony of at least one credible witness, directly contradictory of defendant's oath, and, in addition thereto, there must be testimony of another witness, or corroborating circumstances established by independent evidence, and of such character as to overcome defendant's oath and the presumption of innocence. Another instruction was that the additional evidence must be at least strongly corroborative of the accusing witness. Held, that it was proper to refuse an instruction that there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true, but if the corroboration does not go to that extent, defendant must be acquitted, since the former instructions were sufficient on corroboration.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[o] Where two instructions as to evidence of defendant's good character were as favorable as defendant could reasonably ask, it was not error to refuse to add a third instruction on that subject, everything stated in it being plainly implied in the other two.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[p] Where, in addition to instructions that the burden of proof was on the prosecution, and that the jury must be entirely satisfied of defendant's guilt before they could convict, an instruction was given that if, on the proof given, there was a reasonable doubt, the accused was entitled to an acquittal, and the evidence must establish the truth of the charge to a reasonable and moral certainty, it was not error to refuse to instruct that a preponderance of evidence would not be sufficient to justify a conviction.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[q] Where an erroneous instruction cautioning the jury against testimony of verbal admissions was given, it was not error to refuse defendant's other requested instructions that the jury view with caution testimony of a witness as to oral admissions by defendant, and also the testimony of another witness as to oral admissions of the beneficiary of the will, between whom and defendant there was alleged to be a conspiracy to defraud the estate, since the subject of such instructions had been treated in the first one, of which defendant could not complain, he having requested it.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[r] Where the rule as to the degree of proof required in criminal cases and the doctrine of reasonable doubt were fully stated and explained in instructions in a prosecution for embezzlement, a requested instruction that the jury had a right to consider that innocent men had been convicted, and the danger of convicting innocent men, was properly refused.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[s] Defendant cannot complain of instruction which is in substance the same as those requested by him and rejected by court.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[t] Where the court instructed that, if the evidence tended to establish an alibi, to the extent that it raised a reasonable doubt as to defendant's guilt, he should be acquitted, and gave other correct instructions on the subject, the refusal to instruct that, if the jury entertained a reasonable doubt as to the sufficiency of the evidence to establish an alibi, defendant should be acquitted, was not reversible error.—People v. Feliz, 136 Cal. xix, 69 Pac. 220.

[u] It is not error to refuse instructions substantially given in charge of court, or which are not pertinent to evidence in the case, nor to give instructions substantially the same as the provisions of the code, or which are correct statements of the law.—People v. McGlade, 139 Cal. 66, 72 Pac. 600.

[v] Instruction requested by defendant on the subject of reasonable doubt and burden of proof, in the language of Mr. Justice Shaw, in Commonwealth v. Webster, is not materially weakened because the part thereof on the subject of burden of proof is omitted as being elsewhere given and repeated in the charge of the court.—People v. Nunley, 142 Cal. 105, 75 Pac. 676.

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[w] Where the court gives that portion of an instruction requested in a prosecution for murder, which declares that the drunkenness of defendant is to be considered in determining the degree of the offense, the fact that it strikes out another portion containing the same proposition is not error.—People v. Ochoa, 142 Cal. 268, 75 Pac. 847.

[x] Where, on a trial for crime, the court charged that the burden of prof was on the prosecution, and that defendant was presumed to be innocent until his guilt was established, and that he was entitled to the benefit of any reasonable doubt, and could not be convicted unless the jury were convinced by the evidence beyond all reasonable doubt, the refusal to charge that the presumption of innocence attached at the commencement of the trial and remained till its close was not prejudicial.—People v. Miles, 143 Cal. 636, 77 Pac. 666.

[y] Where the court instructed the jury that if they could reasonably account for any fact in the case on a theory which would admit of accused's innocence, it was their duty to do so, and that if they had any reasonable doubt of his guilt, to acquit him, it was not error to refuse a charge that the jury might reject any theory on which "the evidence might point to defendant's guilt, even though such theory may be reasonable, and much more probable than the one which admits of his innocence."—People v. Clark, 145 Cal. 727, 79 Pac. 434.

[z] An instruction as to the jury's right to believe witnesses, in accordance with Code of Civil Procedure, section 2061, having been given, it was not error for the court, at the request of the state, to further charge that jurors were the exclusive judges of the weight and sufficiency of the evidence.—People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 718.

[aa] In a prosecution for larceny, held not error to refuse a charge that the jury should not consider testimony stricken out.—People v. Roberts (Cal. App.), 82 Pac. 624.

[bb] On a trial for murder the refusal to warn the jury against being influenced by public sentiment held not erroneous in view of the charge given and the facts.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

[cc] In a prosecution for homicide, refusal of the court to charge that, unless the evidence was sufficiently strong to overcome the presumption of innocence and satisfy the jury of defendant's guilt beyond a reasonable doubt, defendant was entitled to an acquittal was not error.—People v. Weber (Cal. Sup.), 86 Pac. 671.

[dd] On a trial for assault with intent to murder, a refusal to charge held not erroneous in view of the charge given.—People v. Owens (Cal. App.), 86 Pac. 980.

§ 466. —— Requests Wholly or Partly Erroneous, Inapplicable or Misleading.

[a] Strong expressions, and a manifest attempt at coloring favorable to the defendant, in instructions asked by his counsel, in a criminal case, which state the law correctly, may not be regarded as constituting substantial reasons for refusing the instructions.—People v. Williams, 32 Cal. 280.

[b] It is not error for court to refuse to give abstract instruction which is not applicable to the case.—People v. Davis, 47 Cal. 93; Fowler v. Smith, 2 Cal. 39; Benham v. Rowe, 2 Cal. 387.

[c] If any part of a single instruction ought not to be given, the action of the trial court in rejecting the whole will always be affirmed. People v. Davis, 64 Cal. 440, 1 Pac. 889.

[d] Instruction quoted in the opinion held properly refused on ground that it was calculated to mislead the jury.—People v. Gonzales, 71 Cal. 569, 12 Pac. 783.

[e] Instruction to effect that flight is not inference of guilt, and that timid persons, although innocent, might seek safety thereby, held properly refused.—People v. Giancoli, 74 Cal. 642, 16 Pac. 510.

[f] Inapplicable instructions are properly refused.—People v. Fine, 77 Cal. 149, 19 Pac. 269.

[g] Instructions inapplicable to any facts in evidence are properly refused.—People v. Buelna, 81 Cal. 140, 22 Pac. 596.

[h] Instruction confining jury to only one theory of case and compelling them to disregard all other facts in evidence is properly refused.—People v. Buelna, 81 Cal. 140, 22 Pac. 596.

[i] Instruction on weight to be attached to evidence is properly refused.—People v. Cline, 87 Cal. 379.

[j] Where an instruction asked for by a defendant in a criminal proceeding, and refused by the court, is so broad in its terms as to be misleading, if not positively erroneous, and so far as correct is given with the necessary qualifications in another instruction allowed by the court, no error is committed in the refusal to give it as asked.—People v. Walters, 98 Cal. 138, 32 Pac. 864.

[k] It is not erroneous to refuse instructions upon subjects unwarranted by testimony.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[l] An instruction asked, containing the words, "that the evidence against defendant is purely and wholly circumstantial," when in fact it is not, is properly denied.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[m] Where charge as given to jury fairly covers law bearing upon case, refusal of very numerous instructions asked for by the defendant is not erroneous.—People v. Johnson, 106 Cal. 289, 39 Pac. 622.

[n] Portions of instructions calculated to confuse jury are properly stricken out.—People v. Ammerman, 118 Cal. 29, 50 Pac. 15.

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[o] Argumentative instruction as to identity of defendant, based upon facts, and not containing any proposition of law, is properly refused.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[p] An instruction requested for the defendant which, so far as correct, consists of commonplace matters well known to the jury, and which contains an incomplete statement of the manner by which the defendant may be impeached, and an incorrect presumption of law as to the good character of the defendant as a witness, in the absence of one kind of impeaching testimony, is properly refused. People v. Gleason, 127 Cal. 323, 59 Pac. 592.

[q] An unintelligible instruction is properly refused.—People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156.

[r] Instructions having no application to facts of the case are properly disallowed.—People v. Brown, 130 Cal. 591, 62 Pac. 1072.

[s] Where, upon affidavit of defendant for continuance, it was admitted that witness whose evidence was desired would, if present, testify to facts set out in affidavit, instruction requested by defendant that testimony of such witness was conceded and admitted to be true by prosecution, was properly rejected, no such concession having been made by prosecution.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[t] Requested proper instructions, which are coupled with improper instructions, so as to constitute a presumed whole, may be properly refused as a whole.—People v. Davis, 135 Cal. 162, 67 Pac. 59.

[u] Upon trial of information for embezzlement, where evidence, without conflict, showed that crime committed was embezzlement, and nothing else, requested instructions as to the crime of larceny were properly refused.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

[v] Requested instruction involving a matter of fact was properly refused, though it might have been harmless if given. Where the jury were properly instructed as to the elements of each offense included in the crime charged, if the defendant desired a more elaborate definition of malice given to the jury, he should have requested a special instruction upon that subject.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

[w] Requested instruction which embodies only proper matter of argument by defendant's counsel to jury, was properly refused. People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

[x] In a prosecution for robbery, a requested instruction, without evidence to support it, was properly refused.—People v. Stevens, 141 Cal. 488, 75 Pac. 62.

[y] Instructions which are inapplicable to evidence are properly refused.—People v. Wardrip, 141 Cal. 231, 74 Pac. 744.

[z] Refusal of instruction which states mere commonplace matter within general knowledge of jurors is harmless error.—People v. Wardrip, 141 Cal. 232, 74 Pac. 744.

[aa] Requested instruction on law of self-defense is properly refused where there is no evidence in case on that issue.—People v. Manoogian, 141 Cal. 599, 75 Pac. 177.

[bb] Instruction singling out testimony of particular witness for comment is properly refused.—People v. Keith, 141 Cal. 690, 75 Pac. 304.

[cc] Instructions asked by the defendant, based upon the erroneous assumption that defendant could not be convicted of an attempt to commit the crime charged, and instructions asked which were included in the charge of the court, were properly refused.—People v. Oates, 142 Cal. 12, 75 Pac. 337.

[dd] Requested instructions which are unnecessary, argumentative, or an invasion of the province of the jury, or which are included fully in the charge of the court, are properly refused.—People v. Nunley, 142 Cal. 105, 75 Pac. 676.

[ee] Instructions requested by defendant which were substantially covered by the instructions given, or which were erroneous or inapplicable to the evidence, were properly refused.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[ff] In a prosecution for homicide, an instruction that the evidence of certain named witnesses had been stricken, and therefore must not be considered, held properly refused. People v. Weber (Cal. Sup.), 86 Pac. 671.

§ 467. Noting Disposition of Request.

[a] That an instruction is indorsed by the court "Given as modified" does not show that part of it was refused, so as to require the court, as provided by Penal Code, section 1127, in such case, to make an indorsement showing part given and part refused, as modification may have consisted in something added by court by way of correction or otherwise.—People v. Owens, 123 Cal. 482, 56 Pac. 251.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 647; 14 Cent. Dig., col. 2833, § 2019.

J. CUSTODY, CONDUCT AND DELIBERATIONS OF JURY.

ADMONITION TO JURY, § 468.
PLACING JURY IN CHARGE OF OFFICER—BIASED SHERIFF, § 469.
—— ELISOR, § 470.
MISCONDUCT OF OFFICERS AFFECTING JURY, § 471.
MISCONDUCT OF JURORS, § 472.
EXPERIMENTING OUT OF COURT, § 473.
TAKING PAPERS OR ARTICLES TO JURY-ROOM, § 474.
DISOBEDIENCE OF ADMONITION, § 475.
SEPARATION, § 476.
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RESTATING TESTIMONY AFTER SUBMISSION, § 478.
URGING AGREEMENT, § 479.
DISCHARGE OF JURY, § 480.
—— FOR FAILURE TO AGREE, § 481.
—— FOR RENDERING VOID VERDICT, § 482.
—— FOR MISCONDUCT OR DISREGARD OF EVIDENCE, § 483.
—— ON LEGAL HOLIDAY, § 484.

§ 468. Admonition to Jury.

[a] It is doubtful whether Criminal Practice Act, section 394, which provides that, "at each adjournment of the court," the jury shall be admonished by the court as to their conduct, applies to a mere temporary recess. People v. Colmere, 23 Cal. 631.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 674; 14 Cent. Dig., cols. 2844, 2845, § 2031.

§ 469. Placing Jury in Charge of Officer—Biased Sheriff.

[a] A sheriff who was disqualified from summoning the jurors in a case on account of bias should not be given charge of the jury on their retirement to consider the verdict.—People v. Fellows, 122 Cal. 233, 54 Pac. 830.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 669-671; 14 Cent. Dig., cols. 2845-2847, §§ 2033-2038.

§ 470. —— Elisor.

[a] Where the sheriff and his deputies were disqualified, and the coroner was physically unable to perform his duty, the appointment of an elisor to take charge of the jury was proper.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

§ 471. Misconduct of Officers Affecting Jury.

[a] When jury were leaving courtroom for consultation, the clerk, without the knowledge of the court or consent of the defendant, handed them three forms of verdict corresponding to those mentioned in the instructions, and they returned one of them, finding the defendant guilty of grand larceny, held, not erroneous or irregular.—People v. Robinson, 65 Cal. 136.

[b] Pending the trial, and while the jury was in his charge, the sheriff conducted the jurymen to public saloons, and furnished them with liquor at his own expense. A reward had been offered for the conviction of the defendants, which the sheriff hoped to obtain. Held, that the conduct of the sheriff was a sufficient irregularity to warrant a new trial. People v. Myers, 70 Cal. 582, 12 Pac. 719.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 674, 675; 14 Cent. Dig., cols. 2857-2860, §§ 2048-2053.

§ 472. Misconduct of Jurors.

[a] It is misconduct for a juror to attend and remain at a public meeting called to denounce defendant.—People v. Turner, 39 Cal. 370.

[b] Voluntary listening of a juror to remarks of others in regard to the case is prima facie misconduct.—People v. Turner, 39 Cal. 370.

[c] Under the facts juror held not to have acted improperly in conversation with clerk and prosecuting attorney.—People v. McCurdy, 68 Cal. 581, 10 Pac. 212.

[d] Conversation between jurymen in the jury-box is not of itself misconduct, and unless it be shown to have improper reference to the evidence or merits of the case, and be prejudicial to defendant, it will not work a reversal.—People v. Kramer, 117 Cal. 647, 49 Pac. 842.

[e] After a juror had asked another to take a drink while in a hotel, the sheriff asked all the jurors to take a drink; and some of them took about two tablespoonfuls of whisky, some took cigars, and one took mineral water. No one was affected in any way by what he drank. Held, the verdict should not be set aside.—People v. Van Horn, 119 Cal. 323, 51 Pac. 538.

[f] Where the defendant attempts to show an alibi by proving his presence in a certain saloon at the time of the commission of the crime, the fact that a juror visits the saloon during the trial is not sufficient misconduct to invalidate a conviction.—People v. Rowell, 133 Cal. 39, 65 Pac. 127.

[g] Upon review of the facts appearing in counter-affidavits, showing the incorrectness of a charge made in the defendant's affidavit on motion for a new trial, that the juror had visited the county jail without permission of the court, in reference to points contained in the testimony in regard to the treatment of the defendant in the jail—held, that a case of misconduct of the juror was not made out. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014.

[h] There is no error or misconduct on part of the jury in that, after deliberating for hours, they requested an instruction from the court, and after receiving it immediately agreed upon a verdict of guilty.—People v. Philbon, 138 Cal. 530, 71 Pac. 650.

[i] Jurors in a criminal case held to have been guilty of misconduct in reading certain newspaper articles.—People v. Chin Non, 146 Cal. 561, 80 Pac. 681.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 674, 675; 14 Cent. Dig., cols. 2857-2860, §§ 2048-2053.

§ 473. Experimenting Out of Court.

[a] Where the clothing of the deceased offered in evidence showed no powder marks,

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a new trial should be granted for misconduct of jurors in investigating the case out of the courtroom, where it appears by uncontradicted affidavits that two of the jurors experimented with a rifle out of court for the purpose of ascertaining at what distance powder marks upon clothing would be carried by the firing of the rifle.—People v. Conkling, 111 Cal. 616, 44 Pac. 314.

§ 474. Taking Papers or Articles to Jury-room.

[a] Reading by jury while deliberating upon their verdict of copy of writing which had been introduced in evidence, but which they did not take with them when retiring for deliberation, is the reception of evidence out of court, within the meaning of section 1181 of the Penal Code.—People v. Thornton, 74 Cal. 482, 16 Pac. 244.

[b] Court should see to it, by contempt proceedings, if necessary, that no newspaper articles tending to prejudice defendant's cause reach jury.—People v. Goldenson, 76 Cal. 353, 19 Pac. 161.

[c] Consent of counsel for defendant, in presence of defendant, that certain articles be taken to jury-room waives all objection.—People v. Mahoney, 77 Cal. 531, 20 Pac. 73.

§ 475. Disobedience of Admonition.

[a] It is not a disobedience of the admonition of the court not to talk about the merits of the case, for a juror to state, at the conclusion of the charge of the court, that there is a misunderstanding among the jury as to the testimony of a witness, and ask to have stated what the testimony was.—People v. West, 73 Cal. 345, 14 Pac. 848.

§ 476. Separation.

[a] Juror has no right to separate from others without permission of the court, even though defendant's counsel consented to it. People v. Backus, 5 Cal. 275.

[ab] Fact that jury occupied separate rooms in hotel is not separation.—People v. Bush, 68 Cal. 627, 628, 10 Pac. 169.

[b] Transporting jury to place of homicide in separate wagons, always in sight of each other, is not separation.—People v. Bush, 68 Cal. 627, 628, 10 Pac. 169.

[c] After the jury have retired to deliberate upon their verdict, they must be kept together; and the court has no power to permit their separation, nor can the consent of the defendant or his counsel operate to empower or excuse the court in violating the express provisions of the statute; but such separation is not ground for a motion to discharge the defendant, though it is of itself, and without any showing of improper conduct on the part of the jury or any of them, during their separation, a sufficient ground for granting a new trial.—People v. Hawley, 111 Cal. 78, 43 Pac. 404.

[d] A motion to discharge defendant, in a criminal case, for separation of the jury, had on his motion and with his consent, is properly denied.—People v. Hawley, 111 Cal. 78, 43 Pac. 404.

[e] Separation of jurors during time of adjournment is in discretion of trial court.—People v. Coyne, 116 Cal. 297, 48 Pac. 218.

[f] It was not error, in the trial of a criminal case, to permit the jurors to separate on adjourment from day to day, after having been admonished, as provided by Penal Code, section 1122, as such action is discretionary. People v. Ebanks, 117 Cal. 652, 49 Pac. 1049.

[g] Court has discretion to permit a separation of jurors during impaneling of jury and subsequent progress of trial, after properly admonishing them, without consent of defendant or his counsel. Section 1121 of Penal Code, conferring such discretion, is not in violation of section 7 of article 1 of constitution, securing the right of trial by jury.—People v. Chaves, 122 Cal. 134, 54 Pac. 596.

[h] Where, after a criminal case had been submitted to a jury, which was in charge of a bailiff directed to keep them together until they had agreed or been discharged, the bailiff divided the jurors into three groups at night, and put them into three rooms, each on a different floor or story of the hotel, where they were kept locked up for eight or nine hours, such acts constituted a separation of the jury, prohibited by Penal Code, sections 1128, 1135, 1136, which vitiated their verdict. People v. Adams, 143 Cal. 208, 76 Pac. 954, 66 L. R. A. 247.

[i] Where, on a trial for homicide, the court had exercised the discretion conferred by Penal Code, section 1121, by ordering the jury to remain in the custody of the sheriff during the trial, it was error to permit the jurors to separate during the progress of the trial.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

FOR AUTHORITIES FROM OTHER STATES:

When separation of jury avoids verdict: 60 Am. Rep. 73, note. See, also, 12 Cyc. 671-674; 14 Cent. Dig., cols. 2848-2856, §§ 2039-2047.

§ 477. Instructions After Submission of Case.

[a] Under code, section 362, as amended in 1855, it is error orally to instruct a jury, returned after retirement, in the absence of the phonographic reporter, without consent of the counsel.—People v. Hersey, 53 Cal. 574.

[b] After the jury had retired, they returned and inquired what was the least punishment for the offense charged. The court instructed them orally that they had nothing to do with the matter, but informed them of the penalty. Held, that the instruction was immaterial, and that it was of no consequence that it was not in writing.—People v. Jackson, 57 Cal. 316.

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[c] A court may cause the jury to be returned for further instructions, though the jury has not requested them.—People v. Perry, 65 Cal. 568, 4 Pac. 572; People v. Righetti, 66 Cal. 184, 4 Pac. 1063.

[d] It is not error to recall jury, and to give instruction in absence of defendant's counsel, where they cannot be found after search, if defendant himself is present, and court directs an exception in his behalf.—People v. Mayes, 113 Cal. 618, 45 Pac. 860.

[e] Upon a request by jury for further instructions, it is immaterial whether court confined itself to the points upon which information was asked or not, provided the language used, though not the best that could have been used, was not such that the jury could have been misled.—People v. McKay, 122 Cal. 628, 55 Pac. 594.

[f] It was error for the court, after having instructed the jury, and having given them two forms of verdict, "Guilty, as charged," and "Not guilty," and, on their return to the courtroom after deliberating, having reiterated the same instructions, to give them a further instruction on a subsequent return to the courtroom, after over twenty-four hours' deliberations, and after the opinions of the jurors were fully disclosed, and they had announced that they could not reach a verdict under the instructions as they then stood, to give them, for the first time, an instruction and form of verdict authorizing a conviction of attempt to commit the crime.—People v. Stouter, 142 Cal. 146, 75 Pac. 780.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 679, 680; 14 Cent. Dig., cols. 2871-2877, §§ 2065-2067.

§ 478. Restating Testimony After Submission.

[a] The statute (Wood's Digest, 301, article 1655) authorizes the judge, on the trial of a criminal case, at the request of the jury on their return into court, to state to them the testimony of a witness.—People v. Ybarra, 17 Cal. 166.

[b] It is not error for the court to give information asked, by reading a memorandum taken by another person, instead of reading its own minutes or relying upon its own memory.—People v. Boggs, 20 Cal. 432.

[c] The jury, after being out several hours, asked to have read the testimony of a witness. It was found that this would take several hours, and owing to the lateness of the hour the court, without objection or exception, announced an adjournment until the next day, when the testimony was to be read, but just before the time set therefor the jury announced an agreement. Held, that their verdict was thereupon properly received, without the reading of such testimony.—People v. Warren, 130 Cal. 678, 63 Pac. 87.

[d] Conduct of trial judge in not compelling the jury on their return after retiring to hear all the testimony of defendant, held not error. People v. Smith (Cal. App.), 84 Pac. 449.

§ 479. Urging Agreement.

[a] Remarks of the court to jury, on sending them out for further consideration of the case after they had returned into court and the foreman had informed the court that he did not think that an agreement was possible, and other jurors had stated that there might be a change, to the effect that if there was a mistrial a great expense would be incurred because of a retrial, and if the jury thought there would be an agreement and thus save the expense of a retrial they should again retire, and that they must arrive at a verdict solely from the evidence and the instructions, did not constitute prejudicial error.—People v. Miles, 143 Cal. 636, 77 Pac. 666.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 682; 14 Cent. Dig., cols. 2878-2881, § 2069.

§ 480. Discharge of Jury.

[a] After the impaneling of the jury and commencement of a trial, it was an abuse of discretion to discharge the jury for sixty-three days, on motion of the state, because one of its witnesses was unable to attend, where the nature of the offense charged was likely to create prejudice against the defendant in the community from which they were drawn.—People v. Dinsmore, 102 Cal. 381, 36 Pac. 661.

FOR AUTHORITIES FROM OTHER STATES:

Discharge of jury without a verdict: 1 Am. Dec. 176, note.

§ 481. —— For Failure to Agree.

[a] A prisoner confined on a criminal charge is not entitled to his discharge on habeas corpus because a jury impaneled to try him was discharged by the court, without his consent, by reason of its inability to agree on a verdict.—McLaughlin, Ex parte, 41 Cal. 211, 10 Am. Rep. 272.

[b] Inability of jury to agree after a reasonable time for deliberation, and close of term, are sufficient grounds for discharge.—People v. Cage, 48 Cal. 323, 17 Am. Rep. 436.

[c] Discretion of court in discharge of jury because of their inability to agree must be exercised upon some kind of evidence, and the judgment of the court on the point should be expressed in some form upon the record; and a discharge of a jury, in a criminal case, in the absence of defendant, upon an oral report made by the sheriff to the court that the jury say that they are unable to agree, and without the court requiring the jury to come before him, is an irregular exercise of his discretion, and is equivalent to an acquittal.—People v. Cage, 48 Cal. 323, 17 Am. Rep. 436.

[d] Inability of jury to agree upon a verdict is one of those necessities that will an-

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thorize the court to discharge the jury, and thereby subject the defendant to a second trial.—People v. Smalling, 94 Cal. 112, 29 Pac. 421.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 683-685; 14 Cent. Dig., cols. 2882-2891, §§ 2071-2078.

§ 482. —— For Rendering Void Verdict.

[a] Where verdict is void, jury should not be discharged but should be sent out for further deliberation.—People v. Curtis, 76 Cal. 59, 17 Pac. 941.

§ 483. —— For Misconduct or Disregard of Evidence.

[a] Mere fact that juror visited premises during trial is not ground for discharging jury.—People v. Hope, 62 Cal. 291.

[b] Jury may be discharged from further service for purposely disregarding evidence and returning verdict in violation of sworn duty.—People v. Murray, 85 Cal. 355, 24 Pac. 666.

§ 484. —— On Legal Holiday.

[a] A jury may be constitutionally discharged on a legal holiday.—People v. Soto, 65 Cal. 621, 4 Pac. 664.

K. VERDICT.

FORM AND SUFFICIENCY IN GENERAL, § 485.
GENERAL OR SPECIAL VERDICT, § 486.
CONFORMITY TO INDICTMENT, § 487.
SURPLUSAGE, § 488.
MISNOMER OF ACCUSED, § 489.
VERDICT AGAINST CODEFENDANT, § 490.
SEVERAL PLEAS, § 491.
SPECIFICATION OF OFFENSE FOUND, § 492.
SPECIFICATION OF DEGREE OF OFFENSE, § 493.
SPECIFICATION OF PLACE OF COMMISSION OF CRIME, § 494.
RECOMMENDATION TO MERCY, § 495.
RENDITION AND RECEPTION, § 496.
AMENDMENT OR CORRECTION, § 497.
SETTING ASIDE, § 498.
RECORDING, § 499.
CONSTRUCTION AND OPERATION, § 500.

See, also, references under Verdict.

In prosecution for assault and battery. See Assault and Battery, § 47.

In prosecution for homicide. See Homicide, VII, D.

In prosecution for larceny. See Larceny, § 47.

§ 485. Form and Sufficiency in General.

[a] A strict adherence to the terms of the form of verdict given by the Penal Code is not required. An informal verdict, in a criminal case, is sufficient, if it can be clearly understood as being a general verdict of guilty or not guilty.—People v. McCarty, 48 Cal. 557.

[b] A verdict "that the jury do find the defendant guilty of the indictment as charged to him" is invalid, since the words are meaningless.—People v. Ah Gow, 53 Cal. 627.

[c] A verdict finding the defendant "guilty as he stands charged in the indictment" is sufficient.—People v. De Cleer, 60 Cal. 382.

[d] A verdict in a criminal case must contain, either in itself or by reference to the indictment, every element of the crime.—People v. Cummings, 117 Cal. 497, 49 Pac. 576.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cent. Dig., cols. 2901-2932, §§ 2089-2108.

§ 486. General or Special Verdict.

[a] In criminal cases, jury may render a general or special verdict, except upon an indictment for libel, when it must be general.—People v. Antonio, 27 Cal. 404.

[b] Under Criminal Practice Act, section 417, providing that the jury may render either a special or general verdict, accused cannot demand a special verdict.—People v. Antonio, 27 Cal. 404.

[c] In a prosecution for burglary committed in another county from that where the venue is laid, a verdict is not defective, as being both general and special, because it contains the unnecessary statement that the goods stolen were taken by the defendant into the county where the venue is laid.—People v. Jochinsky, 106 Cal. 638, 39 Pac. 1077.

§ 487. Conformity to Indictment.

[a] When offense is statutory, verdict of conviction must be of very crime charged.—People v. Keefer, 18 Cal. 637.

§ 488. Surplusage.

[a] Surplusage in general verdict of guilty is not prejudicial to defendant, and is not ground for reversal of judgment of conviction.—People v. Jochinsky, 106 Cal. 638, 39 Pac. 1077.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 689; 14 Cent. Dig., cols. 2907, § 2091.

§ 489. Misnomer of Accused.

[a] Where a verdict finds the defendant guilty, the fact that it inserts his name after the word "defendant," and inserts the wrong middle initial, is immaterial, since finding the "defendant" guilty is sufficient, and the name is merely surplusage.—People v. Boggs, 20 Cal. 432.

[b] Where the jury found a verdict that, "in the case of the People of California v. Ty Chin, a Chinaman, do find the said Ty Chin, a Chinaman, guilty," when the defendant was indicted by the name of John Doe, and gave his name as Ah Ye, and no objection was made to the form of the verdict at the time by the court or district attorney, the verdict was held to be a finding that

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Ah Ye was not guilty.—People v. Ah Ye, 31 Cal. 451.

[c] Fact that jury, in prefixing to their verdict the title of the case, make a mistake in the name of the defendant, does not invalidate the judgment.—People v. Ah Kim, 34 Cal. 189.

§ 490. Verdict Against Codefendants.

[a] Where two were indicted and tried together, a verdict finding the defendant guilty is void for uncertainty.—People v. Sepulveda, 59 Cal. 342.

§ 491. Several Pleas.

[a] Where defendant pleaded former conviction or acquittal, as well as not guilty, verdict must expressly find whether special plea is true or not.—People v. Kinsey, 51 Cal. 278; People v. Helbing, 59 Cal. 567; People v. Fuqua, 61 Cal. 377; (1888) People v. O'Leary, 16 Pac. 884.

[b] If there is a plea of not guilty and also a plea of former conviction or acquittal, the defendant is entitled to a verdict on each plea. If there is a verdict of guilty alone there can be no judgment of conviction.—People v. Kinsey, 51 Cal. 278; People v. Fuqua, 61 Cal. 377.

[c] Issue on plea of former jeopardy must be specially passed on in addition to general finding on plea of not guilty.—People v. Hamberg, 84 Cal. 473, 24 Pac. 298.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 695; 14 Cent. Dig., cols. 2922, 2923, § 2103.

§ 492. Specification of Offense Found.

[a] On a trial for assault with intent to commit murder, a verdict of the jury finding the defendant "guilty of an assault with a deadly weapon with intent to inflict a bodily injury," is sufficient to sustain a judgment subjecting the accused to confinement in the state prison.—People v. English, 30 Cal. 214.

[b] Verdict must specify the offense found. Verdict of "guilty of the indictment" is insufficient.—People v. Ah Gow, 53 Cal. 627.

[c] Under Penal Code, section 1151, providing that a general verdict on a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment, the designation of the offense in a general verdict is mere surplusage, and a verdict finding defendant guilty of "burgularly" is valid.—People v. Brady, 133 Cal. xx, 65 Pac. 823.

§ 493. Specification of Degree of Offense.

[a] If conviction is for any lesser offense than that charged, but included therein, it must be specified in the verdict.—People v. March, 6 Cal. 543.

[b] Where the offense consists of different degrees, a verdict of guilty must state the degree of which accused is convicted.—People v. Marquis, 15 Cal. 38; People v. Coch, 53 Cal. 627.

[c] Where an indictment charges only the lowest degree of crime, as defined by the Penal Code, it is unnecessary for the jury, in their verdict, to specify the degree of the crime of which the accused is found guilty.—People v. Fisher, 51 Cal. 319.

[d] In criminal case where indictment charges an offense that includes an offense of less degree, and the jury returns a verdict of "guilty as charged in the indictment," the verdict is so uncertain that judgment cannot be passed, and the record of the trial is not evidence of jeopardy upon a new trial under the same indictment.—People v. Baza, 53 Cal. 690.

[e] Failure of verdict to specify degree of crime vitiates it.—People v. O'Neil, 78 Cal. 389, 20 Pac. 705.

[f] Where there are no degrees to offense charged, verdict of guilty as charged is sufficient.—People v. Perez, 87 Cal. 123, 25 Pac. 262.

[g] If the verdict is required to specify the degree of the crime, a verdict omitting to specify the degree is invalid, though it assess a punishment prescribed for a certain degree.—People v. Le Yune Chong, 94 Cal. 379, 29 Pac. 776.

[h] Under Penal Code, section 1157, providing that, whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of which defendant is guilty, the jury are not excused from finding the degree by the fact that the court instructed that, if the jury found defendant guilty, it could be for the lower degree.—(1893) People v. Bannister, 34 Pac. 710; (1894) People v. Cornwell, 35 Pac. 566.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 696; 14 Cent. Dig., cols. 2923-2926, §§ 2104-2106.

§ 494. Specification of Place of Commission of Crime.

[a] Under an indictment charging an offense in a certain county, a general verdict of guilty is sufficiently responsive without specifying the county in which the offense was committed.—People v. Jochinsky, 106 Cal. 638, 39 Pac. 1077.

§ 495. Recommendation to Mercy.

[a] A recommendation to mercy, accompanying a verdict of guilty, is addressed to the discretion of the court, and an order to record the verdict without it is proper.—People v. Lee, 17 Cal. 76.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 697; 14 Cent. Dig., cols. 2931, 2932, § 2108.

§ 496. Rendition and Reception.

[a] Irregularity of receiving a verdict without first calling over names of jurors does

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not prejudice a defendant if jury were all present and had agreed.—People v. Rodundo, 44 Cal. 538.

[b] Order of court, made by consent of accused, authorizing the sheriff to receive from the jury a sealed verdict, and on its receipt to allow the jury to separate until the session of court on the following morning, is not an error of which accused can complain.—People v. Kelly, 46 Cal. 355.

[c] On a prosecution for burglary it was not error to leave it to the jury to formulate their own verdict on blank forms furnished, stating the degree of guilt of the defendants, if either of them were guilty, and that, if the jury needed further instruction as to framing a verdict, it should return to the courtroom for such instruction.—People v. Brady, 133 Cal. xx, 65 Pac. 823.

§ 497. Amendment or Correction.

[a] If verdict is defective in form, court may require it to be amended by jury before receiving it.—People v. Dick, 34 Cal. 663; (1880) People v. Jenkins, 56 Cal. 4.

[b] It is the duty of a court to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records of the court, and for that purpose the court can, at any time while the jury is before it, and under its control, see that the verdict is amended in form so as to meet the requirements of the law.—People v. Jenkins, 56 Cal. 4.

[c] After a jury have returned their verdict, been discharged, and separated, they cannot be recalled to alter or amend it.—People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776.

[d] Where the jury has returned a defective verdict, and the court accepts it, he has no power subsequently to direct the jury to amend it by assessing the degree of the crime. People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776.

For Authorities from Other States:

See 23 L. R. A. 723, note. See, also, 12 Cyc. 699, 700; 14 Cent. Dig., cols. 2932-2937, §§ 2109-2113.

§ 498. Setting Aside.

[a] If, through misdirection of judge in matter of law, a verdict is improperly rendered, it can never afterward, on application of the prosecution in any form of proceeding, be set aside.—People v. Terrill, 132 Cal. 497, 64 Pac. 894.

§ 499. Recording.

[a] Fact that verdict is not transcribed in the minute-book until after jury have been discharged does not render it invalid, where it was transcribed on a sheet of paper and read to and acknowledged by the jury.—People v. Smith, 59 Cal. 601.

[b] Recording verdict before it is read, when defendant requests that it first be read, is an irregularity.—People v. Nichols, 62 Cal. 518.

[c] Court handed the jury forms of verdicts as to the pleas of former acquittal, former conviction, and once in jeopardy, and instructed them to find for the people thereon. Upon the return of the jury the foreman declared the verdict to be guilty of murder. The clerk read the verdict to the jury as recorded, and asked them if that was their verdict, and they all responded, "Yes." The foreman also handed to the court their verdicts on the three special pleas. The court then, in the presence of the jury, stated that these verdicts were in favor of the people, and asked the counsel for the defendant whether they insisted upon having them then entered by the clerk before the jury were discharged, and read to them, and have them declared whether they were their verdicts. The counsel for the defendant having waived the then recording of these verdicts the jury were discharged, and the verdicts were recorded afterward. Held, that the requirements of sections 1149 and 1164 of the Penal Code, as to the manner of declaring and recording the verdicts, had not been complied with, but that the irregularity was without prejudice.—People v. Smalling, 94 Cal. 112, 29 Pac. 421.

For Authorities from Other States:

See 12 Cyc. 700; 14 Cent. Dig., cols. 2937-2939, § 2114.

§ 500. Construction and Operation.

[a] Where a defendant was indicted for an assault with intent to commit murder, and the jury found a verdict of guilty of an "assault with intent to do bodily injury," the verdict only found the prisoner guilty of an assault and not of a felony.—People v. Vanard, 6 Cal. 562.

[b] A verdict, on an indictment for an assault with intent to commit murder, finding "the defendant guilty of an assault to do great bodily injury," is a verdict for a misdemeanor merely, and does not warrant an imprisonment in the state prison.—Max, Ex parte, 44 Cal. 579.

[c] Verdict finding defendants guilty of involuntary manslaughter, "not a felony," is sufficient to sustain a conviction for manslaughter, although that is a felony.—People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[d] Where one accused of manslaughter pleads not guilty, and also "once in jeopardy," and the jury find against him on the latter plea, and disagree on the former, he is not entitled to have his plea of "once in jeopardy" submitted to the jury at his second trial.—People v. Smith, 121 Cal. 355, 53 Pac. 802.

[e] On a prosecution for forgery, under an information containing three separate charges, the first of which was sufficient, the

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so as to read that each side was entitled to the independent judgment, etc.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 664; 14 Cent. Dig., cols. 2824-2829, §§ 2013, 2014.

§ 463. Refusal of Requests—Duty of Court.

[a] Better practice is for court never to refuse instruction asked on behalf of defendant in a criminal case, to which there is no valid objection, although the jury may have been already fully instructed on the point. A district attorney ought never to object to such instructions.—People v. Lachanais, 32 Cal. 433.

[b] It is better to give an instruction in a criminal case, which in the main states the law correctly, with modifications if required, than to refuse it, although no error may be committed in refusing it.—People v. Williams, 32 Cal. 280.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 666; 14 Cent. Dig., cols. 2831-2833, §§ 2017, 2018.

§ 464. —— Assigning Reason.

[a] If instruction be refused for reason that it has already been given, the reason of the refusal should be stated, so as not to mislead the jury.—People v. Hurley, 8 Cal. 390; People v. Ramirez, 13 Cal. 172; People v. Williams, 17 Cal. 142.

[b] When instructions are incorrect, the reason for refusing them is immaterial.—People v. Sears, 18 Cal. 635.

[c] Court need not instruct that certain instructions asked by defendant were refused because already given in other instructions.—People v. Barthleman, 120 Cal. 11, 52 Pac. 112.

[d] Jury can consider only those instructions which have been given and have no knowledge of those which have been refused.—People v. Barthleman, 120 Cal. 11, 52 Pac. 112.

§ 465. —— Instructions Substantially Included in Those Given.

[a] Error of refusing a proper instruction is not cured by the fact that it was in substance given by the court.—People v. Ramirez, 13 Cal. 172.

[b] Requested instructions, which are already substantially given and covered by the general charge, or special instructions, are properly refused.—People v. Williams, 32 Cal. 280; People v. Hope, 62 Cal. 291; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Righetti, 66 Cal. 184, 4 Pac. 1063; People v. McCoy, 71 Cal. 395, 12 Pac. 272; People v. Rogers, 71 Cal. 565, 12 Pac. 679; People v. Giancoli, 74 Cal. 642, 16 Pac. 510; People v. O'Brien, 78 Cal. 41, 20 Pac. 359; People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595; People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[c] Where the court assumed that the evidence was circumstantial, it was error to refuse to instruct the jury that, in order to convict the defendant, it was necessary, not only that all the circumstances should concur to show that he committed the crime charged, but that they should all be inconsistent with any other rational conclusion, and should exclude to a moral certainty every other hypothesis but the one of guilt, though the general charge comprehended the legal proposition contained in some of the instructions requested and refused, but not in the instructions set forth.—People v. Dick, 32 Cal. 213.

[d] Where an instruction asked has already been given substantially by the court, it is not error to refuse it; but in a criminal case, the better course is to give it.—(1866) People v. Strong, 30 Cal. 151; People v. Murray, 41 Cal. 66.

[e] When legal principle has been once announced in the instructions of the court there can be no necessity for its repetition, and there can be no error in refusing to give it in a second instruction.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

[f] Requested instructions included in general charge are properly refused.—People v. Wong Ah Foo, 69 Cal. 182, 10 Pac. 375; People v. Phillips, 70 Cal. 69, 11 Pac. 493; People v. Barthleman, 120 Cal. 10, 13, 52 Pac. 112; People v. Burns, 121 Cal. 529, 53 Pac. 1096; People v. Benc, 130 Cal. 159, 62 Pac. 404; People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People v. Castile (Cal. App.), 86 Pac. 746.

[g] Requested instructions contained in other requested instructions are properly refused.—People v. Treadwell, 69 Cal. 237, 10 Pac. 502.

[h] Instructions already given need not be repeated.—People v. Madden, 76 Cal. 522, 18 Pac. 402; People v. Doane, 77 Cal. 562, 20 Pac. 84; People v. Fine, 77 Cal. 149, 19 Pac. 269; People v. O'Brien, 78 Cal. 44, 20 Pac. 359; People v. Swalm, 80 Cal. 51, 13 Am. St. Rep. 96, 22 Pac. 67; People v. Adams, 85 Cal. 235, 24 Pac. 629; People v. Sternberg, 111 Cal. 11, 43 Pac. 201; People v. Barney, 114 Cal. 554, 47 Pac. 41; O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130; People v. Elliott, 119 Cal. 593, 51 Pac. 955; People v. Chaves, 122 Cal. 134, 54 Pac. 596; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; People v. Nunley, 142 Cal. 105, 441, 75 Pac. 676; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Donnolly, 143 Cal. 394, 77 Pac. 177; People v. Moran, 144 Cal. 48, 77 Pac. 777; People v. Eldridge, 147 Cal. 782, 82 Pac. 442; People v. Feld (Cal. Sup.), 86 Pac. 1100; People v. Fernandez (Cal. App.), 86 Pac. 899.

[i] It is proper to refuse instructions requested by the defendant upon the subject of reasonable doubt, upon the ground that they are given elsewhere, if the charge contains all

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that is correct in the instructions asked.—People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

[j] It is not necessary that the court should repeat instructions in every possible connection in which reference can be made to the degrees of the offense; but it is sufficient if such instruction is once clearly and explicitly given.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[k] It is not error to refuse a proposed instruction upon the law of self-defense, where that law has been adequately set forth in the instructions given.—People v. Roemer, 114 Cal. 51, 45 Pac. 1003.

[l] Instructions already substantially given may be refused.—People v. Durrant, 116 Cal. 222, 48 Pac. 75; People v. Elliott, 119 Cal. 594, 51 Pac. 955; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; People v. Prather, 120 Cal. 660, 53 Pac. 259 People v. Chaves, 122 Cal. 134, 54 Pac. 596; People v. Burgle, 123 Cal. 303, 55 Pac. 998; People v. Solomon, 125 Cal. xix, 58 Pac. 55; People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Bene, 130 Cal. 159, 62 Pac. 404; People v. Lem Deo, 132 Cal. 199, 64 Pac. 265; People v. Grimes, 132 Cal. 30, 64 Pac. 101; People v. Ross, 134 Cal. 256, 66 Pac. 229; People v. Amaya, 134 Cal. 531, 66 Pac. 794; People v. Mendenhall, 135 Cal. 344, 67 Pac. 325, reversing 63 Pac. 675; People v. Wardrip, 141 Cal. 236, 74 Pac. 744; People v. Keith, 141 Cal. 691, 75 Pac. 304; People v. Jailles, 146 Cal. 301, 79 Pac. 965; People v. Castile (Cal. App.), 86 Pac. 745.

[m] Where a fair and full instruction requested by the defendant as to the consideration of his testimony by the jury was given, it was not error to refuse another instruction requested by him upon the same subject, which was substantially covered by the instruction given.—People v. Holmes, 126 Cal. 462, 58 Pac. 917.

[n] On trial for perjury, an instruction was given that there must be direct testimony of at least one credible witness, directly contradictory of defendant's oath, and, in addition thereto, there must be testimony of another witness, or corroborating circumstances established by independent evidence, and of such character as to overcome defendant's oath and the presumption of innocence. Another instruction was that the additional evidence must be at least strongly corroborative of the accusing witness. Held, that it was proper to refuse an instruction that there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true, but if the corroboration does not go to that extent, defendant must be acquitted, since the former instructions were sufficient on corroboration.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[o] Where two instructions as to evidence of defendant's good character were as favorable as defendant could reasonably ask, it was not error to refuse to add a third instruction on that subject, everything stated in it being plainly implied in the other two.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[p] Where, in addition to instructions that the burden of proof was on the prosecution, and that the jury must be entirely satisfied of defendant's guilt before they could convict, an instruction was given that if, on the proof given, there was a reasonable doubt, the accused was entitled to an acquittal, and the evidence must establish the truth of the charge to a reasonable and moral certainty, it was not error to refuse to instruct that a preponderance of evidence would not be sufficient to justify a conviction.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[q] Where an erroneous instruction cautioning the jury against testimony of verbal admissions was given, it was not error to refuse defendant's other requested instructions that the jury view with caution testimony of a witness as to oral admissions by defendant, and also the testimony of another witness as to oral admissions of the beneficiary of the will, between whom and defendant there was alleged to be a conspiracy to defraud the estate, since the subject of such instructions had been treated in the first one, of which defendant could not complain, he having requested it.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[r] Where the rule as to the degree of proof required in criminal cases and the doctrine of reasonable doubt were fully stated and explained in instructions in a prosecution for embezzlement, a requested instruction that the jury had a right to consider that innocent men had been convicted, and the danger of convicting innocent men, was properly refused.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[s] Defendant cannot complain of instruction which is in substance the same as those requested by him and rejected by court.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[t] Where the court instructed that, if the evidence tended to establish an alibi, to the extent that it raised a reasonable doubt as to defendant's guilt, he should be acquitted, and gave other correct instructions on the subject, the refusal to instruct that, if the jury entertained a reasonable doubt as to the sufficiency of the evidence to establish an alibi, defendant should be acquitted, was not reversible error.—People v. Feliz, 136 Cal. xix, 69 Pac. 220.

[u] It is not error to refuse instructions substantially given in charge of court, or which are not pertinent to evidence in the case, nor to give instructions substantially the same as the provisions of the code, or which are correct statements of the law.—People v. McGlade, 139 Cal. 66, 72 Pac. 600.

[v] Instruction requested by defendant on the subject of reasonable doubt and burden of proof, in the language of Mr. Justice Shaw, in Commonwealth v. Webster, is not materially weakened because the part thereof on the subject of burden of proof is omitted as being elsewhere given and repeated in the charge of the court.—People v. Nunley, 142 Cal. 105, 75 Pac. 676.

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[w] Where the court gives that portion of an instruction requested in a prosecution for murder, which declares that the drunkenness of defendant is to be considered in determining the degree of the offense, the fact that it strikes out another portion containing the same proposition is not error.—People v. Ochoa, 142 Cal. 268, 75 Pac. 847.

[x] Where, on a trial for crime, the court charged that the burden of prof was on the prosecution, and that defendant was presumed to be innocent until his guilt was established, and that he was entitled to the benefit of any reasonable doubt, and could not be convicted unless the jury were convinced by the evidence beyond all reasonable doubt, the refusal to charge that the presumption of innocence attached at the commencement of the trial and remained till its close was not prejudicial.—People v. Miles, 143 Cal. 636, 77 Pac. 666.

[y] Where the court instructed the jury that if they could reasonably account for any fact in the case on a theory which would admit of accused's innocence, it was their duty to do so, and that if they had any reasonable doubt of his guilt, to acquit him, it was not error to refuse a charge that the jury might reject any theory on which "the evidence might point to defendant's guilt, even though such theory may be reasonable, and much more probable than the one which admits of his innocence."—People v. Clark, 145 Cal. 727, 79 Pac. 434.

[z] An instruction as to the jury's right to believe witnesses, in accordance with Code of Civil Procedure, section 2061, having been given, it was not error for the court, at the request of the state, to further charge that jurors were the exclusive judges of the weight and sufficiency of the evidence.—People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 718.

[aa] In a prosecution for larceny, held not error to refuse a charge that the jury should not consider testimony stricken out.—People v. Roberts (Cal. App.), 82 Pac. 624.

[bb] On a trial for murder the refusal to warn the jury against being influenced by public sentiment held not erroneous in view of the charge given and the facts.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

[cc] In a prosecution for homicide, refusal of the court to charge that, unless the evidence was sufficiently strong to overcome the presumption of innocence and satisfy the jury of defendant's guilt beyond a reasonable doubt, defendant was entitled to an acquittal was not error.—People v. Weber (Cal. Sup.), 86 Pac. 671.

[dd] On a trial for assault with intent to murder, a refusal to charge held not erroneous in view of the charge given.—People v. Owens (Cal. App.), 86 Pac. 980.

§ 466. —— Requests Wholly or Partly Erroneous, Inapplicable or Misleading.

[a] Strong expressions, and a manifest attempt at coloring favorable to the defendant, in instructions asked by his counsel, in a criminal case, which state the law correctly, may not be regarded as constituting substantial reasons for refusing the instructions.—People v. Williams, 32 Cal. 280.

[b] It is not error for court to refuse to give abstract instruction which is not applicable to the case.—People v. Davis, 47 Cal. 93; Fowler v. Smith, 2 Cal. 39; Benham v. Rowe, 2 Cal. 387.

[c] If any part of a single instruction ought not to be given, the action of the trial court in rejecting the whole will always be affirmed. People v. Davis, 64 Cal. 440, 1 Pac. 889.

[d] Instruction quoted in the opinion held properly refused on ground that it was calculated to mislead the jury.—People v. Gonzales, 71 Cal. 569, 12 Pac. 783.

[e] Instruction to effect that flight is not inference of guilt, and that timid persons, although innocent, might seek safety thereby, held properly refused.—People v. Giaccoli, 74 Cal. 642, 16 Pac. 510.

[f] Inapplicable instructions are properly refused.—People v. Fine, 77 Cal. 149, 19 Pac. 269.

[g] Instructions inapplicable to any facts in evidence are properly refused.—People v. Buelna, 81 Cal. 140, 22 Pac. 596.

[h] Instruction confining jury to only one theory of case and compelling them to disregard all other facts in evidence is properly refused.—People v. Buelna, 81 Cal. 140, 22 Pac. 596.

[i] Instruction on weight to be attached to evidence is properly refused.—People v. Cline, 87 Cal. 379.

[j] Where an instruction asked for by a defendant in a criminal proceeding, and refused by the court, is so broad in its terms as to be misleading, if not positively erroneous, and so far as correct is given with the necessary qualifications in another instruction allowed by the court, no error is committed in the refusal to give it as asked.—People v. Walters, 98 Cal. 138, 32 Pac. 864.

[k] It is not erroneous to refuse instructions upon subjects unwarranted by testimony.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[l] An instruction asked, containing the words, "that the evidence against defendant is purely and wholly circumstantial," when in fact it is not, is properly denied.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[m] Where charge as given to jury fairly covers law bearing upon case, refusal of very numerous instructions asked for by the defendant is not erroneous.—People v. Johnson, 106 Cal. 289, 39 Pac. 622.

[n] Portions of instructions calculated to confuse jury are properly stricken out.—People v. Ammerman, 118 Cal. 29, 50 Pac. 15.

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[o] Argumentative instruction as to identity of defendant, based upon facts, and not containing any proposition of law, is properly refused.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[p] An instruction requested for the defendant which, so far as correct, consists of commonplace matters well known to the jury, and which contains an incomplete statement of the manner by which the defendant may be impeached, and an incorrect presumption of law as to the good character of the defendant as a witness, in the absence of one kind of impeaching testimony, is properly refused. People v. Gleason, 127 Cal. 323, 59 Pac. 592.

[q] An unintelligible instruction is properly refused.—People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156.

[r] Instructions having no application to facts of the case are properly disallowed.—People v. Brown, 130 Cal. 591, 62 Pac. 1072.

[s] Where, upon affidavit of defendant for continuance, it was admitted that witness whose evidence was desired would, if present, testify to facts set out in affidavit, instruction requested by defendant that testimony of such witness was conceded and admitted to be true by prosecution, was properly rejected, no such concession having been made by prosecution.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[t] Requested proper instructions, which are coupled with improper instructions, so as to constitute a presumed whole, may be properly refused as a whole.—People v. Davis, 135 Cal. 162, 67 Pac. 59.

[u] Upon trial of information for embezzlement, where evidence, without conflict, showed that crime committed was embezzlement, and nothing else, requested instructions as to the crime of larceny were properly refused.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

[v] Requested instruction involving a matter of fact was properly refused, though it might have been harmless if given. Where the jury were properly instructed as to the elements of each offense included in the crime charged, if the defendant desired a more elaborate definition of malice given to the jury, he should have requested a special instruction upon that subject.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

[w] Requested instruction which embodies only proper matter of argument by defendant's counsel to jury, was properly refused. People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

[x] In a prosecution for robbery, a requested instruction, without evidence to support it, was properly refused.—People v. Stevens, 141 Cal. 488, 75 Pac. 62.

[y] Instructions which are inapplicable to evidence are properly refused.—People v. Wardrip, 141 Cal. 231, 74 Pac. 744.

[z] Refusal of instruction which states mere commonplace matter within general knowledge of jurors is harmless error.—People v. Wardrip, 141 Cal. 232, 74 Pac. 744.

[aa] Requested instruction on law of self-defense is properly refused where there is no evidence in case on that issue.—People v. Manoogian, 141 Cal. 599, 75 Pac. 177.

[bb] Instruction singling out testimony of particular witness for comment is properly refused.—People v. Keith, 141 Cal. 690, 75 Pac. 304.

[cc] Instructions asked by the defendant, based upon the erroneous assumption that defendant could not be convicted of an attempt to commit the crime charged, and instructions asked which were included in the charge of the court, were properly refused.—People v. Oates, 142 Cal. 12, 75 Pac. 337.

[dd] Requested instructions which are unnecessary, argumentative, or an invasion of the province of the jury, or which are included fully in the charge of the court, are properly refused.—People v. Nunley, 142 Cal. 105, 75 Pac. 676.

[ee] Instructions requested by defendant which were substantially covered by the instructions given, or which were erroneous or inapplicable to the evidence, were properly refused.—People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[ff] In a prosecution for homicide, an instruction that the evidence of certain named witnesses had been stricken, and therefore must not be considered, held properly refused. People v. Weber (Cal. Sup.), 86 Pac. 671.

§ 467. Noting Disposition of Request.

[a] That an instruction is indorsed by the court "Given as modified" does not show that part of it was refused, so as to require the court, as provided by Penal Code, section 1127, in such case, to make an indorsement showing part given and part refused, as modification may have consisted in something added by court by way of correction or otherwise.—People v. Owens, 123 Cal. 482, 56 Pac. 251.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 647; 14 Cent. Dig., col. 2833, § 2019.

J. CUSTODY, CONDUCT AND DELIBERATIONS OF JURY.

ADMONITION TO JURY, § 468.
PLACING JURY IN CHARGE OF OFFICER—BIASED SHERIFF, § 469.
—— ELISOR, § 470.
MISCONDUCT OF OFFICERS AFFECTING JURY, § 471.
MISCONDUCT OF JURORS, § 472.
EXPERIMENTING OUT OF COURT, § 473.
TAKING PAPERS OR ARTICLES TO JURY-ROOM, § 474.
DISOBEDIENCE OF ADMONITION, § 475.
SEPARATION, § 476.
INSTRUCTIONS AFTER SUBMISSION OF CASE, § 477.

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and public are clamoring for punishment, does not prevent defendant from having fair trial if jury is fair and uninfluenced except by evidence adduced.—People v. Durrant, 116 Cal. 223, 224, 48 Pac. 75.

§ 520. Errors and Irregularities in Conduct of Trial.

[a] At a trial for assault with intent to commit a rape on a young child, the fact that she was sworn, but then withdrawn from the stand before she had testified to any fact in the case, she being, in fact, too young to do so, is not sufficient cause for a new trial, on the ground that her appearance on the stand was calculated to excite the sympathies of the jury.—People v. Graham, 21 Cal. 261.

[b] A new trial will not be granted, on an indictment for murder, because another judge took the place of the presiding judge during the course of the trial, but with the express consent of defendant, or because the judge who first presided resumed his seat after the rendition of the verdict, and acted in the subsequent proceedings.—People v. Henderson, 28 Cal. 465.

[c] After issue of fact is joined, every step taken for purpose of determination of that issue, up to and including the verdict upon such issue, must be regarded as arising during the course of the trial.—People v. Turner, 39 Cal. 370.

[d] Any substantial error of court on question or matter arising during course of trial is a proper ground for a motion for a new trial.—People v. Turner, 39 Cal. 370.

[e] Fact that sheriff, in absence of the judge, adjourned court at 10 A. M., instead of waiting until 12 M., is not ground for a new trial in a criminal case.—People v. Shainwold, 51 Cal. 468.

FOR AUTHORITIES FROM OTHER STATES:
See 12 Cyc. 705-707; 15 Cent. Dig., cols. 26-35, §§ 2163-2196.

§ 521. —— Failure of Judge to Attend View.

[a] Defendant is entitled to a new trial where the judge does not accompany jury on a view.—People v. Yut Ling, 74 Cal. 569, 16 Pac. 489.

§ 522. —— View Without Presence of Accused.

[a] Fact that jury, during a murder trial, were allowed to view the scene of the crime, and a buggy in which defendant and deceased had been seen driving together on the day of the murder, without the presence of defendant, was held no ground for a new trial, especially since the prisoner made no objection, and did not ask to accompany them at the time.—People v. Bonney, 19 Cal. 426.

§ 523. —— Limitation of Argument.

[a] In a criminal case, if the court below impose upon counsel, against their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived, by the limitation, of the opportunity of a full defense; for this is his constitutional right, without which he cannot be lawfully convicted.—People v. Keenan, 13 Cal. 581.

§ 524. —— Absence of Accused.

[a] In cases of felony, prisoner must be present during whole of his trial, and, where depositions are read to a jury during his absence, a new trial will be ordered.—People v. Kohler, 5 Cal. 72.

[b] That defendants' trial was continued in his absence, and that he was not present at the trial of his codefendant, are not grounds for a new trial.—People v. O'Brien, 88 Cal. 483, 26 Pac. 362.

§ 525. —— Absence of Judge.

[a] Absence of judge from the courtroom during any part of trial for felony, though he may be within hearing of courtroom, is prejudicial error entitling accused to a new trial. People v. Blackman, 127 Cal. 238, 59 Pac. 573.

§ 526. —— Erroneous Rulings on Evidence.

[a] At a trial for an assault on a young child, whose tender age prevented her giving any material testimony, the court allowed the question to be put to another witness, "Did the child tell you how this occurred, at the time?" Held, that the ruling of the court, in allowing this question, was erroneous, but that, unless it was shown that some objectionable testimony was given in answer to the question, the objection could not be availed of as a ground for a new trial.—People v. Graham, 21 Cal. 261.

[b] Where a portion of a conversation is admitted tending to establish a material admission by defendant, the exclusion of the balance of the conversation is ground for a new trial.—People v. Murphy, 39 Cal. 52.

[c] That declarations of one deceased, not made in the presence of defendant, and inadmissible under the law, and prejudicial to defendant, were received in evidence, is ground for a new trial.—People v. Dailey, 59 Cal. 600.

[d] Where jury viewed premises, and were particularly instructed to view the various bullet marks, error in refusing to allow a witness to testify as to what he saw concerning course of a bullet or bullet mark in the wall is not ground for a new trial.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

§ 527. —— Errors in Instructions.

[a] A ruling depriving the prisoner of a statutory privilege, like the right to demand that the charge should be in writing, may be objected to for the first time on a motion for a new trial.—People v. Ah Fong, 12 Cal. 345.

[b] All the charge must be taken together, and if it harmonizes as a whole, and correctly

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presents the law, a new trial will not be granted because a separate instruction does not contain all the conditions which are to be gathered from the entire text.—People v. Doyell, 48 Cal. 85; People v. Nelson, 56 Cal. 77.

[c] It is better practice to refrain from instructing jurors as to relation of defendant to case, and rule heretofore declared will be strictly adhered to, and new trials will be the result if its limits are overstepped by any extent.—People v. Curry, 103 Cal. 548, 37 Pac. 503.

[d] Failure of court to admonish jury as to their duty during separation occurring before trial begun is not ground for new trial.—People v. Coyne, 116 Cal. 297, 48 Pac. 218.

§ 528. Misconduct of Judge or Counsel for Prosecution.

[a] An erroneous statement of the testimony to the jury by counsel, in the trial of a cause, is not an error for which a new trial will be granted.—People v. Barnhart, 59 Cal. 402; People v. Lee Ah Yute, 60 Cal. 95.

[b] Where a defendant charged with murder was taken to the coroner's inquest by the officers, but was not sworn as a witness by the coroner's jury, who were conducting an ex parte examination, and called upon whom they pleased as witnesses, remarks by the district attorney in his closing argument drawing conclusions adverse to defendant from fact that he had not stated certain matters at coroner's inquest, which he had testified to on trial, and remarks of judge implying that it was proper to claim that defendant had failed to make statements before coroner, are improper, and unfair to defendant.—People v. Lemperle, 94 Cal. 45, 29 Pac. 709.

[c] Where alleged misconduct of judge and counsel for the people consisted in various statements made in presence of the jury, and in the asking of improper questions, but there is no extreme case, and no willful error, or display of anger, working injustice against the defendant, appears a new trial will not be granted for the alleged misconduct.—People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

[d] New trial may be granted for misconduct of prosecuting attorney in his opening statement.—People v. Searcey, 121 Cal. 4, 53 Pac. 359.

[de] New trial will not be granted for misconduct of district attorney in opening statement not such as to justify conclusion that he was actuated by bad faith.—People v. Searcey, 121 Cal. 4, 5, 53 Pac. 359.

[e] In a criminal case, held, that there was no ground for granting a new trial because of misconduct of counsel.—People v. Woods, 147 Cal. 265, 81 Pac. 652.

FOR AUTHORITIES FROM OTHER STATES:

Granting new trial for improper argument of counsel: 56 Am. Rep. 812, 58 Am. Rep. 648, notes. See, also, 12 Cyc. 707; 15 Cent. Dig., cols. 35-41, §§ 2197-2201.

§ 529. Misconduct of Officer of Court.

[a] Misconduct by officers of the court should be presented to the trial court on motion for a new trial, and not by appeal to the supreme court.—People v. Torres, 38 Cal. 141.

§ 530. Misconduct of Jury—In General.

[a] On a murder trial, one of defendant's principal witnesses was a woman who kept a disreputable place, and with whom he lived. During the trial, four of the jurors visited her place repeatedly, and their conduct became so notorious that the judge reprimanded them, and placed them in the custody of the sheriff, and his comments were published in the newspapers. The sheriff also told the jury that, if a disagreement was brought about by those of their number guilty of the misconduct, "there would be hell to pay." Held, that a conviction would be set aside, since the only way the jury could free themselves from suspicion was by a conviction.—People v. Mitchell, 100 Cal. 328, 34 Pac. 698.

[b] On a motion for a new trial, an affidavit was made that, on the day before the trial closed, one of the jurors was seen in earnest conversation with deceased's brother, the conversation being out of hearing. Defendant's counsel also made affidavit five days after the verdict that he had been informed that another juror had publicly stated during the trial that defendant ought to be hanged, but no one was named who heard the statement. Held, that the discretion of the court in refusing to examine the jurors or to order a new trial would not be interfered with.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 717-730; 15 Cent. Dig., cols. 10, 11, § 2136; cols. 78-125, §§ 2238-2282.

§ 531. —— Not Injuriously Affecting Accused.

[a] Where juror has manifested inclination to talk about case, such impropriety on the part of the juror is not a sufficient ground for setting aside the verdict if it appear conclusively that the defendant was not affected prejudicially thereby.—People v. Dennis, 39 Cal. 625.

[b] To secure new trial for misconduct of juror defendant need not, in all cases, show affirmatively that he was injured.—People v. Lee Chuck, 78 Cal. 335, 338, 20 Pac. 719.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 78-125, §§ 2238-2282.

§ 532. —— Before Being Sworn.

[a] New trial will be granted on ground of improper conduct of a juror after having

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been called and examined on his voir dire, and before being finally sworn as a juror.—People v. Turner, 39 Cal. 370.

§ 533. —— Exposure to Public.

[a] The fact that the jury, after agreeing on their verdict, were allowed to remain in the courtroom while the officer waited on the porch some minutes for the judge, is not ground for new trial, where it does not appear that any communication was had with the jury in the meantime.—People v. Boggs, 20 Cal. 432.

[b] Verdict of guilty will not be set aside on a showing that a third person expressed in the presence of the jury, while they were deliberating upon their verdict, a wish that the defendant should be convicted, where the expression appears to have been a mere passing remark, and not part of a conversation in which the jury engaged.—People v. Brannigan, 21 Cal. 337.

[c] The facts that the jury, after they retired for deliberation, were conducted by the officer having them in charge to the dining-room of a hotel, where they remained together for three-quarters of an hour; that one of the doors of the room was opened and accessible to strangers; and that the officer in charge was absent from the room for a few minutes during the period named—are insufficient to constitute misconduct on the part of the jury or of the officer, for which a new trial should be granted.—People v. Kelly, 46 Cal. 355.

§ 534. —— Communication with Outsiders.

[a] Where there is no reason to suppose that any injury has resulted from a few accidental or careless remarks passing between the jury and strangers, there can be no necessity for ordering a new trial therefor.—People v. Boggs, 20 Cal. 432.

[b] Fact that a person outside the jury-room spoke to one of the jurors during their deliberations, and that some of the jurors spoke to other persons outside, is not ground for new trial where it does not appear that anything was said referring to the trial.—People v. Boggs, 20 Cal. 432.

For Authorities from Other States:

See 12 Cyc. 718-727; 15 Cent. Dig., cols. 111-119, §§ 2263-2271.

§ 535. —— Failure to Admonish Jury.

[a] A new trial will not be ordered, on the ground that the court, before adjournment, did not admonish the jury not to converse or express an opinion on the case, etc., as Criminal Practice Act, section 894, provides, when defendant has shown no injury resulting to himself from the neglect of the court.—People v. Colmere, 23 Cal. 631.

§ 536. —— Separation.

[a] It is ground for new trial that one of the jurors separated from the others, though he did so by consent of prisoner's counsel.—People v. Backus, 5 Cal. 275.

[b] If one or more jurors in a criminal trial separate without leave of court, so that such juror might have been improperly influenced by others, verdict will be set aside.—People v. Backus, 5 Cal. 275.

[c] The fact that during a trial for murder some of the jurors lifted up a witness, who had suddenly fainted during her examination, and carried her into an adjoining chamber of the judge, and laid her upon a sofa—the deputy sheriff in attendance upon the court accompanying the jurors, who were absent about a minute, during which time the witness was insensible—is no ground for a new trial because of a separation of the jurors.—People v. Lee, 17 Cal. 76.

[d] The fact that some of the jurors, during their deliberations on their verdict, are taken by the bailiff from the jury-room to the water-closet, and returned, if nothing of a prejudicial character occurs during such separation, is no ground for setting aside the verdict and granting a new trial.—People v. Bonney, 19 Cal. 426; People v. Wheatley, 88 Cal. 114, 26 Pac. 95.

[e] In a criminal action, the separation of the jury without permission of the court, after retiring to consider their verdict, is ground for setting aside their verdict of guilty, unless it be affirmatively shown by the prosecuting attorney that no prejudice resulted to defendant.—People v. Brannigan, 21 Cal. 337.

[f] Mere fact that a jury, in a capital case, separated without permission of court, and that some of the jury conversed with third persons before rendering a verdict, is not a sufficient ground for a new trial being granted, if it is shown that no injury to defendant resulted therefrom.—People v. Symonds, 22 Cal. 348.

[g] The retirement of a jury for a necessary purpose for a few moments, with the permission of the sheriff, out of his sight, there being no evidence that during such retirement they communicated with anyone or with each other, but positive proof to the contrary, is not sufficient ground on which to grant a new trial.—People v. Moore, 41 Cal. 238.

[h] After retiring for deliberation, jury went to restaurant. While there, three jurors went to the bar, about twenty-five feet from where the others sat, for drinks. Held, that, under Penal Code, section 1181, subdivision 3, regulating new trials, such separation is ground for new trial.—People v. Thornton, 74 Cal. 482, 16 Pac. 244.

[i] Fact that some of jurors in making a view were occasionally out of sight of the others does not constitute a separation if they were kept as much in a body as the nature of the premises viewed would permit. People v. Yut Ling, 74 Cal. 569, 16 Pac. 489.

[j] Momentary separation of jury while viewing premises, with consent of both parties, is harmless.—People v. Tarm Poi, 86 Cal. 229, 231, 24 Pac. 998.

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[k] The fact that several jurors, in a murder cause, were separated from their fellow-jurors during the progress of the trial, and out of the sight of the officer who had them in charge, contrary to the orders of the court, is not sufficient ground to grant a new trial, where it does not appear that anything was said to either of them concerning the cause, or that they were guilty of any misconduct, or that they did any act inconsistent with their duties as jurors during the separation.—People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

[l] Where, during the progress of a criminal trial, a witness for the people, while upon the stand, becomes ill, and unable to proceed in giving evidence, and physicians report that it would not be safe for him to continue his testimony within the next two months, an order continuing the case for a period of sixty-three days, and instructing the jury to return to court in that time, and allowing them to return to their homes, and there remain until the expiration of the continuance, is an abuse of discretion, entitling the defendant to a new trial.—People v. Dinsmore, 102 Cal. 381, 36 Pac. 661.

§ 537. —— Mistake in Arriving at Verdict.

[a] Proof that certain of the jurors agreed on their verdict, in a criminal case, under a mistaken impression as to the powers of the court to punish on their conviction, is no ground for a new trial. The question of guilt is the sole province of the jury.—People v. Lee, 17 Cal. 76.

§ 538. —— Urging Agreement.

[a] A new trial, in a criminal case, will not be granted because the judge informed the jury, after it had been out some time, that, if it did not agree in five minutes, it would have to stay out all night.—People v. Hughes, 29 Cal. 257.

§ 539. —— Improperly Influencing Jury.

[a] Where, after the statement of a juror that the jury were unable to agree without a view of the premises, defendant requested that a view might be had, and consented to a separation of the jury until morning for that purpose, at which time he moved for his discharge on account of the separation of the jury, which motion was denied, whereupon the judge made indignant statements to the jury about the change of defendant's action, and told them to retire for deliberation, five minutes after which they returned a verdict of guilty, the conclusion is justified that they were improperly influenced by the manner and statements of the judge, and that they inferred that the defendant did not really desire a view of the premises, and that such view would have added to the evidence of his guilt; and a new trial should be granted.—People v. Hawley, 111 Cal. 78, 43 Pac. 404.

§ 540. —— Reading Newspapers.

[a] Reading by a juror, during the progress of the trial of a newspaper containing any matter in connection with the subject matter of the trial would be at all likely to influence him in the performance of his duty, is sufficient misconduct to warrant a new trial.—People v. McCoy, 71 Cal. 395, 12 Pac. 272.

[b] Reading by jury of newspaper article written for purpose of intimidating them, and inducing them to find defendant guilty is ground for new trial.—People v. Murray, 85 Cal. 361, 24 Pac. 666.

[c] Where the jury, after retiring to deliberate on a verdict, read newspaper statements that two men will hang the jury, that their identity is known to the public, and that attempts will be made to corrupt the jury, the verdict will be set aside.—People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207.

[d] An affidavit that a juror read in a newspaper "reports of the progress of the trial" was insufficient to show misconduct justifying a new trial.—People v. Fernandez (Cal. App.), 86 Pac. 899.

[e] A newspaper article published during the trial of a criminal case referring to one of the jurors and read by the jury held not to contain matter that would unduly influence any of the jurors not referred to in the article.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

[f] One convicted of crime who moves for new trial on the ground of misconduct of the jury arising from their reading a newspaper article held required to show that the article came to the knowledge of the jury.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

§ 541. —— Receiving Evidence Out of Court.

[a] On motion for a new trial on the ground that the jury received evidence out of court, presumption is that jurors perform their duty, and to overthrow this presumption, positive evidence of misconduct must be introduced.—People v. Williams, 24 Cal. 31.

[b] Where, on the trial of an indictment for larceny in stealing a cow, horns, which had been introduced in evidence on the general statement of a witness that they were the horns of the stolen cow, were handled and examined by one of the jurors during a recess in the court, such examination does not amount to receiving evidence out of court, within the meaning of Penal Code, section 1181, subdivision 2, providing that a new trial may be granted where the jury has received any evidence out of court.—People v. Tipton, 73 Cal. 405, 14 Pac. 894.

[c] On trial for libel, after retiring, the jury found and read portions of a pamphlet containing the alleged libel. The pamphlet had been admitted in evidence, and partly read to the jury. Held, that the jury had "received evidence out of court," and, under Penal Code, section 1181, subdivision 2, a new trial should be granted.—People v. Thornton, 74 Cal. 482, 16 Pac. 244.

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[d] On a prosecution for homicide, certain diagrams of the premises where the killing occurred were introduced in evidence without objection, and were tacked to a blackboard in view of the jury. During a recess, one of the jurors left the jury-box and stepped over and casually inspected the diagrams. Held no ground for new trial under Penal Code, section 1181, subdivision 2, forbidding the jury to receive evidence out of court other than that resulting from a view of the premises, as against an objection that the diagrams purported to represent not only the house in which the homicide occurred, but the surrounding premises, including on outhouse or closet in which was found some of the material objects introduced in evidence, and that there was also on the diagrams the representation of a building occupied by other parties; there being no suggestion as to what the "surrounding premises" were, or what the "building occupied by parties other than the defendant" was, and there being no question as to the other portions of the diagram having been accurately represented.—People v. Antony, 146 Cal. 124, 79 Pac. 858.

[e] A diagram drawn by a juror on a blackboard in the jury-room, from the juror's memory of the evidence, held not objectionable as the reception of evidence out of court. People v. Gallanar (Cal. App.), 86 Pac. 814.

§ 542. —— Use of Intoxicating Liquors.

[a] During a murder trial, lasting eleven days, large quantities of beer, wine, and whisky were ordered by the jury, at their own expense, and consumed by them, mostly before the submission, but some afterward, without permission of the court, and without the knowledge of the defendant. It did not clearly appear that any juror was intoxicated. Held, that a conviction must be set aside.—People v. Gray, 61 Cal. 164, 44 Am. Rep. 549.

[b] Use of wine or liquor by jury while deliberating upon their verdict in capital case is ground for new trial.—People v. Lee Chuck, 78 Cal. 332, 20 Pac. 719.

[c] Use of intoxicating liquors by jury, or a juror, is not ground for a new trial, in absence of any showing that injurious consequences resulted therefrom.—People v. Sansome, 98 Cal. 235, 33 Pac. 202; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Leary, 105 Cal. 486, 39 Pac. 24.

[d] Fact that jurors took a drink on one occasion before supper at hotel bar at invitation of sheriff is not ground for new trial.—People v. Van Horn, 119 Cal. 333, 51 Pac. 538.

[e] Mere fact that, during a trial which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney, or that one of them took dinner at his house under circumstances rendering the act of invitation necessary, or took supper with counsel under similar circumstances, is no ground for new trial.—People v. Lyle, 4 Pac. 977.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 725; 15 Cent. Dig., cols. 95-98, §§ 2254-2256.

§ 543. —— Change of Officer in Charge.

[a] A new trial will not be granted, in a criminal case, because, after a deputy sheriff was sworn to take charge of the jury, the sheriff himself took charge of them.—People v. Hughes, 29 Cal. 257.

§ 544. —— Temporary Absence of Officer in Charge.

[a] Fact that officer having charge of jury was absent from their room for some minutes is not ground for a new trial when it does not appear that the jury were allowed to separate.—People v. Boggs, 20 Cal. 432.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 728-730; 15 Cent. Dig., cols. 119-123, §§ 2272-2279.

§ 545. Irregularities or Defects in Verdict.

[a] Where a defendant accused of crime has interposed a plea of not guilty, and also a separate plea of "once in jeopardy" for the same offense, he is entitled to have the latter plea passed upon by the jury before judgment can properly be pronounced against him, and, where the jury found a verdict of guilty without passing upon the plea of "once in jeopardy," a judgment of conviction will be reversed, and a new trial granted. People v. Tucker, 115 Cal. 337, 47 Pac. 111.

[b] Where, from the verdict and the instructions, it is impossible to say whether the jury found that defendant was present at the time a crime was actually committed, and participated in that commission, or whether they found that, though he was elsewhere at the time of the commission, of the crime, still he was guilty as an aider and abettor, a new trial will be granted.—People v. Schoedde, 126 Cal. 373, 58 Pac. 859.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 730, 731; 15 Cent. Dig., cols. 125-129, §§ 2283-2292.

§ 546. —— Verdict Improperly Influenced.

[a] Interruption by juryman of counsel for defense in an improper manner tends to show passion or prejudice.—People v. Hamilton, 46 Cal. 540.

[b] It is always competent for convicted defendant to show that verdict is result of improper influences—e. g., newspaper articles. People v. Murray, 85 Cal. 361, 24 Pac. 666.

[c] Where there is legal evidence to support a verdict of guilty, the jury's recommendation of "extreme mercy of the court" negatives the claim of "passion and prejudice" in rendering the verdict.—People v. Wilson, 119 Cal. 384, 51 Pac. 639.

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§ 547. —— Verdict Contrary to Evidence.

[a] A new trial will not be granted when there is evidence, though conflicting, to support it.—People v. Ah Ti, 9 Cal. 16.

[b] A new trial will be granted where the issue involves matters of fact only, and the facts proved require a different verdict from that found by the jury, or where there has been no proof whatever of a material fact, or not sufficient proof of the facts in issue.—People v. Ah Ti, 9 Cal. 16.

[c] To justify interference with verdict there must be an absence of evidence against prisoner, or a decided preponderance in his favor.—People v. Ah Loy, 10 Cal. 301.

[d] If the judge before whom a case is tried is satisfied that a verdict is obtained against the accused on the testimony of witnesses unworthy of belief, it is his duty, on the application of defendant, to set aside the verdict and grant a new trial.—People v. Baker, 39 Cal. 686.

[e] Defendant may move for new trial on ground of preponderance of evidence in his favor upon some issue which it is material for prosecution to establish, and court, if it is of the opinion that there is such a preponderance, should set aside the verdict.—People v. Ashnauer, 47 Cal. 98.

For Authorities from Other States:

See 12 Cyc. 731; 15 Cent. Dig., cols. 130-135, §§ 2297-2298.

§ 548. Reception of Verdict in Absence of Defendant.

[a] Receiving verdict in absence of defendant is ground for new trial.—People v. Beauchamp, 49 Cal. 41.

§ 549. Surprise.

[a] People may examine a witness who did not testify before grand jury and whose name is not indorsed on indictment, without first giving notice of such intended examination; and the rule in respect to surprise is the same as to the evidence of such a witness as to that of any other witness.—People v. Jocelyn, 29 Cal. 562.

[b] In a prosecution for homicide, the fact that the attorney general changed his theory of the case on final argument thereof to the jury, held not ground for new trial.—People v. Weber, (Cal. Sup.), 86 Pac. 671.

§ 550. Newly Discovered Evidence—In General.

[a] In criminal cases newly discovered evidence is not ground for new trial. Statute names all grounds for setting aside verdict. People v. Bernstein, 18 Cal. 699.

[b] A new trial will not be granted on the ground of newly discovered evidence, unless the affidavits set forth evidence which would have been admissible on the trial.—People v. Voll, 43 Cal. 166.

[c] Evidence stated in an affidavit for continuance is not newly discovered.—People v. Ah Yute, 53 Cal. 614.

[d] To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence, and not merely its materiality, be newly discovered; that the party could not with reasonable diligence have discovered and produced it at the trial; and that these facts be shown by the best evidence which the case admits.—People v. Sutton, 73 Cal. 243, 15 Pac. 86.

[e] Application for a new trial in a criminal case, on the ground of newly discovered evidence, should be regarded with distrust and disfavor.—People v. Howard, 74 Cal. 547, 16 Pac. 394.

[f] Newly discovered evidence from a witness for the prosecution, which was so closely related to evidence given by him at the trial that it might have been called out upon cross-examination at that time, is not ground for a new trial.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[g] Defendant filed the affidavits of himself and two others alleging that he was in a certain saloon when the offense was committed, that another person had admitted that he did the act, and that defendant did not know of such evidence until after trial. Held, that a new trial was improperly refused.—People v. Kelleher, 16 Pac. 705.

For Authorities from Other States:

See 12 Cyc. 734-742; 15 Cent. Dig., cols. 141-178, §§ 2306-2336.

§ 551. —— Diligence Prerequisite.

[a] A and B were jointly indicted for a crime. A, being tried separately, was found guilty. It appeared that A had reason, if innocent, to believe that B was guilty, and had opportunity on the trial to examine B, but neglected to do so. Held, that a new trial would not be granted on the ground of newly discovered evidence.—People v. Miller, 33 Cal. 99.

[b] Motion for a new trial on the ground of newly discovered evidence should not be granted without a satisfactory showing of diligence.—People v. Ah Ton, 53 Cal. 741.

[c] Defendant was entitled to a new trial, where he had been precluded by prosecution from inquiring into material matter until after his conviction.—People v. Stanford, 64 Cal. 27, 28 Pac. 106.

[d] Newly discovered evidence is not ground for new trial in absence of showing that such evidence could not, by reasonable diligence, have been had on the trial.—People v. Jones, 8 Pac. 611; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Howard, 74

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Cal. 457, 16 Pac. 394; People v. Leong Yunge Gun, 77 Cal. 636, 20 Pac. 27; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; People v. Cesena, 90 Cal. 381, 27 Pac. 300; People v. Freeman, 92 Cal. 359, 28 Pac. 261.

[c] New trial will not be granted for newly discovered evidence unless excuse shown for not producing it at trial.—People v. Nelson, 85 Cal. 431, 24 Pac. 1006.

[f] When the affidavits on the subject of diligence in the discovery of the new evidence are vague and general, and do not disclose the manner in which the evidence was discovered, and no explanation is given why it was not discovered before the trial, it is not an abuse of discretion to deny the motion for want of diligence.—People v. Kloss, 115 Cal. 567, 47 Pac. 459.

[g] New trial cannot be granted for newly discovered evidence where affidavits in support of motion do not make a showing of diligence, and the newly discovered evidence appears to be merely cumulative to proof given upon the trial.—People v. Brittan, 118 Cal. 409, 50 Pac. 664.

[h] A new trial will not be granted on the ground of material evidence not presented at the trial, where the party was aware of the existence of such evidence, and the one who could have testified to it was in court during part of the trial, and no effort was made to secure his testimony.—People v. Luchetti, 119 Cal. 501, 51 Pac. 707.

[i] Where there is no strong or exceptional showing made, to overcome the lack of diligence in securing the evidence, there is no abuse of discretion in denying the motion.—People v. Griner, 124 Cal. 19, 56 Pac. 625.

[j] Motion for a new trial upon ground of newly discovered evidence is looked upon with disfavor; and where it appears, in view of the affidavits and counter-affidavits, that there is not a sufficient showing of diligence or of the truth and materiality of the evidence to make a strong case in favor of the motion, it is properly denied.—People v. Warren, 130 Cal. 683, 63 Pac. 86.

FOR AUTHORITIES FROM OTHER STATES.

See 12 Cyc. 737, 738; 15 Cent. Dig., cols. 150-158, §§ 2318-2323.

§ 552. —— Materiality of Evidence Discovered.

[a] After-discovered evidence that earmarks of hog alleged to have been stolen are different from marks testified to on trial is material.—People v. Stanford, 64 Cal. 27, 28 Pac. 106.

[b] New trial should not be granted for newly discovered evidence which would not probably produce different result.—People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Howard, 74 Cal. 547, 16 Pac. 394; People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; People v. Demasters, 109 Cal. 607, 42 Pac. 236.

[c] New trial will not be granted for newly discovered evidence which is immaterial.—People v. Nelson, 85 Cal. 431, 24 Pac. 1006.

[d] Newly discovered evidence which could not have changed result is not ground for new trial.—People v. Luchetti, 119 Cal. 509, 51 Pac. 707.

[e] New trial will not be granted on ground of newly discovered evidence where such evidence was of little importance, and no diligence was used in discovering evidence before trial.—People v. Soap, 127 Cal. 408, 59 Pac. 771.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 738, 739; 15 Cent. Dig., cols. 158-167, §§ 2324-2327.

§ 553. —— Cumulative Evidence.

[a] New trial will not be awarded for newly discovered evidence which is merely cumulative.—People v. McCurdy, 68 Cal. 583, 10 Pac. 207; People v. Wong At Foo, 69 Cal. 182, 10 Pac. 375; People v. Fang Ah Sing, 70 Cal. 8, 11 Pac. 323; People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Goldenson, 76 Cal. 352, 27 Pac. 295; People v. O'Brien, 78 Cal. 48, 20 Pac. 359; People v. Cesena, 90 Cal. 381, 27 Pac. 300; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Davis, 1 Cal. App. 8, 81 Pac. 716-718.

[b] The denial by the trial court of a motion for new trial, on the ground of newly discovered evidence, tending to show statements of the prosecuting witness inconsistent with his testimony, will be affirmed, where two eye-witnesses gave testimony directly contrary to that of such prosecuting witness, since such new evidence is merely cumulative.—People v. Loui Tung, 90 Cal. 377, 27 Pac. 295.

[c] New trial on ground of newly discovered evidence is properly refused where substantially the same matters set forth in the affidavit were testified to by the witnesses at the trial, the only difference being that a certain statement made by defendant was testified to by witnesses as having been made before the trial, while the affidavit referred to statements made subsequent to the trial.—People v. Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096.

[d] The denial of an application for a new trial on the ground of newly discovered evidence will not be reversed where such evidence was merely cumulative, and in every material point contradicted by counter-affidavits.—People v. Mesa, 93 Cal. 580, 29 Pac. 116.

[e] Testimony of a physician who attended defendant at the time of an injury that, in his opinion, it was the kind of an injury which would produce epilepsy, is but cumulative evidence, not calling for a new trial: the physicians who testified as experts having had all the data that he had, and more,

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and defendant's expert having testified to the same thing.—People v. Kloss, 115 Cal. 567, 47 Cal. 459.

[f] When, on a motion for a new trial on a prosecution for rape, affidavits of persons who claimed to have met defendant at different times, from one to three days after the alleged rape, stating that they had seen no marks or scratches on his face, and that they were sure they would have noticed them if they had been there, were presented, and evidence to such effect had been given at the trial, it was no abuse of discretion to deny a motion for a new trial for newly discovered evidence, since the evidence was merely cumulative.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[g] A new trial should not be granted because of newly discovered evidence which is merely cumulative, and manifestly would not have changed the result.—People v. Chrisman, 135 Cal. 282, 67 Pac. 136.

[h] Where it appears that, upon the trial of a defendant charged with forgery, the evidence was strongly conflicting, and evidence on part of prosecution, leaving out of view that of defendant, was extremely slight and unsatisfactory, matters which in ordinary cases might be disregarded on motion for a new trial will be closely examined, and a new trial should be granted for newly discovered evidence that the prosecuting witness had declared that he himself had signed the note alleged to be forged, although such evidence is, in some sense, cumulative for the defendant.—People v. Lapique, 136 Cal. 503, 69 Pac. 226.

[i] On a prosecution for forgery, wherein the prosecutor testified that he did not sign the note in question, and two other witnesses testified that he had admitted the signature to be genuine, newly discovered evidence that the prosecutor had admitted that the signature to the note had been placed there by himself is not ground for a new trial since it was merely cumulative and impeaching.—People v. Lapique, 67 Pac. 14; judgment reversed, 69 Pac. 226.

For Authorities from Other States:

See 12 Cyc. 740; 15 Cent. Dig., cols. 167-171, §§ 2328-2330.

§ 554. —— Impeaching Evidence.

[a] Newly discovered evidence, which is designed to contradict a witness, is not of a character to warrant a new trial.—People v. Anthony, 56 Cal. 397; People v. McCurdy, 68 Cal. 583, 10 Pac. 207; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Loui Tung, 90 Cal. 377, 27 Pac. 295; People v. Freeman, 92 Cal. 359, 28 Pac. 261; People v. Holmes, 126 Cal. 462, 58 Pac. 917.

[b] Refusal of trial court to grant new trial on ground of newly discovered evidence will be affirmed when such evidence is merely contradictory of the state's testimony, and counter-affidavits show that unless such testimony is false defendant must have known of it before.—People v. Cesena, 90 Cal. 381, 27 Pac. 300.

[c] New trial cannot be granted on ground of newly discovered evidence, the effect of which would be to impeach prosecuting witness, where counter-affidavits weaken, showing and make it unsatisfactory.—People v. Ah Noon, 116 Cal. 657, 658, 48 Pac. 794.

[d] In a prosecution for homicide, it was not an abuse of discretion for the trial court to refuse a new trial for newly discovered evidence impeaching the testimony of a witness merely as to one of the reasons which he gave for his identification of a weapon.—People v. Weber (Cal. Sup.), 86 Pac. 671.

For Authorities from Other States:

See 12 Cyc. 741; 15 Cent. Dig., cols. 172-176, §§ 2331, 2332.

§ 555. —— Conflicting or Contradicted Evidence.

[a] An application for a new trial on the ground of newly discovered evidence is properly refused when the newly discovered evidence is irreconcilable with the testimony which defendant gave on the first trial.—People v. McCauley, 45 Cal. 146.

[b] Although a defendant may make as many and different defenses to a charge as he may see fit, although they may be inconsistent, yet if he proceeds to trial upon a certain line of defense without making due inquiry and preparation as to any other defense that he may have to the charge, he cannot be permitted, when the issue has gone against him, to thereafter come in, and, upon a motion for a new trial, suggest for the first time that there is other evidence material to his defense, upon a new and different theory, in conflict with the defense made at the trial. People v. Freeman, 92 Cal. 359, 28 Pac. 261.

For Authorities from Other States:

See 15 Cent. Dig., cols. 176, 177, §§ 2333, 2334.

§ 556. —— Credibility or Probate Effect of Evidence.

[a] Defendant was convicted of embezzlement, his identity being established by four witnesses, three of whom testified that he had a beard of about two weeks' growth at the time of the crime. Defendant asked a new trial, based on newly discovered evidence, tending to show that he had no beard, and filed several affidavits. In one of these affiant stated that another told him before the trial that he had committed the crime. Affiant did not make this alleged fact known until after defendant's conviction. This affidavit also seriously contradicted statements made upon defendant's preliminary examination. Held, that the affidavits contained nothing which rendered it probable that on a retrial of the case a different result would be reached.—People v. Woodruff, 126 Cal. xvii, 58 Pac. 854.

[b] Where on a motion for new trial on a prosecution for rape, affidavits of persons who claimed to have met defendant at differ-

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ent times, from one to three days after the alleged rape, stating that they had seen no marks or scratches on his face, and that they were sure they would have noticed them if they had been there, were presented, and evidence to such effect had been given at the trial, and there had been a prior trial, it was no abuse of discretion to deny the motion on the ground of newly discovered evidence since the evidence would not probably have changed the result.—People v. Benc, 130 Cal. 159, 62 Pac. 404.

[c] In considering a motion for a new trial in a criminal case there is always a question whether, under all the circumstances, the newly discovered evidence is produced in such a way and is of such a nature that its introduction upon another trial would render a different result reasonably probable, and whether, in the absence of such evidence, defendant has had a fair trial on the merits.—People v. Sing Yow, 145 Cal. 1, 78 Pac. 235.

[d] To justify the granting of a new trial on the ground of newly discovered evidence in a criminal case the evidence newly discovered must be such as to render a different result probable in the event of a new trial.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 742; 15 Cent. Dig., col. 178, § 2336.

§ 557. Application or Motion for New Trial—Formal Requisites.

[a] A motion for a new trial being an application for a rule or order made viva voce to a court or judge, the attention of the court must be called to it, and the court moved to grant it; merely making out and filing a written application for such rule or order is not sufficient.—People v. Ah Sam, 41 Cal. 645.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 179-181, §§ 2337-2344.

§ 558. —— Amendment of Motion.

[a] Where defendant's motion for a new trial is denied, and judgment is pronounced, his application for leave to amend the motion, made nearly a year later, is properly denied, since no motion for a new trial is pending, and there is nothing to amend.—People v. Wessel, 98 Cal. 352, 33 Pac. 216.

§ 559. —— Jurisdiction to Hear and Grant.

[a] The mere fact that the motion for a new trial, in a murder case, is without objection from the defendant, heard before different judges from those sitting at the trial, will not, without some special cause shown, constitute of itself a sufficient ground for the reversal of judgment.—People v. Hobson, 17 Cal. 424.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 743; 15 Cent. Dig., cols. 181-183, §§ 2345-2348.

§ 560. —— Time for Making.

[a] Statute does not contemplate a motion for new trial until all of the issues have been passed upon.—People v. Smith, 121 Cal. 355.

[b] Under Penal Code, section 1182, providing that in criminal cases a motion for a new trial must be made "before judgment," where such a motion was made and denied when the defendant was brought before the court, and judgment was then pronounced without arraignment, he is not authorized to make another motion for a new trial upon the vacation of the judgment and his subsequent arraignment.—People v. Walker, 142 Cal. 90, 75 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 743, 744; 15 Cent. Dig., cols. 183-188, §§ 2349-2358.

§ 561. —— Necessity for Bill of Exceptions.

[a] Motion for new trial may be heard without any bill of exceptions.—People v. Keyser, 53 Cal. 183.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 746; 15 Cent. Dig., cols. 192-194, §§ 2368-2372.

§ 562. —— Parties.

[a] Under the statutes, courts are authorized to grant new trials, in criminal cases, only on application of defendant.—People v. Bangeneaur, 40 Cal. 613.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., col. 179, § 2338.

§ 563. —— Necessity and Sufficiency of Affidavits and Other Proofs in General.

[a] If a prisoner objects that he was absent at the time of trial or the rendition of the verdict, or the passing of the sentence, he must prove his absence.—People v. Stuart, 4 Cal. 218.

[b] Defendant ought, on motion for new trial on ground that testimony was excluded —motion being based on affidavit by counsel of defendant that he was surprised by the exclusion of the testimony, and that he had, during the trial, another witness who could have proved the fact that deceased fired the first shot, and whom counsel could have introduced but for the admission of deceased's statement, and that this witness was now within reach of court,—to have tendered the affidavit of this witness, or have shown that it could not be had.—People v. Bealoba, 17 Cal. 389.

[c] Affidavit which states that affiant is informed and believes that jury, while deliberating, reads slips of paper and books containing evidence produced at a former trial, is not sufficient proof of receiving evidence out of court as a ground for granting a new trial.—People v. Williams, 24 Cal. 31.

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[d] Where defendant moves for new trial on ground that court erred in not granting him a continuance by reason of absence of his witnesses, he should procure the affidavits of witnesses to show that they could testify to the facts desired to be proved by them.—People v. De Lacey, 28 Cal. 589.

[e] A motion to set aside a verdict on the ground of surprise will be denied, when the affidavit does not show that the testimony of the witness objected to was not true, or that it could be obviated by other evidence.—People v. Jocelyn, 29 Cal. 562.

[f] Where a motion for a new trial is made on the ground that the verdict is contrary to the evidence, the motion is heard as it would be were it brought on for hearing immediately after the verdict, and neither a statement nor the reporter's notes are required to be filed in support of the motion.—People v. Fisher, 51 Cal. 319.

[g] On motion for new trial defendant may show whether jury read newspaper article having intimidating effect on them.—People v. Murray, 85 Cal. 361, 24 Pac. 666.

[h] Affidavit of misconduct of jury made on information and belief is insufficient.—People v. Tarm Poi, 86 Cal. 231, 24 Pac. 998; People v. Findley, 132 Cal. 301, 64 Pac. 472; People v. Chin Non, 146 Cal. 561, 80 Pac. 681; People v. Feld (Cal. Sup.), 86 Pac. 1100.

[i] Motion to be allowed to file additional affidavits in support of a motion for a new trial is properly denied when made after the new trial has been denied, and without production of the affidavits.—People v. Fice, 97 Cal. 459, 32 Pac. 531.

[j] Proof of the publication of articles in newspapers during a criminal trial adverse to accused held not to raise a presumption that the articles came to the knowledge of the jurors.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

[k] Evidence of accused after conviction given on the trial of his companion charged with the same offense held unavailable on accused's application for a new trial to rebut evidence given on his trial.—People v. Sullivan (Cal. App.), 86 Pac. 834.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 746-749; 15 Cent. Dig., cols. 194-210, §§ 2373-2391.

§ 564. —— Counter-affidavits.

[a] On a motion for new trial on ground of newly discovered evidence, counter-affidavits are competent to show that defendant has not exercised due diligence.—People v. Cesena, 90 Cal. 381, 27 Pac. 300.

[b] Where defendant's affidavits in support of a motion for a new trial for newly discovered evidence are fully contradicted by affidavits of the prosecution, a new trial is properly denied.—People v. Fice, 97 Cal. 459, 32 Pac. 531.

[c] On a motion for a new trial in a criminal case on the ground of newly discovered evidence shown by affidavits of the proposed witnesses, it is not error for the court to permit the state to file counter-affidavits.—People v. Sing Yow, 145 Cal. 1, 78 Pac. 235.

§ 565. —— Affidavits and Testimony of Jurors.

[a] Affidavit of juryman, made after verdict, that he had formed and expressed an opinion before the trial, cannot be received on a motion for a new trial.—People v. Baker, 1 Cal. 403.

[b] Affidavit of juror, purging his conduct from imputation of corruption or impropriety, will not be admitted where he separates from the rest of jury in a criminal trial without permission of court.—People v. Backus, 5 Cal. 275.

[c] Verdict cannot be impeached by affidavit of one juror tending to show that it was not fair expression of opinion of jury.—People v. Wyman, 15 Cal. 70.

[d] While a juror is not disqualified from becoming a witness in a proper case, public policy prohibits him from impeaching his own verdict by an affidavit that a juror made statements in the jury-room of matters not in evidence.—People v. Doyell, 48 Cal. 85.

[e] Affidavits of jurors are competent to rebut affidavits of misconduct on their part urged in support of a new trial.—People v. Hunt, 59 Cal. 430.

[f] Affidavits of jurors denying misconduct or that they read newspaper articles are admissible and conclusive on that point.—People v. Goldenson, 76 Cal. 352, 19 Pac. 161.

[g] Affidavits of jurors are inadmissible to impeach their verdict.—People v. Pratt, 78 Cal. 350, 20 Pac. 731.

[h] Where defendant in criminal prosecution has introduced evidence upon a motion for a new trial, showing that the jury had read newspaper articles during the trial, which it was claimed had a tendency to influence their verdict, it is proper to receive rebutting evidence on the part of the prosecution, showing by the jurors themselves that the reading of the articles had not influenced them in any way prejudicial to the defendant in rendering their verdict.—People v. Murray, 94 Cal. 212, 28 Am. St. Rep. 113, 29 Pac. 494.

[i] Affidavits of jurors may be used to disprove or explain alleged misconduct, but cannot, admitting misconduct, be used to show that verdict was not influenced thereby.—People v. Azoff, 105 Cal. 632, 39 Pac. 59.

[j] The affidavit of a juror cannot be received to impeach the verdict to which he agreed, by swearing that he was misled by statements of the foreman, and that he did not understand the verdict, and was too timid and confused to express his dissent at the time when he ought to have dissented.—People v. Kloss, 115 Cal. 567, 47 Pac. 459.

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[k] An affidavit of the jurymen in explanation of the verdict cannot be read upon motion for new trial, since that is an attempted impeachment of the verdict by the jurymen.—People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[l] Affidavit of a juror cannot be received to impeach the verdict by setting forth a misrepresentation made by a juror as to the limit of punishment which could be inflicted for manslaughter, by which many jurors were induced to agree upon a verdict of guilty of that offense.—People v. Soap, 127 Cal. 408, 59 Pac. 771.

[m] Verdict of a jury cannot be impeached in this state by the affidavits of jurors showing misconduct on the part of any member of the jury, except where the verdict is reached "by a resort to the determination of chance." Nor can the verdict be impeached by the hearsay statements of jurors; and an affidavit of the defendant as to the misconduct of the jury, based on information and belief, is entitled to no weight.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[n] Jurors cannot impeach verdict by showing that improper statements were made by some of them when deliberating upon the verdict; and an affidavit of the defendant which must necessarily rest upon hearsay from jurors cannot be received to show such misconduct. People v. Dobbins, 138 Cal. 693, 72 Pac. 339.

[o] A juror cannot be allowed by his own testimony or declarations to impeach and defeat his verdict, except in a case authorized by statute.—People v. Murphy, 146 Cal. 502, 80 Pac. 709.

[p] Certain affidavits of jurors in a criminal case held not within the rule that such affidavits cannot be considered to impeach the verdict.—People v. Chin Non, 146 Cal. 561, 80 Pac. 681.

[q] Affidavit of juror though sufficient to show knowledge on his part of a newspaper article commenting on his being a juror in the case held insufficient to show that he was influenced by the article.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

[r] Affidavits of jurors made in opposition to a motion for a new trial on the ground of misconduct held not proof of misconduct except so far as the averments affirmatively allege misconduct.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 749-751; 15 Cent. Dig., cols. 210-218, §§ 2392-2395.

§ 566. —— —— To Prove Chance or Compromise Verdict.

[a] New trial will not be granted on affidavits of jurors as to their own misconduct, except in case of a chance verdict.—People v. Hughes, 29 Cal. 257.

[b] Under Code of Civil Procedure, section 657, providing that, when any of the jurors have been induced to assent to any verdict or finding by a resort to a determination by chance, such misconduct may be proved by the affidavit of any of the jurors, the misconduct of a juror, in a prosecution for embezzlement, other than a resort to chance, could not be proved by the affidavits of jurors.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[c] A verdict finding a defendant charged with murder guilty of manslaughter cannot be impeached by affidavits of the jurors that it was agreed to as a compromise between jurors who were in favor of a higher degree and those who were for acquittal.—People v. Richards (Cal. App.), 82 Pac. 691.

§ 567. —— Testimony of Officer in Charge of Jury.

[a] Testimony of sheriff is competent to disclose what transpires in the jury-room.—Wilson v. Berryman, 5 Cal. 44.

§ 568. —— Affidavit of Newly Discovered Evidence.

[a] Affidavits in support of motion for new trial, on ground of newly discovered evidence in a criminal case, must set forth such evidence as would be received on the trial.—People v. Voll, 43 Cal. 166.

[b] Application must show that evidence was not discoverable before trial and is such as to render different result probable on retrial.—People v. Leong Yune Gun, 77 Cal. 637, 20 Pac. 27.

[c] A motion for new trial, or permission to make such motion, on the ground of newly discovered evidence, is properly denied—no affidavits being produced or offered, or statement made of the nature, character, or time of discovery of the evidence.—People v. Eppinger, 114 Cal. 350, 46 Pac. 97.

[d] An affidavit for new trial in a homicide case on newly discovered evidence is objectionable in not stating why witness could not have been discovered in the six months between the homicide and the trial, or the manner in which he was discovered.—People v. Kloss, 115 Cal. 567, 47 Pac. 459.

[e] Where, on a motion for a new trial on account of newly discovered evidence, it was not shown why the evidence was not produced, and it appeared from counter-affidavits that the substance of what was set forth in the supporting affidavit was testified to by affiant on the trial, the motion was properly denied.—People v. Warren, 130 Cal. 683, 63 Pac. 86.

§ 569. —— Hearing and Determination of Motion.

[a] Court may, in its discretion, allow defendant to cross-examine parties who filed counter-affidavits in support of verdict, but refusal to do so is not error.—People v. Lee Chuck, 78 Cal. 339, 20 Pac. 719.

[b] It is within the discretion of the trial court to refuse to hear oral evidence in sup

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port of a motion for a new trial in a criminal case.—People v. Tucker, 117 Cal. 229, 49 Pac. 134.

[c] There was no abuse of discretion in refusing to hear oral evidence of the intoxication of a juror during the trial of a criminal case, on a motion for a new trial, though it was claimed that the affidavits of the witnesses could not be obtained; the juror's condition being within the observation of the judge, and defendant's counsel not even presenting their own affidavits as to the facts claimed.—People v. Tucker, 117 Cal. 229, 49 Pac. 134.

[d] Where showing on request for more time to prepare affidavits for motion for new trial did not indicate what misconduct of jury consisted in, name of guilty juror, nature of newly discovered evidence, why it was not produced at trial, nor that it could be produced on new trial, request is properly refused.—People v. Winthrop, 118 Cal. 92, 50 Pac. 395.

[e] A motion for a new trial in a prosecution for felony, based on the judge's absence form the courtroom, must be determined on the affidavits filed, and not on his belief as to the length of time he was absent.—People v. Blackman, 127 Cal. 248, 59 Pac. 573.

[f] Exclusion of oral testimony of witnesses subpoenaed by defendant in support of charge of misconduct of jury is not prejudicial, where affidavits of each of the witnesses was presented, if there is no showing that any one of them had refused to testify fully by affidavit to all the material facts within his knowledge. The law allows no difference between affidavits or depositions or oral testimony when offered in support of motions.—People v. Sullivan, 129 Cal. 557, 62 Pac. 101.

[g] Where neither a convicted defendant nor any one in his behalf presents any affidavit in support of a motion for a continuance of the date for argument on a motion to set aside the verdict because of jury's misconduct of a newly discovered evidence showing any fact in regard to such grounds, and no other showing is made, it was proper to refuse a continuance.—People v. Ross, 134 Cal. 256, 66 Pac. 229.

[h] Certain matters held not properly considered in support of a motion for a new trial after a conviction for crime.—People v. Owens (Cal. App.), 86 Pac. 980.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 753; 15 Cent. Dig., cols. 228-230, §§ 2406-2411.

§ 569½. Arrest of Judgment—For Want of Preliminary Examination.

[a] Want of preliminary examination and commitment before filing the information is not a ground for arrest of judgment.—People v. Bawden, 90 Cal. 195, 27 Pac. 204.

§ 570. —— For Causes Mentioned in Statute Only.

[a] Only grounds on which a motion in arrest of judgment can be based are those mentioned in the statute.—People v. Indian Peter, 48 Cal. 250.

§ 571. —— For Illegality of Commitment.

[a] Motion in arrest of judgment can only be founded on defects appearing upon the face of the information or indictment, and cannot be made for want of a legal commitment before the filing of the information.—People v. Chaves, 122 Cal. 134, 54 Pac. 596.

§ 572. —— For Defects in Indictment or Information.

[a] Objection that indictment charges more than one offense can be taken advantage of only by demurrer, cannot be considered on motion to arrest judgment.—People v. Shotwell, 27 Cal. 394.

[b] Where a defendant, failed to demur to indictment on ground that it did not substantially conform to the requirements of sections 950-952 of the Penal Code, requiring the indictment to set forth the particular circumstances of the offense, he cannot move in arrest of judgment, after verdict, on the ground that indictment did not conform to the sections.—People v. Swenson, 49 Cal. 388.

[c] Under Penal Code, sections 1004, 1185, a motion in arrest of judgment can only be founded on defects in the indictment or information appearing on the face of it.—People v. Johnson, 71 Cal. 384, 12 Pac. 261; People v. O'Leary, 77 Cal. 34, 18 Pac. 856; People v. McConnell, 82 Cal. 620, 23 Pac. 40; People v. Gardner, 98 Cal. 127, 32 Pac. 880; People v. Chaves, 122 Cal. 134, 54 Pac. 596; People v. Cole, 127 Cal. 545, 59 Pac. 984.

[d] Where information and indictment does not allege facts affirmatively showing jurisdiction of the offense, and its allegations are consistent with the fact that the offense was committed outside of the jurisdiction of the court, a motion in arrest of judgment should be granted, and the action dismissed.—People v. Wong Wang, 92 Cal. 277, 28 Pac. 270.

[e] Objection that an information for attempt to rape a girl under the age of fourteen years states that the girl was eleven years old, and therefore does not charge the offense, if of any merit at all, is too technical to be raised by motion in arrest, or otherwise than by special demurrer.—People v. Gardner, 98 Cal. 127, 32 Pac. 880.

[f] Objection that information is defective in alleging that offense was committed in a certain county, over a portion of the territory of which the court has no jurisdiction, without denying its commission on such excepted territory, is a matter of defense, and cannot be raised by motion in arrest.—People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

[g] Minor defects and imperfections in pleadings, not affecting any substantial right of defendant as provided by Penal Code, sections 960-1258, are insufficient to sustain a motion to arrest judgment.—People v. Wynn, 133 Cal. 72, 65 Pac. 126.

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[h] Where an information does not show the alleged offense was committed in the state, a motion in arrest of judgment will lie, though the information is also demurrable.—People v. Webber, 133 Cal. 623, 66 Pac. 38.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 760-765; 15 Cent. Dig., cols. 252-273, §§ 2445-2462.

§ 573. —— For Defects in Verdict.

[a] Intent to defraud is an essential element of crime of forgery, and is an essential averment in every indictment or information for forgery; and where one of two counts in an information is defective, in omitting such averment, and evidence is introduced under both counts, a general verdict of guilty cannot be referred to the good count only, and a motion in arrest of judgment should be granted, and a judgment of conviction will be reversed upon appeal. People v. Turner, 113 Cal. 278, 45 Pac. 331.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 766, 767; 15 Cent. Dig., cols. 273-276, §§ 2463-2468.

§ 574. —— For Failure of Statute to Fix Punishment.

[a] Objection that court has no jurisdiction to affix any penalty or render any judgment, because of failure of statute to provide any punishment for offense charged, cannot be urged upon the hearing of such motion.—People v. Gardner, 98 Cal. 127, 32 Pac. 880.

§ 575. —— Motion for New Trial as Waiver of Right.

[a] Defendant who has demurred to an information as charging two offenses does not waive his right to move in arrest of judgment by moving for a new trial.—People v. Clement, 35 Pac. 1022.

§ 576. —— Necessity for Motion in Arrest.

[a] Criminal Practice Act, section 443, authorizes the court, on its own view of fatal defects in an indictment, to arrest the judgment, without motion.—Hartman, Ex parte, 44 Cal. 32.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 767, 768; 15 Cent. Dig., cols. 276-281, §§ 2469-2479.

§ 577. —— Operation and Effect of Arrest.

[a] The effect of an order arresting a judgment is to place accused as nearly in the same situation as he was before the indictment as the rules of law will permit. On its entry, he must be discharged, unless detained by virtue of some other legal process or order.—Hartman, Ex parte, 44 Cal. 32.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 768, 769; 15 Cent. Dig., cols. 281, 282, §§ 2480, 2481.

XIV. JUDGMENT, SENTENCE AND FINAL COMMITMENT.

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Collateral attack on judgment rendered in criminal case. See Judgment, § 344.
Conclusiveness of judgment in criminal case. See Judgment, § 521.
Sentence for larceny. See Larceny, § 49.

§ 578. Power of Court or Judge.

[a] Court of first instance had no authority under Mexican law to pronounce sentence of death upon a prisoner convicted of a capital offense. In such case the proceedings were to be sent up to the court of second instance, in which court alone could final judgment be rendered. (Per Bennett, J.) People v. Daniels, 1 Cal. 106.

[b] The judge of a district in which cause was tried may pass sentence on a verdict of guilty when the judge of another district presided during the argument of case to jury and received the verdict.—People v. Henderson, 28 Cal. 465.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 769-771; 15 Cent. Dig., cols. 284-300, §§ 2482-2509.

§ 579. Time to Pronounce Sentence.

[a] Statute does not require judgment to be pronounced at same term at which verdict was found.—People v. Felix, 45 Cal. 163.

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[b] Defendant may waive time allowed by the Penal Code, after conviction before sentence is pronounced, and consent that immediate judgment be pronounced.—People v. Robinson, 46 Cal. 94.

[c] It is doubtful whether limitation of time fixed in the Penal Code, within which judgment may be pronounced in a criminal case after conviction, applies in case of a judgment upon plea of guilty.—People v. Robinson, 46 Cal. 94.

[d] Judgment pronounced without objection less than two days after verdict, in case of felony, is valid.—People v. Mess, 65 Cal. 174, 3 Pac. 670.

[e] One convicted of felony may waive time which code says must elapse between verdict and sentence and consent that judgment be pronounced immediately.—People v. Johnson, 88 Cal. 174, 25 Pac. 1116.

[f] Refusal to continue the time for pronouncing judgment is not error, several continuances having been had.—People v. Holmes, 126 Cal. 462, 58 Pac. 917.

§ 580. Sentence on Plea of Guilty.

[a] Proceeding to determine degree of crime of murder, after a plea of guilty, is not a trial requiring a jury, but is a question for court.—People v. Noll, 20 Cal. 164.

[b] Under the statutory provision requiring that, after a plea of guilty, witnesses shall be examined to determine the degree of the crime, a judgment reciting the plea and examination of witnesses, and that "the court now finds defendant guilty of murder in the first degree and doth adjudge the penalty therefor to be death," is sufficient, since no form of judgment is prescribed by statute. People v. Noll, 20 Cal. 164.

[c] Where accused pleads guilty to an indictment charging an offense which is divided into degrees, court before passing sentence, must ascertain degree.—People v. Jefferson, 52 Cal. 452.

[d] Penal Code, section 1192, provides that, on a plea of guilty of a crime divided into degrees, the court must, before passing sentence, determine the degree. After a plea of guilty of burglary, the court swore the accused, and interrogated him, ascertaining that the crime was committed at 11 o'clock P. M., from which evidence the court determined that the crime was burglary in the first degree. Held, that this did not amount to trying the defendant after he had pleaded "Guilty," so as to constitute error.—People v. Miller, 137 Cal. 642, 70 Pac. 735.

[e] Penal Code, section 1192, devolving on the court the duty of determining the degree of crime where defendant pleads guilty, is supplemented by Code of Civil Procedure, section 187, providing that, where jurisdiction is by any statute conferred on a court, all means necessary to carry it into effect are also given.—People v. Chew Lan Ong, 141 Cal. 550, 75 Pac. 186.

[f] Defendant pleaded guilty to a charge of burglary in the first degree, and the judgment recited that, "whereas defendant has been convicted of the crime of burglary in the first degree, ... it is ordered," etc. Held, that the judgment was valid, though the minutes of the court did not show that any evidence was heard as to the degree.—Woods, Ex parte, 41 Pac. 796.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 771, 772; 15 Cent. Dig., cols. 290-292, §§ 2493-2496.

§ 581. Insanity After Conviction.

[a] Under code, section 1201, it is only when court is in doubt as to sanity of one convicted of a crime that the question of sanity need be passed upon by a jury before sentence is pronounced.—People v. Pico, 62 Cal. 50.

[b] Where the only evidence of accused's insanity was an affidavit of his attorneys that, during two months last passed, they had frequently seen him and that they were informed and believed he was insane, no question of his insanity having been raised during the trial, a refusal after conviction to submit a special issue of his insanity will not be disturbed, under Penal Code, section 1201, providing for a trial of the issue of accused's insanity if, in the opinion of the court, there is a reasonable ground to believe him insane.—People v. Knott, 122 Cal. 410, 55 Pac. 154.

§ 582. Sentence on Conviction of Lesser Offense Included in Charge.

[a] If defendant is convicted of an offense of a lesser grade than that for which he was indicted, and the lesser offense is included in the greater, the verdict is followed by the same judgment as though the defendant had been indicted for the offense of which he was convicted.—People v. English, 30 Cal. 214.

§ 583. Suspension of Sentence—For Four Years.

[a] On the day set for sentence the court, on motion of counsel for defendant (the district attorney consenting), ordered that sentence be suspended, and defendant allowed to ship on a certain vessel. The sheriff returned that he had delivered defendant on board the vessel indicated, where he was shipped as a sailor. Nearly four years thereafter defendant was arrested on a bench warrant, the order of suspension of judgment set aside, and sentence of imprisonment imposed. Held, that defendant could not be heard to complain of such sentence, on the ground that the court had lost jurisdiction, as the former order merely suspended sentence until the further order of the court, and was made on motion of defendant.—People v. Patrick, 118 Cal. 332, 50 Pac. 425.

§ 584. Setting Day for Pronouncing Sentence in Absence of Accused.

[a] It is no error for court to set day for pronouncing sentence in absence of prisoner.

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It is only requisite that he should be present when the sentence is pronounced.—People v. Galvin, 9 Cal. 115.

§ 585. Formalities in Pronouncing Sentence. —Informing Accused of Nature of Charge, etc.

[a] Where, before sentence, the court called defendant, whereon his counsel, without waiting, moved for a new trial, after denial of which sentence was pronounced, such action was not a waiver of defendant's right to be informed of the nature of the charge, plea and verdict, and to be asked if there was any reason why judgment should not be pronounced. Judgment (1900) 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

[b] Where defendant was sentenced without being informed of the nature of the charge against him, or the plea and verdict, or asked if there was any reason why judgment should not be pronounced, he was not entitled to be discharged on motion. Judgment (1900) 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

[c] Penal Code, section 1200, is mandatory, and a failure to comply therewith deprives the defendant of substantial rights. Judgment (1900) 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

§ 586. Requisites and Validity of Judgment or Sentence.

[a] Judgments of inferior criminal courts created by statute are not required to be of any different form from those of criminal courts of general jurisdiction.—People v. Forbes, 22 Cal. 135.

[b] Judgment of court, to be entered by clerk in court's minutes, is sufficient, if it states of what offense defendant was finally convicted, and the penalty imposed by the court, and it need not recite the facts contained in the other papers constituting the record.—Ring, In re, 28 Cal. 247.

[c] A recital in the judgment that the defendant was found guilty of the offense of gaming at tan, as charged in the information, is equivalent to a recital that the defendant was found guilty of gaming at tan by carrying on and conducting the same for money or its equivalent.—People v. Sam Lung, 70 Cal. 515, 11 Pac. 673.

[d] Fact that process was not served by proper person or at proper place or time, or warrant void and arrest unlawful, will not render judgment void.—Ah Men, Ex parte, 77 Cal. 201, 11 Am. St. Rep. 263, 19 Pac. 380.

[e] Judgment that accused be imprisoned in state prison of California at San Quentin for term of nine years held sufficient.—People v. Perez, 87 Cal. 123, 25 Pac. 262.

[f] Judgment stating crime for which defendant is convicted and sentence of court is sufficient.—People v. Douglas, 87 Cal. 283, 25 Pac. 417.

[g] Judgment is not rendered insufficient in form because it orders and adjudges that defendant be punished by imprisonment in the state prison.—People v. Wheatley, 88 Cal. 114, 26 Pac. 95.

[gh] Judgment adjudging that defendant be punished in state prison, etc., is sufficient.—People v. Wheatley, 88 Cal. 120, 26 Pac. 95.

[h] Judgment ordering that defendant be punished by imprisonment need not direct that he be imprisoned.—People v. Johnson, 88 Cal. 176, 25 Pac. 1116.

[i] Where information charges that offense was committed in "the city and county of San Francisco," the place where it was committed need not be repeated in the judgment.—People v. Johnson, 88 Cal. 171, 25 Pac. 1116.

[j] Only material parts of a judgment in a criminal case are the statement of the offense for which the defendant has been convicted and the sentence of the court, and it is not necessary that anything which is contained in the papers which precede it should be repeated therein.—Williams, Ex parte, 89 Cal. 421, 26 Pac. 887.

[k] Judgment in criminal case need not run in name of people of state, under Constitution, article 6, section 20. That section does not include such a judgment.—Ahern, Ex parte, 103 Cal. 412, 37 Pac. 390.

[l] If judgment sufficiently expresses that which is adjudged, failure to recite facts on which it is based does not make it void but merely erroneous.—People v. Kelly, 120 Cal. 273, 52 Pac. 587.

§ 587. —— Conformity to Verdict.

[a] On a conviction under an indictment charging the making and passing of a fictitious check with intent to defraud (Pen. Code, sec. 476), it is error to enter judgment of conviction of forgery (section 470), though the penalty is the same for both offenses.—People v. Eppinger, 114 Cal. 350, 46 Pac. 97.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 779; 15 Cent. Dig., cols. 306-309, § 2519.

§ 588. —— Stating Venue.

[a] Judgment need not state venue of offense.—People v. Johnson, 88 Cal. 176, 25 Pac. 1116.

§ 589. —— Time of Commencement of Imprisonment.

[a] A sentence of imprisonment for a certain term, "to commence at the expiration of previous sentences," without definitely fixing the time of the commencement of the term, held valid upon habeas corpus, and prisoner remanded.—People v. Forbes, 22 Cal. 135.

[b] Sentence to imprisonment which does not specify any time for the imprisonment to

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commence is not void. It is sufficient if it states the duration and place of confinement. People v. King, 28 Cal. 265; People v. Hughes, 29 Cal. 257.

[c] Judgment that defendant be imprisoned four years from time of his delivery to warden of penitentiary is not erroneous.—People v. Hughes, 29 Cal. 257.

§ 590. —— Fine and Imprisonment Until Paid.

See, also, post, § 823.

[a] Portion of judgment providing for imprisonment to enforce payment of fine is separable and will not avoid judgment.—Mitchell, Ex parte, 70 Cal. 3, 11 Pac. 488; Soto, Ex parte, 88 Cal. 624, 26 Pac. 530.

[b] Imprisonment until fine is paid at specified rate is valid if total imprisonment does not exceed statutory limitation.—Sing Ah Tong, Ex parte, 84 Cal. 167, 24 Pac. 181.

[c] Judgment that defendant convicted of misdemeanor pay fine and be imprisoned until it is paid is not void because it provides for the payment of the fine "forthwith."—Noble, Ex parte, 96 Cal. 362, 31 Pac. 224.

§ 591. —— Partial Invalidity.

[a] Where part of sentence is illegal, if part that is valid can be separated from the rest, it will be enforced.—Mitchell, Ex parte, 70 Cal. 1, 11 Pac. 488.

[b] Judgment imposing fine and imprisonment and further imprisonment for nonpayment of fine is void as to latter portion only. Lowrey v. Hogue, 85 Cal. 602, 24 Pac. 995.

[c] Under Penal Code, section 1205, the clause in a judgment imposing a fine directing imprisonment for purposes of enforcement of the judgment is separable from the rest of the judgment, and its invalidity does not affect the rest of the judgment.—Sullivan, In re (Cal. App.), 84 Pac. 781.

§ 592. Modification of Sentence.

[a] Under Penal Code, section 1205, where the court imposed a fine and provided for imprisonment in the state prison until payment thereof, it had no authority after the commitment of defendant to modify the provision as to imprisonment.—Sullivan, In re (Cal. App.), 84 Pac. 781.

FOR AUTHORITIES FROM OTHER STATES:

Sentences, power of the court to revise or amend: 79 Am. Dec. 779, note. See, also, 12 Cyc. 783-785; 15 Cent. Dig., cols. 321-324, § 2531.

§ 593. Resentence.

[a] When one sentence is valid, proceedings looking to a resentence are void.—People v. Mess, 65 Cal. 175, 3 Pac. 670.

§ 594. Recording and Entering.

[a] Under Criminal Practice Act, sections 462, 463, providing that the entry of judgment in a criminal case shall state briefly the offense for which conviction was had, an entry that defendant was duly convicted, etc., of the crime of misdemeanor, is sufficient.—Murray, Ex parte, 43 Cal. 455.

[b] Mistake in entry of statement by court to defendant of nature of offense for which he has been convicted does not invalidate the judgment, since it is not a part of it.—People v. Murback, 64 Cal. 369, 30 Pac. 608.

[c] Record in prosecution for felony sufficiently shows that defendant was present in court when verdict was received, if it recites that parties and their attorneys were present at every stage of proceedings, and that upon discharge of jury defendant was remanded to custody of sheriff.—People v. Jung Qung Sing, 70 Cal. 469, 11 Pac. 755.

[d] Where record shows prior convictions which court had right to consider in imposing sentence, omission of clerk to recite prior conviction in entering judgment is harmless error.—People v. Kelly, 120 Cal. 273, 274, 52 Pac. 587.

[e] Record in a criminal case should disclose fact that court at each adjournment admonished the jury, as required by Penal Code, section 1122.—People v. Maughs (Cal. Sup.), 86 Pac. 187.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 785; 15 Cent. Dig., cols. 325, 326, §§ 2532-2535.

§ 595. Amending and Correcting Record.

[a] Sentence may be amended at any time before final judgment is signed.—People v. Thompson, 4 Cal. 238.

[b] Inherent power of court to amend its records to accord with facts exists in criminal as well as civil cases.—People v. Ward, 141 Cal. 630, 75 Pac. 306.

[c] Clerical defect in minute entry of judgment of conviction may be corrected where record affords sufficient evidence to make correction.—People v. Ward, 141 Cal. 631-633, 75 Pac. 306.

[d] A record recited a conviction of embezzlement and an order that defendant "be punished by imprisonment in the state at F. for the term of seven years," and concluded with a statement that defendant was to be delivered to the proper officers of "said state prison at F." The only sentence that can be imposed for embezzlement is incarceration in the state prison, and there is a state prison at F. Held, that the record was sufficient to authorize its correction so as to recite an order that defendant be "punished by imprisonment in the state prison at F. for the term of seven years."—People v. Ward, 141 Cal. 628, 75 Pac. 306.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 787, 788; 15 Cent. Dig., cols. 332-336, §§ 2544-2546.

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§ 596. —— Nunc Pro Tunc.

[a] Where the clerk omits to enter the judgment in a criminal case when it is pronounced, defendant being then present, an order to enter the judgment nunc pro tunc may afterwards be made, though defendant is not in court.—People v. Lenon, 79 Cal. 625, 631, 21 Pac. 967.

[b] The trial court can amend its minutes nunc pro tunc to show, in accordance with the fact, that when defendant appeared for judgment, he was asked "if he had any legal cause to show why judgment should not be pronounced against him."—People v. McNulty, 93 Cal. 427, 29 Pac. 61.

§ 597. Setting Aside Judgment.

[a] If illegal sentence be imposed, court before which conviction was had has power, within reasonable time, to vacate sentence and impose one in accordance with law; and delay of six days between time of first and second sentence is not unreasonable.—Gilmore, Ex parte, 71 Cal. 624, 12 Pac. 800.

[b] Crime of forgery, as defined by section 470 of the Penal Code, and that of passing a fictitious check with intent to defraud, under section 476 of the same code, are different offenses, and the entry of a judgment for forgery upon a charge of passing a fictitious check is a material variance, for which the judgment must be set aside.—People v. Eppinger, 114 Cal. 350, 46 Pac. 97.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 788; 15 Cent. Dig., cols. 338, 339, § 2549.

§ 598. Execution of Judgment.

[a] Mode of executing judgments in criminal cases is prescribed and controlled by statute, and not by an order of an appellate court.—People v. Dick, 39 Cal. 102.

§ 599. Commitment or Certified Copy of Judgment.

Commitment for abduction. See Abduction, § 14.

[a] A certified copy of the judgment properly entered in a criminal action is sufficient authority in the hands of the prison warden for defendant's detention.—Ring, In re, 28 Cal. 247; (1867) Brown, In re, 32 Cal. 49.

[b] A commitment to the state prison, which consists only of the history of the proceedings against the prisoner, is fatally defective, as such a commitment should consist of a certified copy of the judgment as entered on the court's minutes.—Gibson, Ex parte, 31 Cal. 619, 91 Am. Dec. 546.

[c] Where the court, at defendant's request, stayed execution of judgment of conviction until the judgment had become final by the expiration of more than a year after its entry without appeal, and without a motion for a new trial, defendant cannot object to an order vacating the order staying execution and directing a commitment to issue; otherwise, the court would be powerless to carry the judgment into effect.—People v. Walker, 61 Pac. 800.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 789; 15 Cent. Dig., cols. 339-341, §§ 2550-2553.

§ 600. Effect of Appeal from Order Denying Writ of Habeas Corpus.

[a] Appeal from federal circuit to supreme court from order denying writ of habeas corpus stays hands of state and state authorities while pending.—People v. Durrant, 119 Cal. 55, 50 Pac. 1066.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 791; 15 Cent. Dig., col. 344, § 2559½.

XV. APPEAL AND ERROR, AND CERTIORARI.

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A. FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW.

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§ 601. Right of Defendant to Review.

[a] Right of appeal to supreme court is guaranteed by constitution and is as sacred as right to trial by jury.—Adams, In re, 81 Cal. 167, 22 Pac. 547.

FOR AUTHORITIES FROM OTHER STATES:

Right of fugitive from justice to prosecute an appeal: 41 Am. Dec. 272, note.

See, also, 12 Cyc. 807; 15 Cent. Dig., cols. 404-406, §§ 2615-2618.

§ 602. Right of Prosecution to Review and Waiver Thereof.

[a] Demurrer to indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appeal from the order sustaining the demurrer. Held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right of appeal. People v. Wooster, 16 Cal. 435.

[b] It seems that no appeal lies by state from order directing jury to find for defendant.—People v. Horn, 70 Cal. 18, 11 Pac. 470.

[c] Rejection of evidence offered by the people cannot be reviewed, under Penal Code, section 1238, subdivision 5, authorizing an appeal from an order directing the jury to find for defendant.—People v. Roberts, 114 Cal. 67, 45 Pac. 1016.

[d] Where accused was tried in a court of competent jurisdiction on a valid information for attempting to bribe a witness, and was acquitted by a verdict, jeopardy attached, and as she could not again be tried, the case will not be reviewed on appeal by the state. People v. Hill, 146 Cal. 145, 79 Pac. 845.

FOR AUTHORITIES FROM OTHER STATES:

See 19 L. R. A. 342, note. See, also, 12 Cyc. 804-807; 15 Cent. Dig., cols. 390-404, §§ 2599-2614.

§ 603. Dispensing with Rules Governing Appeals.

[a] In cases involving life or liberty or in case of peculiar hardship, supreme court will dispense with rules designed merely to expedite business.—People v. Northey, 77 Cal. 635, 19 Pac. 865, 20 Pac. 129.

§ 604. Mode of Review—Appeal.

[a] Appeal is not proper remedy of one imprisoned for misdemeanor or contempt under order of superior court made without jurisdiction.—People v. Kuhlman, 118 Cal. 141, 50 Pac. 382.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 792-795; 15 Cent. Dig., cols. 348-357, §§ 2564-2569.

§ 605. —— Writ of Error.

[a] A writ of error may be issued by the county court to the San Francisco city criminal court, when there is no statute providing the mode of an appeal.—Thistleton, Ex parte, 52 Cal. 220.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 792; 15 Cent. Dig., cols. 348-350, § 2565.

§ 606. —— Certiorari or Habeas Corpus.

[a] Certiorari does not lie to bring up for review an erroneous decision of the county court in overruling a demurrer in a case of misdemeanor.—People v. Burney, 29 Cal. 459.

[b] An erroneous refusal of a county court to hear an appeal, in a criminal case, because no statement was made, is not an excess of the jurisdiction of the county court for which relief may be had by certiorari from the district court.—Morly v. Elkins, 37 Cal. 454.

[c] An error by the court in taxing costs on defendant is not an excess of jurisdiction, and consequently is not reviewable on certiorari.—Petty v. County Court of San Joaquin, 45 Cal. 245.

[d] Under Constitution, article 6, section 4, giving the supreme court appellate jurisdiction, "in all criminal cases prosecuted by indictment or information," no appeal lies from a judgment imposing a fine for contempt. The remedy must be by habeas corpus or certiorari.—Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414.

[e] Under Code of Civil Procedure, section 1067 et seq., providing for writs of certiorari when there is no remedy by appeal, certiorari will not lie to the police court to determine the validity of an ordinance on which a conviction was based, and the sufficiency of the complaint and judgment, but such subjects are determinable on appeal from the conviction, and cannot be reviewed on certiorari, though the right to appeal has been lost by laches, or

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where an appeal has been heard and decided adversely to appellant.—Valentine v. Police Court of City and County of San Francisco, 141 Cal. 615, 75 Pac. 336.

[f] Under Code of Civil Procedure, section 1068, providing for a review on certiorari when an inferior tribunal, board, or officer exercising judicial functions exceeds its jurisdiction, and there is no appeal or other adequate remedy, that writ does not lie to review the action of a police judge in ordering or summoning a jury, pursuant to section 230, for the trial of a misdemeanor case.—Wittman v. Police Court of City and County of San Francisco, 145 Cal. 474, 78 Pac. 1052.

FOR AUTHORITIES FROM OTHER STATES:

See 45 L. R. A. 158, note. See, also, 12 Cyc. 794; 15 Cent. Dig., cols. 353-357, § 2569.

§ 607. Double Appeals.

[a] Under Penal Code, section 1176, which provides that the instructions given or refused, with the indorsements thereon, form a part of the record, and the rulings may be reviewed on appeal as though embodied in a bill of exceptions; and section 1237, which provides for an appeal from the judgment of conviction, and from an order refusing a new trial—defendant may prosecute both appeals, and can have alleged error in the giving of instructions considered on either of them, but not on both.—People v. Thompson, 115 Cal. 160, 46 Pac. 912.

§ 608. Appellate Jurisdiction.

[a] Constitution, article 6, section 4, giving the supreme court appellate jurisdiction in "cases at law" involving legality of taxation or municipal fines, refers to civil, as distinguished from criminal, cases.—People v. Johnson, 30 Cal. 98.

[b] Question, whether supreme court has jurisdiction to review verdict in criminal case upon a question of fact, raised by the attorney general, but not decided.—People v. Dodge, 30 Cal. 448.

[c] Under late constitution, supreme court had appellate jurisdiction in criminal cases, on questions of law alone; and such a question is presented—where the verdict is complained of as being contrary to the evidence—only where there is no evidence to establish the charge; and not where there is evidence tending to prove it.—People v. Smallman, 55 Cal. 185.

[d] Defendants, as New City Hall commissioners for the city and county of San Francisco, were indicted for misconduct in office. Held, this court has jurisdiction of the appeal.—People v. Kalloch, 60 Cal. 113, 115.

[e] The supreme court has jurisdiction of an appeal from a judgment of conviction rendered by a court without jurisdiction.—People v. Pingree, 61 Cal. 141.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 796, 797; 15 Cent. Dig., cols. 358-370, §§ 2572-2580.

§ 609. —— Dependent on Degree of Crime.

[a] The supreme court of this state has no appellate jurisdiction in cases of misdemeanors or crimes of a less degree than felony, and no jurisdiction can be conferred by the legislature in these cases.—People v. Applegate, 5 Cal. 295.

[b] Supreme court has no jurisdiction of a criminal case not amounting to a felony.—People v. Vick, 7 Cal. 165; People v. Shear, 7 Cal. 140; People v. Burney, 29 Cal. 459; People v. Johnson, 30 Cal. 98; People v. Aubrey, 53 Cal. 427; People v. Apgar, 35 Cal. 389.

[c] To an indictment for an assault with intent to commit murder, the defendant pleaded guilty of an assault with intent to commit bodily injury, and was sentenced to pay a fine of twelve hundred dollars, or to be imprisoned in the county jail. Held, that the offense was only a misdemeanor, and that the supreme court had no jurisdiction of an appeal.—People v. Cornell, 16 Cal. 187.

[d] Where to an indictment which charges an offense punishable either by imprisonment in the state prison or by fine, a demurrer interposed by the defendant is sustained, and the defendant has judgment thereon, from which the people appeal. Held, that no judgment having been pronounced which protects the defendant from liability to be punished by imprisonment in the state prison, this court has jurisdiction of the appeal.—People v. War, 20 Cal. 117.

[e] The appellate power of the supreme court does not extend to cases of misdemeanor.—People v. Burney, 29 Cal. 459.

[f] In all cases of misdemeanor, the judgment of the county court is final, except where there has been an excess of jurisdiction.—People v. Johnson, 30 Cal. 98.

[g] This court has no jurisdiction of an appeal where the defendant was convicted of a misdemeanor, although he was indicted for a felony in which the misdemeanor is included. People v. Apgar, 35 Cal. 389.

[h] Jurisdiction of supreme court in criminal cases, on defendant's appeal, is not to be determined by offense charged in indictment, but by offense of which defendant is convicted.—People v. Apgar, 35 Cal. 389.

[i] The provisions of the Penal Code with reference to appeals in criminal cases amounting to felonies are applicable to misdemeanors prosecuted by indictment or information, and the supreme court adopts such as the practice, and will entertain such appeals when taken in the manner prescribed in Penal Code, chapter 1, title 9, part 2.—People v. Jordan, 65 Cal. 644, 4 Pac. 683.

[j] The supreme court has no jurisdiction of an appeal from a judgment of the superior court, affirming a judgment of the police court, adjudging a defendant guilty of a misdemeanor, and imposing a fine.—People v. Meiggs' Wharf Co., 65 Cal. 99.

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FOR AUTHORITIES FROM OTHER STATES:

12 Cyc. 797; 15 Cent. Dig., cols. 363-370, §§ 2578-2580.

§ 610. —— Necessity for Actual Controversy.

[a] Where an application to the supreme court for a writ of review is made merely to test the validity of the grand jury, and presents no real controversy between the parties to the record, the court will not take cognizance of it.—People v. Wallace, 91 Cal. 535, 27 Pac. 767.

§ 611. Appealable Judgments and Orders.

[a] Provision of 1 Hittell's Digest, page 299, article 2068, section 481, that the party aggrieved in a criminal action, whether the people or the defendant, may appeal, etc., when construed with reference to Constitution, article 1, section 8, providing that no person shall be twice put in jeopardy for the same offense, must be understood to have reference to such errors, only, as may occur in the proceedings before the legal jeopardy attaches.—People v. Webb, 38 Cal. 467.

[b] Appeal will not lie from a judgment on a plea of former conviction. Such judgment is not a final judgment.—People v. Majors, 65 Cal. 100.

[c] No appeal lies to the supreme court from a judgment in a criminal case, unless it is one prosecuted by indictment or information.—Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414.

[d] Appeal lies to supreme court upon exception to ruling denying challenge of juror for actual bias.—People v. Wells, 100 Cal. 227, 34 Pac. 718.

[e] There is no appeal from superior court in criminal case unless appellant was prosecuted under information or indictment.—People v. Kuhlman, 118 Cal. 141, 50 Pac. 382.

[f] "Order" of police judge is not appealable.—Wells v. Torrance, 119 Cal. 440, 51 Pac. 626.

[g] An appeal held not to lie from a verdict of guilty, or from an order denying a motion in arrest of judgment.—People v. Hill (Cal. App.), 82 Pac. 398.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 798-801; 15 Cent. Dig., cols. 372-390, §§ 2583-2598.

§ 612. —— Denying Change of Venue.

[a] Order refusing to change the place of trial is not appealable, though it may be reviewed on appeal from the final judgment in the case.—People v. Stillman, 7 Cal. 117.

§ 613. —— Denying Continuance.

[a] Under our statute, motions for continuance in criminal cases are subject to review upon appeal.—People v. Diaz, 6 Cal. 248.

§ 614. —— Dismissal.

[a] Order dismissing an information for want of prosecution is not appealable.—People v. Hollis, 65 Cal. 78, 2 Pac. 893.

[b] No appeal lies on behalf of the people from order made by superior court, of its own motion, dismissing criminal action.—People v. More, 71 Cal. 546, 12 Pac. 631.

§ 615. —— Setting Aside or Refusing to Set Aside Indictment.

[a] Order setting aside an indictment for perjury is an appealable order.—People v. Young, 31 Cal. 563.

[b] An order of the court, setting aside an indictment for a felony, and discharging the defendant without delay, constitutes a final disposition of the case, and is a final judgment in the sense of the statute in relation to appeals in criminal cases. Crim. Prac. Act, sec. 481.—People v. Stacey, 34 Cal. 307.

[c] Order setting aside information and discharging accused is final and appealable.—People v. More, 68 Cal. 504, 9 Pac. 461, 463.

[d] An order setting aside an information accusing a defendant of a felony is not appealable, and an appeal by the people therefrom must be dismissed.—People v. Richter, 113 Cal. 473, 45 Pac. 811; People v. Higgins, 114 Cal. 63, 45 Pac. 1004.

[e] Order denying motion to set aside indictment is not appealable.—People v. Simmons, 119 Cal. 2, 50 Pac. 844.

[f] Order denying motion to set aside indictment is reviewable on appeal from judgment when proceedings are brought up by bill of exceptions.—People v. Simmons, 119 Cal. 2, 50 Pac. 844.

§ 616. —— Ruling on Demurrer.

[a] Order overruling a demurrer is not an order affecting a substantial right, and is not appealable.—People v. Ah Fong, 12 Cal. 424; People v. Hall, 45 Cal. 253.

[b] To an indictment for an offense punishable both as a felony and as a misdemeanor, a demurrer was sustained. Held, that an appeal from the judgment sustaining the demurrer would lie, since no judgment had been pronounced protecting the defendant from liability to a punishment as for felony.—People v. War, 20 Cal. 117.

[c] Order sustaining a demurrer to an indictment is a final judgment in the court granting it, from which an appeal will lie.—People v. Ah Own, 39 Cal. 604.

[d] Order sustaining demurrer in part is not appealable.—People v. Martin, 47 Cal. 112.

[e] A demurrer to an indictment was sustained, and the court ordered the district attorney to file an information against defendant. Held, that the order was not appealable. People v. Specht, 62 Cal. 537.

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[f] Appeal from "order sustaining a demurrer" is an appeal from a judgment on demurrer.—People v. Jordan, 65 Cal. 644, 4 Pac. 683.

[g] People have a right to appeal from an order sustaining a demurrer to an indictment where the order is excepted to; and the fact that the court of its own motion or volition directed a submission of the case to another grand jury cannot affect the right of appeal, and a motion to dismiss such appeal upon the ground that the court directed such submission will be denied.—People v. Lee, 107 Cal. 477, 40 Pac. 754.

§ 617. —— Refusing to Allow Filing of Second Information.

[a] It is within the power, and it is the duty of the court, where the accused has been acquitted on the ground of variance, to order his detention and to direct a new information; but, as a new information can be filed without the order of the court, there is no practical utility in an appeal from an order refusing to detain the prisoner, and an appeal, therefore, will not be entertained.—People v. Allen, 61 Cal. 140.

[b] Order refusing to allow second information to be filed after setting aside first is appealable.—People v. More, 68 Cal. 504, 9 Pac. 461, 463.

§ 618. —— Interlocutory Orders.

[a] Statute authorizing appeal from order granting or refusing new trial, or which affects a substantial right, does not apply to interlocutory orders made in the progress of the trial.—People v. Ah Fong, 12 Cal. 424.

[b] By the provisions of Criminal Practice Act, section 484, to the effect that intermediate orders or proceedings forming part of the record of a criminal case may be reviewed on appeal from the final judgment, it is intended to prohibit a separable appeal from such intermediate orders or proceedings. People v. Clarke, 42 Cal. 622.

[c] An order of a county court directing that a criminal charge, ignored by one grand jury, be submitted to another, is not the subject of an independent appeal, but is only reviewable, if at all, on an appeal from the final judgment. The true construction of the provisions of the Criminal Practice Act on this subject is that orders and proceedings occurring prior to the judgment which are subject to review can be corrected on an appeal from the judgment, or from an order granting or refusing a new trial; while an order affecting a substantial right of a party, made after final judgment, can be reviewed on a direct appeal from the order.—People v. Clarke, 42 Cal. 622.

§ 619. —— Refusing to Correct Minutes of Court.

[a] An appeal will not lie from an order overruling a motion to correct the minutes of the court as to arraignment of defendant, under Code of Civil Procedure, section 963, allowing an appeal from a special order made after final judgment.—People v. Walker, 61 Pac. 800.

§ 620. —— Denying New Trial.

[a] Under Penal Code, section 1172, which provides for an exception to an order denying a new trial, such order may be reviewed on an appeal from the judgment on a proper record; and there is no necessity for a separate appeal from the order, though both are provided for by section 1237.—People v. Thompson, 115 Cal. 160, 46 Pac. 912.

[b] An appeal will not lie from an order denying a motion for a new trial.—People v. Majors, 2 Pac. 744.

§ 621. —— Order Made After Judgment.

[a] That portion of Criminal Practice Acts, section 481, which authorizes an appeal from an order "which affects a substantial right in a criminal case, amounting to a felony," applies only to orders made after final judgment. People v. Clarke, 42 Cal. 622.

[b] An order of court fixing the time of sentence, after conviction of felony, is not an appealable order, and an exception taken to such order, because it provided for a sentence before the time provided by law, is not reviewable.—People v. Mess, 65 Cal. 174, 3 Pac. 670.

[c] Under Penal Code, section 1237, subdivision 3, order, made after a capital conviction, fixing the time and place of execution, may be appealed.—People v. McNulty, 95 Cal. 594, 30 Pac. 963.

[d] Where the death warrant was signed on the third day after the judgment was entered, but not in the presence of defendant or of his counsel, or with the knowledge of either, such order is appealable, under Penal Code, section 1237, providing that an appeal may be taken by defendant from an order made after judgment, affecting his substantial rights.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People v. Durrant, 119 Cal. 201, 51 Pac. 185.

[e] Order directing the entry of judgment nunc pro tunc, as of a prior date, reciting that judgment was then duly rendered, and that the clerk failed to enter it fully and correctly, is an order after judgment affecting a substantial right of the defendant, which is appealable.—Ward v. Dunne, 136 Cal. 19, 68 Pac. 105.

[f] Under Penal Code, section 1174, order made after judgment, refusing to settle a bill of exceptions, is not final and appealable, under section 1237, as an order, made after judgment, affecting defendant's substantial rights.—People v. Jackson, 138 Cal. 32, 70 Pac. 918.

§ 622. —— Refusing to Set Aside Order or Judgment.

[a] An order refusing to hear a motion to set aside a former order denying a new trial

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is not appealable.—People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

[b] Where defendant moved to vacate a judgment and correct the minutes on the ground that they incorrectly stated that before sentence defendant was informed of the nature of the charge, plea and verdict, and asked if there was any reason why judgment should not be pronounced against him, an appeal would lie from orders refusing the motions, as they affected substantial rights, and could not have been reviewed on appeal from the judgment. Judgment (1900) 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

[c] An appeal will not lie from an order overruling a motion to discharge from imprisonment, nor from an order denying a motion to vacate the judgment of conviction, since the judgment of conviction was appealable, and all objections could have been reviewed on appeal from it.—People v. Walker, 61 Pac. 800.

§ 623. —— Arresting Judgment.

[a] Appeal cannot be taken from an order made after a verdict of guilty, in a criminal case, arresting the judgment.—People v. Ah Kim, 44 Cal. 384.

§ 624. —— Denying Motion in Arrest of Judgment.

[a] Order denying motion in arrest of judgment is not appealable.—People v. Henry, 77 Cal. 446, 19 Pac. 830; People v. Dolan, 96 Cal. 315, 31 Pac. 107; People v. Sansome, 98 Cal. 235, 33 Pac. 202; People v. Burgle, 123 Cal. 303, 55 Pac. 998; People v. Ford, 138 Cal. 140, 70 Pac. 1075; People v. Jackson, 138 Cal. 462, 71 Pac. 566; People v. Cadot, 138 Cal. 527, 71 Pac. 649; People v. Matuszewski, 138 Cal. 533, 71 Pac. 701; People v. Lonnen, 139 Cal. 634, 73 Pac. 586; People v. Feld (Cal. Sup.) 86 Pac. 1100.

[c] No appeal lies from an order denying a motion in arrest of judgment, but it can be reviewed only on appeal from the judgment. Judgment (1900) 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

[d] Appeal will not lie from an order denying a motion in arrest of judgment, since it may be reviewed on appeal from final judgment.—People v. Walker, 61 Pac. 800.

B. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

NECESSITY FOR OBJECTION IN LOWER COURT, § 625.
—— DEFECTS IN INDICTMENT OR INFORMATION, § 626.
—— COMPETENCY OF JURORS AND RULINGS THEREON, § 627.
—— SUMMONING AND SELECTING JURORS, § 628.
—— APPOINTMENT OF JURY TRIER, § 629.
—— ADMISSION OR EXCLUSION OF EVIDENCE, § 630.
—— REMARKS AND CONDUCT OF COURT, § 631.
—— REMARKS OR CONDUCT OF COUNSEL, § 632.
—— INSTRUCTIONS, § 633.
—— NECESSITY FOR REQUEST, § 634.
—— CUSTODY AND CONDUCT OF JURY, § 635.
—— SEPARATION, § 636.
—— VIEW OR INSPECTION BY JURY, § 637.
—— JUDGMENT, § 638.
SUFFICIENCY OF OBJECTION, § 639.
—— RIGHT TO CHANGE GROUND OF OBJECTION URGED BELOW, § 640.
NECESSITY FOR MOTION TO STRIKE OUT, § 641.
NECESSITY FOR EXCEPTION IN LOWER COURT, § 642.
—— RULINGS ON EVIDENCE, § 643.
—— REMARKS OF COURT, § 644.
SUFFICIENCY OF EXCEPTION, § 645.
NECESSITY FOR MOTION FOR NEW TRIAL, § 646.

§ 625. Necessity for Objection in Lower Court.

[a] Supreme court will not review on appeal any irregularities of a mere technical character occurring in the progress of a trial in the district court, where no objection was raised at the time, and where such irregularities do not appear to have affected the administration of justice.—People v. McCauley, 1 Cal. 379.

[b] Where defendant filed an affidavit for trial before another judge because of prejudice, as authorized by Code of Civil Procedure, section 170, and counter-affidavits of the judge were filed, and considered by the court in determining whether the judge was disqualified, without objection of defendant, it is too late to make such objection on appeal from conviction.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

FOR AUTHORITIES FROM OTHER STATES:

- See 12 Cyc. 808-816; 15 Cent. Dig., cols. 407-444, §§ 2619-2655.

§ 626. —— Defects in Indictment or Information.

[a] Objections to an indictment on account of the omission of certain words, or of alleged uncertainty in the form of allegations, not appearing to have been raised in the court below, by demurrer or otherwise, will not be noticed by the appellate court.—People v. Gatewood, 20 Cal. 146.

[b] Failure to demur to an indictment for burglary which charges that the defendant entered, etc., with intent to commit a felony, without stating what particular felony, does not waive the objection.—People v. Nelson, 58 Cal. 104.

[c] Objection that facts stated in indictment do not constitute a crime may be taken for the first time in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court.—People v. McKenna, 81 Cal. 158, 22 Pac. 488.

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[d] Where the affidavit and information charge a public offense of which the court has jurisdiction, an objection thereto on the ground of uncertainty cannot be raised for the first time on appeal.—People v. Nesbitt, 102 Cal. 327, 36 Pac. 654.

[e] Objection that information lacks certainty and directness cannot be raised for first time on appeal.—People v. Ellenwood, 119 Cal. 168, 51 Pac. 553.

[f] An information against defendant for the crime of rape alleged that "said P., on August 10, 1900, at the county of S., and before the filing of this information, with one C., a female child under the age of sixteen years, to wit, of the age of fourteen years, and not the wife of the said defendant, P., unlawfully and feloniously did," etc. Held, that the information was not void, as against objection first made on appeal, as failing to charge that the prosecutrix was not the wife of defendant on August 10, 1900.—People v. Parks, 133 Cal. 3, 65 Pac. 13.

[g] Conviction under statutes of 1891, page 285, chapter 206, will not be reversed on appeal because the indictment did not charge that defendant, in permitting his wife to be placed in a house of prostitution, did so for the purpose of prostitution, where the objection was not made by demurrer, but by motion in arrest.—People v. Mead, 145 Cal. 500, 76 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 811, 812; 15 Cent. Dig., cols. 412-417, §§ 2627, 2628.

§ 627. —— Competency of Jurors and Rulings Thereon.

[a] When a challenge to a juror for actual bias is tried by the court, its judgment upon that issue will not be reviewed by the appellate court, unless an exception is taken to its ruling in admitting or rejecting evidence. People v. Cotta, 49 Cal. 166.

[b] A judgment will not be reversed on the ground that a juror was not on the assessment-roll, in a case where the competency of the juror was not objected to when the juror was called.—People v. Mortier, 58 Cal. 262.

[c] Examination of juror or any ruling during its continuance cannot be made the foundation for alleged error, unless the challenge is taken at some stage of the proceedings in the court below.—People v. Hamilton, 62 Cal. 377, 382.

[d] The disallowance of challenges of jurors for actual bias will not be reviewed where defendant did not challenge the jurors peremptorily, nor exhaust his peremptory challenges.—People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

§ 628. —— Summoning and Selecting Jurors.

[a] An objection that the jury were not duly selected and summoned cannot be raised in the appellate court for the first time.—Spencer v. Doane, 23 Cal. 418.

[b] An objection in a criminal case that the special venire was placed in the hands of the coroner rather than the sheriff, without any showing why it was so placed, cannot be raised on appeal, where no such fact was stated as a basis of the challenge to the panel. People v. Enwright, 134 Cal. 527, 66 Pac. 726.

§ 629. —— Appointment of Jury Trial.

[a] An objection to the appointment of a trier must be made at the time of such appointment, and exception to the court's ruling thereon must be reserved in the usual way.—People v. Voll, 43 Cal. 166.

§ 630. —— Admission or Exclusion of Evidence.

[a] Error in the admission of evidence is not ground for reversal where no objections were made or exceptions taken thereto.—People v. Reinhart, 39 Cal. 449; People v. Moan, 65 Cal. 532; 4 Pac. 545.

[b] Objection to evidence not raised below will not be considered.—People v. Sheldon, 68 Cal. 438, 9 Pac. 457.

[c] Where no objection is taken to admission of evidence, supreme court will assume that it was by consent of all parties.—People v. McCurdy, 68 Cal. 580, 10 Pac. 207; People v. Northey, 77 Cal. 633, 19 Pac. 865, 20 Pac. 129.

[e] Question should clearly disclose what it is proposed to prove, or proposition to prove certain facts should be submitted to court below and refused in order to present question to appellate court.—People v. Powell, 87 Cal. 365, 25 Pac. 481.

[f] On trial for forgery of a note, where, to show a guilty intent, other alleged forged notes were admitted in evidence on proof of extrajudicial confessions by defendant that they were forged by him, and the only objection made was that the notes were incompetent, immaterial and irrelevant, the objection that sufficient foundation for their admission was not laid cannot be made for the first time on appeal.—People v. Baird, 105 Cal. 126, 38 Pac. 633.

[g] Defendant objected to a question, and his objection was overruled, and he excepted. The question, however, was not answered. Subsequently the same question was asked and answered without objection by defendant. Held, that an objection thereto could not be urged on appeal.—People v. Miller, 122 Cal. 84, 54 Pac. 523.

[h] Where checks executed by the sureties of a tax collector to the county treasurer were admitted in a prosecution for embezzlement as tending to show the amount of the embezzlement by showing that a certain amount had been paid to the treasurer on the tax collector's account, and not by him,

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the admission could not be complained of on appeal on the ground that it must have raised a presumption that defendant was short in his accounts, in the absence of an objection on such ground at the trial.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

[i] Objections to the evidence as to the age of prosecutrix in a rape case on the ground that it was based on hearsay, and not the best evidence, must be made in the trial court, or they will not be passed on by the appellate court.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[j] Two defendants were jointly tried for murder—the same counsel acting for both—and a statement of one defendant was erroneously admitted over the objection that it was not voluntary. This was the only objection made, though as to the other defendant the statement was objectionable only because it was hearsay. Held, that on appeal the latter defendant was not precluded from taking advantage of the error because there was no objection on the ground of hearsay, but that both defendants were entitled to take advantage of the objection made.—People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

[k] On prosecution for larceny, a witness on cross-examination was asked if he did not have defendant arrested because of information that a certain person gave him, to which he replied, "Well, principally," and that he knew nothing of his own knowledge against defendant. He was then asked by the prosecution, "Just state why you had him arrested." Held, that hearsay testimony and argumentative matter elicited by the latter question, not having been objected to on any motion made to strike out the same, afforded no ground for reversal.—People v. Cole, 141 Cal. 88, 74 Pac. 547.

[l] Where testimony is admitted without objection or exception, or without motion to strike it out, error cannot be predicated on the court's instructing the jury that it should be considered.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[m] In a prosecution for robbery, where the complaining witness was absent and could not be found in the state at the time of the trial, but had testified on the preliminary hearing of the defendant, and his testimony, properly certified and filed by the shorthand reporter, was introduced and read in evidence, the defendant is in no position to predicate error on the fact that the shorthand reporter testified as to the correctness of the transcript of his notes and what was said in the preliminary examination by the witness, where no objection was made nor exception taken at the time on the part of the defendant.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[n] The deposition of a witness, taken at a preliminary hearing of defendant and read in evidence in a prosecution for robbery, pursuant to Penal Code, section 686, subdivision 3, showed that the witness, after testifying that three men attacked him, two of them pointing their pistols at him, was asked to state whether he saw two of the men in court, and according to the deposition his answer was, "There is one; that fellow [pointing]." Held, that defendant was in no position to predicate error on the admission of the testimony of the shorthand reporter, who took down the testimony, to the effect that witness pointed at defendant; no objection having been made to the question, nor motion made to strike out the answer.—People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

[o] Proceedings pursuant to a stipulation that the preliminary evidence as to the admissibility of a confession, and the argument on defendant's objections, should be heard in the absence of the jury, will not be reviewed, in the absence of objection and exception in the trial court.—People v. Evans, 41 Pac. 444.

§ 631. —— Remarks and Conduct of Court.

[a] When no objection to the court's instruction to a witness is made at the time it is given, no objection can afterward be raised to it in the appellate court.—People v. Bruzzo, 24 Cal. 41.

[b] Where defendant neither objects nor excepts to the remarks of the trial court or his conduct in examining witnesses, such objections cannot be urged on appeal.—People v. Bishop, 134 Cal. 682, 66 Pac. 976.

§ 632. —— Remarks or Conduct of Counsel.

[a] Intemperate language in the closing argument of the prosecuting attorney is not ground for reversal of a conviction, in the absence of any showing that the trial judge's attention was called to it, and where the result reached is clearly right upon the evidence. People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; (1890) People v. Beaver, 83 Cal. 419, 23 Pac. 321.

[b] That sheriff and district attorney laid bowie-knife, pistol and coat of mail on table before jury, which were not put in evidence, is not ground for reversal where court's attention was not called to them and no instructions were asked in respect to them.—People v. Cox, 76 Cal. 284, 18 Pac. 332.

[c] Improper argument will not be considered on appeal where no action of court forbidding it was requested.—People v. Beaver, 83 Cal. 420, 23 Pac. 321.

[d] Where the attention of the trial court is not called to objectionable remarks of counsel, made during the argument, no question in relation thereto can be considered on appeal.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[e] Where an objection to the language of the district attorney used on the argument is general, and the court's attention was in no way directed to any particular feature complained of, the fact that the district attorney improperly commented upon or called attention to the personal appearance of the defendant as a factor in the evidence,

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though the defendant did not submit himself as a witness in the case, cannot be taken advantage of for the first time on appeal. In order to avail himself of the objection, it was the duty of the defendant to direct the court's attention specifically to such transgression of the people's privilege.—People v. Frigerio, 107 Cal. 151, 40 Pac. 107.

[f] Objection to improper remarks by counsel in his address to the jury cannot be urged for the first time on appeal.—People v. Kramer, 117 Cal. 647, 49 Pac. 842.

[g] Misconduct of the district attorney cannot be reviewed where no objection is made or exception taken.—People v. Brittan, 118 Cal. 409, 50 Pac. 664.

[h] Misconduct of the prosecuting attorney while cross-examining a witness, if not objected to at the time, cannot be considered on appeal.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[i] A new trial should not be granted for improper remarks of district attorney, where defendant merely excepted to the statement, since its effect would have been removed if defendant had asked the court to instruct the jury to disregard it.—People v. Shears, 133 Cal. 154, 65 Pac. 295.

[j] An objection to the manner in which the district attorney questioned a witness cannot be made for the first time on appeal. People v. Farrington, 140 Cal. 656, 74 Pac. 288.

[k] Objection to the remarks of the district attorney in a criminal case cannot be made for the first time in the appellate court.—People v. Owens (Cal. App.), 86 Pac. 980.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 434-436, § 2645.

§ 633. —— Instructions.

[a] Objection that court below directed jury to find specially, as to particular fact, comes too late if made in the supreme court for the first time, it not appearing that the party objecting was injured by the direction.—People v. Chu Quong, 15 Cal. 332.

[b] Where, on trial of an indictment for assault with intent to rob, the court charged, at defendant's request, that it must be shown that defendant committed the assault as charged, and with the intent charged, in order to convict, and the forms of verdict approved by defendant's counsel were sent to the jury—one of "Guilty of assault with intent to commit robbery," and one of "Not guilty,"—defendant could not, after verdict, object that a form for the lesser crime of assault was not also submitted.—People v. Hite, 135 Cal. 76, 67 Pac. 57.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 815; 15 Cent. Dig., cols. 436-439, § 2646.

§ 634. —— —— Necessity for Request.

[a] If charge, in a criminal case, is sufficiently comprehensive, under Criminal Practice Act, section 400, it is not open to the objection of being too general, especially where the accused does not request it to be made more specific or minute.—People v. Byrnes, 30 Cal. 206.

[b] Defendant in criminal case cannot complain that court did not instruct the jury upon a point in issue, unless he asked an instruction on the point, and it was refused.—People v. Ah Wee, 48 Cal. 236.

[c] Failure to request instruction bars right to allege error in omission to give it.—People v. Northey, 77 Cal. 631, 632, 19 Pac. 865, 20 Pac. 129.

[d] Appellant cannot object that instruction was not sufficiently certain unless he requested more specific charge.—People v. Olsen, 80 Cal. 129, 22 Pac. 125.

[e] Appellant cannot complain that charge lacks explicitness unless he has requested more explicit instruction.—People v. Marshall, 120 Cal. 71, 52 Pac. 129.

[f] Omission to charge on material issue is not reversible in absence of request.—People v. Appleton, 120 Cal. 252, 52 Pac. 582.

[g] Upon trial of charge of rape, where the defendant requested no instruction that the jury might find him guilty of the lesser offense of an attempt to commit rape, it is not reversible error for the court to fail to give such instruction of its own motion.—People v. Bailey, 142 Cal. 434, 76 Pac. 49.

[h] Defendant cannot complain, on appeal, of the court's failure to instruct on any particular proposition of law, where he did not request such instruction.—People v. Smith (Cal. App.), 84 Pac. 449.

§ 635. —— Custody and Conduct of Jury.

[a] Where a party in the trial of a criminal action sees or knows of an act of misconduct by a juror which he does not bring to the attention of the court, or object to at the time, or at any other time during the trial, or on the hearing of a motion for a new trial, it will be too late to make it the basis of objection and exception on appeal.—People v. McCoy, 71 Cal. 395, 12 Pac. 272.

[b] If, during trial, a juror appears to be intoxicated in court, defendant should object to his serving before the jury retire.—People v. Deegan, 88 Cal. 602, 26 Pac. 500.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig, cols. 439, 440, § 2647.

§ 636. —— —— Separation.

[a] Separation of jury cannot be considered on appeal unless objected to when opportunity was offered.—People v. Tarm Poi, 86 Cal. 231, 24 Pac. 998.

§ 637. —— View or Inspection by Jury.

[a] In the absence of objection, it will be presumed that the consent of the parties

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was had to an inspection by the jury, after the instructions had been given, of articles of wearing apparel having a bearing on the case.—People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

[b] Upon the trial of a defendant accused of receiving stolen property, knowing it to have been stolen, it is an improper and unauthorized proceeding to conduct the jury to view a steer alleged to have been one of the cattle stolen, the only authorized view of a jury being of the place in which the offense is charged to have been committed; but if the proceeding is not objected to as being irregular and unauthorized, and an exception is taken only upon grounds which are not tenable, it cannot be objected on appeal for the first time that the proceeding was irregular and unauthorized.—People v. Fitzpatrick, 80 Cal. 538, 22 Pac. 215.

§ 638. —— Judgment.

[a] Judgment pronounced sooner than two days after verdict cannot be objected to for first time on appeal.—People v. Johnson, 88 Cal. 174, 25 Pac. 1116; People v. Barton, 88 Cal. 177, 25 Pac. 1117.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 440, 441, § 2650.

§ 639. Sufficiency of Objection.

[a] Appellant cannot complain of form of question unless his objection show that form of question was what was aimed at.—People v. Bush, 68 Cal. 629, 10 Pac. 169.

[b] Failure to specify objection to admitted evidence which might have been obviated if specified, is waived by failure to specify such objection with particularity; and where proffered evidence admitted is imperfect by lack of preliminary proof, which may or may not be supplied, objector must specify that objection, and a general objection to the evidence is not sufficient to warrant an investigation on appeal as to the insufficiency of the preliminary proof.—People v. Louie Foo, 112 Cal. 17, 44 Pac. 453.

[c] On a prosecution for burglary, a witness was allowed to state as a fact that two exhibits were written by the same person. Defendant objected only on the ground that the corpus delicti had not been proven. Held, that the error was not available to defendant on appeal.—People v. Lang, 142 Cal. 482, 76 Pac. 232.

§ 640. —— Right to Change Ground of Objection Urged Below.

[a] Where a defendant's objection to the admission of testimony on the trial is general he cannot be permitted to make it special, for the first time, in this court.—People v. Glenn, 10 Cal. 32.

[b] Defendant, in a criminal case, cannot on appeal abandon the ground of objection to the admission of evidence made on the trial, and assign a new ground.—People v. McCauley, 45 Cal. 146.

[c] Ground of objection to evidence below cannot be changed on appeal.—People v. O'Brien, 78 Cal. 44, 20 Pac. 359.

§ 641. Necessity for Motion to Strike Out.

[a] Where, on a prosecution for an assault on a boy, he has testified without objection to what he told his mother on complaint made to her, the admission of the mother's testimony, in answer but not responsive, to a proper question, that the boy said somebody had done something to him, is not prejudicial; no motion being made to strike out such answer.—People v. Swist, 136 Cal. 520, 69 Pac. 223.

[b] Where there is no motion to strike out hearsay and argumentative matter in answer, objection cannot be raised on appeal.—People v. Cole, 141 Cal. 92, 74 Pac. 547.

§ 642. Necessity for Exception in Lower Court.

[a] The supreme court will not, on appeal, review technical irregularities happening during a trial in the district court, which were not excepted to at the time, and which did not work injustice.—People v. McCauley, 1 Cal. 379.

[b] When the record fails to show that exceptions were taken to a ruling, the ruling will not be reviewed.—People v. Miller, 122 Cal. 84, 54 Pac. 523.

[c] On a prosecution for murder, a ruling of the trial court, not excepted to, held not reviewable on appeal.—People v. Woods, 147 Cal. 265, 81 Pac. 652.

[d] Questions as to the ruling of the court in connection with the argument of the district attorney cannot be reviewed on appeal, where no exception was taken.—People v. Melandrez (Cal. App.), 88 Pac. 372.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 817-820; 15 Cent. Dig., cols. 444-460, §§ 2656-2671.

§ 643. —— Rulings on Evidence.

[a] Rulings on evidence cannot be considered unless proper exceptions are reversed.—People v. Morino, 85 Cal. 517, 24 Pac. 892.

[b] Rulings of the trial court upon the admission of evidence will not be reviewed where no exceptions thereto are found in the record.—People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 818, 819; 15 Cent. Dig., cols. 448-450, §§ 2662-2664.

§ 644. —— Remarks of Court.

[a] An objection to remarks made by the trial court in the presence of the jury, touching the conduct of appellant's attorney in regard to the bribery of a witness, will not be considered upon appeal where no exception

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was noted to the course pursued by the court. People v. Abbott, 101 Cal. 645, 36 Pac. 129.

§ 645. Sufficiency of Exception.

[a] Where the court overrules a challenge, and the prisoner excepts, the exception is to the decision overruling the challenge, and not to the right of the court to decide the question at all.—People v. Renfrow, 41 Cal. 37.

§ 646. Necessity for Motion for New Trial.

[a] If, in a criminal case, the defendant is tried on a good indictment, and convicted and sentenced, and an error of law occurs in the progress of the trial to defendant's prejudice and he appeals, the judgment must be reversed, although the defendant does not ask for a new trial.—People v. Olwell, 28 Cal. 456.

[b] Exceptions do not lie to the acts or conduct of the officers of the court, but the question must be raised on motion for new trial.—People v. Torres, 38 Cal. 141.

[c] The alleged misconduct of a juror, which was not made one of the grounds for a new trial, will not be considered on appeal.—People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719.

[d] Where the defendant in a criminal case fails to testify in his own behalf, the district attorney has no right, in addressing the jury, to comment upon such failure; but error in making such comments can only be availed of on motion for new trial, and is waived unless properly presented upon the record of such motion.—People v. Sansome, 98 Cal. 235, 33 Pac. 202.

[e] On appeal from a judgment in a criminal case, a defendant, without having made a motion for a new trial, may, if he has a bill of exceptions as provided in Penal Code, section 1171, rely on any of the grounds of exception mentioned in section 1170, including decisions in admitting or rejecting testimony. People v. Walker, 142 Cal. 90, 75 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 822, 823; 15 Cent. Dig., cols. 462-469, §§ 2676-2684.

C. PROCEEDING FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

IN GENERAL, § 647.
TIME TO APPEAL, § 648.
CERTIFICATE OF PROBABLE CAUSE, § 649.
NOTICE OF APPEAL, § 650.
CALENDAR, § 651.
EFFECT OF TRANSFER, § 652.
—— APPEAL ON ISSUE OF INSANITY, § 653
—— STAY OF PROCEEDINGS, § 654.

§ 647. In General.

[a] A single justice of the supreme court held without jurisdiction to grant the application of an attorney convicted of perjury, for permission to visit the county clerk's office to enable him as his own attorney to prepare an appeal to the district court of appeals.—People v. Collins (Cal. Sup.), 86 Pac. 895.

§ 648. Time to Appeal.

[a] Appeal from order denying new trial must be dismissed if taken after time limited therefor by section 1239, Penal Code.—People v. Daniels, 105 Cal. 262, 38 Pac. 720.

[b] Where an order is made fixing the time of execution of defendant at a date which renders the preparation and presentation of a bill of exceptions to the supreme court, in an application for a certificate of probable cause, impossible, the order is void on its face, and justifies the issuance of a certificate without a bill of exceptions.—People v. Durrant, 119 Cal. 201, 51 Pac. 185.

[c] The limitation in the Penal Code of one year after the rendition of the judgment within which "an appeal from a judgment must be taken," is mandatory; and this court has no jurisdiction to entertain such appeal taken after the lapse of that period, and it must be dismissed.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

[d] Under Penal Code, section 1239, requiring appeal from a judgment to be taken within a year, an appeal from a conviction in a criminal case, taken more than one year after rendition of judgment, cannot be considered. People v. Walker, 61 Pac. 800.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 802, 803, 825; 15 Cent. Dig., cols. 474-479, §§ 2691-2699.

§ 649. Certificate of Probable Cause.

[a] Certificate of probable cause for appeal should be granted when case presented is debatable, not palpably frivolous and vexatious, and productive of honest difference of opinion.—Adams, In re, 81 Cal. 167, 22 Pac. 547.

[b] To warrant certificate of probable cause for appeal, it is not necessary that there be probable ground for reversal.—Adams, In re, 81 Cal. 166, 22 Pac. 547.

[c] On application for certificate of probable cause, judge should give prisoner benefit of every doubt.—Adams, In re, 81 Cal. 168, 22 Pac. 547.

[d] Judge must grant certificate of probable cause for appeal, though he believes conviction regular and valid, unless case is so clear as to admit of no rational doubt or serious discussion.—Adams, In re, 81 Cal. 167, 22 Pac. 547.

[e] Certificate of probable cause will be granted by supreme court only on notice to district attorney and production of settled bill of exceptions or copy thereof.—Adams, In re, 81 Cal. 164, 22 Pac. 547.

[f] Remedy for refusal of certificate of probable cause for appeal is not by appeal from order, but by renewing application before justice of supreme court.—People v. Durrant, 119 Cal. 209, 51 Pac. 185.

[g] Appellant from a judgment of conviction of a felony has a right to have it

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determined by the trial court, or by a justice of this court, whether there is probable cause for his appeal and to have a stay of proceedings in a proper case; and is entitled to a reasonable stay until the matter can be determined.—People v. Clark, 125 Cal. 251, 57 Pac. 986.

[h] Under Penal Code, section 1243, providing for certificate by the trial judge or a justice of the supreme court of probable cause for appealing from a judgment of conviction of a crime, but not from an order entered after judgment, a justice of the supreme court will not grant such certificate on an appeal from an order for the execution of a capital sentence, but the application for certificate or supersedeas should be made to the court.—People v. Ross, 135 Cal. 59, 67 Pac. 13.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 831; 15 Cent. Dig., cols. 505, 506, § 2730.

§ 650. Notice of Appeal.

[a] Notice of an appeal taken by the people in a criminal case must be served on the defendant personally, if he reside in the county where the trial took place, and service on his attorney will not be sufficient.—People v. Wallace, 23 Cal. 93.

[b] Where it appears from the indorsements on a notice of appeal that the notice was filed on the day of its date, and an admission of service was indorsed beneath the indorsement of filing, the service will be presumed to have been made on the day of the filing.—People v. Ah Yute, 56 Cal. 119.

[c] A notice of appeal in a criminal case may be signed by an attorney other than the attorney of record for accused, since Code, sections 284, 285, requiring a formal substitution of attorneys, do not apply to criminal cases.—Clarke, Ex parte, 62 Cal. 490.

[d] A notice of appeal entitled "In the Superior Court of the City and County of San Francisco, State of California," and referring to the order of "said court," plainly indicates the intention to appeal from an order of the superior court.—People v. Jordan, 65 Cal. 644, 4 Pac. 683.

[e] Notice of appeal must be served on the attorneys for adverse party.—People v. Bell, 70 Cal. 34, 11 Pac. 327.

[f] Judgment was rendered December 2, 1899, but was not entered until an order was made November 19, 1901, directing the entry nunc pro tunc. Afterward, more than a year from December 2, 1899, defendant filed his notice of appeal. Held, that as, if the order nunc pro tunc was proper, the notice was too late, and if it was improper there was no judgment to appeal from, an order directing the clerk of the lower court to print a transcript would be refused.—People v. Ward, 138 Cal. 684, 72 Pac. 343.

[g] Service on district attorney of a notice of appeal from an order denying a new trial on a conviction of crime, after the expiration of more than sixty days after the denial of the new trial, is ineffectual.—People v. Salas (Cal. App.), 84 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 829; 15 Cent. Dig., cols. 497-500, §§ 2722-2724.

§ 651. Calendar.

[a] Criminal causes are regularly placed on the first calendar of the supreme court made up (whether for Sacramento, Los Angeles, or San Francisco) after the records are filed, regardless of the county in which the case was tried.—People v. McDermott, 97 Cal. 247, 32 Pac. 7.

[b] Rules for making up calendar and filing brief are designed to expedite, not delay, decision of causes and will be disregarded when their enforcement would have latter effect.—People v. Durrant, 119 Cal. 205, 206, 51 Pac. 185.

[c] When attorney general has confessed error, appeal may be decided immediately without waiting to place cause on calendar in regular course.—People v. Durrant, 119 Cal. 205, 206, 51 Pac. 185.

§ 652. Effect of Transfer.

[a] Appeal does not lie from an order of the superior court refusing a new trial on the plea of former conviction, and it is within the power of the court to proceed with the trial of a case where such attempted appeal has been taken and is still pending in the appellate court.—People v. Majors, 65 Cal. 138.

[b] Penal Code, section 1243, provides that an appeal to the superior court from a conviction in a capital case stays the execution of judgment. Held, that the warden of the state prison need not, on such an appeal by the prisoner, deliver him to the sheriff of the county where he was tried.—Fredricks, Ex parte, 104 Cal. 400, 38 Pac. 51.

[c] While an appeal from an order denying a new trial is pending, the superior court has no jurisdiction to change the order.—People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 831; 15 Cent. Dig., cols. 509-511, § 2732.

§ 653. —— Appeal on Issue of Insanity.

[a] Trial on main charge in indictment will not be postponed because of appeal on the issue of insanity.—People v. Moice, 15 Cal. 329.

§ 654. —— Stay of Proceedings.

[a] Stay of execution of capital punishment may be allowed in supreme court.—State v. Tanner, 2 Cal. 257.

[b] Under Penal Code, section 1243, providing that an appeal from a judgment of death

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shall not stay execution unless the judge of the court in which the conviction was had, or one of the justices of the supreme court shall certify "that in his opinion there is probable cause for the appeal," in the absence of any such certificate by the trial judge, the supreme court will refuse a supersedeas, where it is satisfied, by examining the record, that there were no errors resulting in the judgment, and that there is "no probable cause for the appeal."—People v. Valencia, 45 Cal. 304.

[c] Temporary stay of proceedings may be granted by superior or supreme court pending preparation of petition for certificate of probable cause.—Adams, In re, 81 Cal. 165, 22 Pac. 547.

[d] Under Penal Code, section 1243, providing that "an appeal . . . . from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases upon filing . . . . a certificate of the judge . . . . or of a justice of the supreme court that in his opinion there is probable cause for the appeal, but not otherwise," an appeal from an order fixing the time and place of execution does not stay the execution, unless such a certificate is filed.—People v. McNulty, 95 Cal. 594, 30 Pac. 963.

[e] Where a defendant convicted of murder is refused a certificate of probable cause by the superior court, and is also refused a stay of proceedings pending settlement of his bill of exceptions, in order that he may renew the application for such a certificate in the appellate court, a stay will be granted by the chief justice of the supreme court pending the settlement of the bill of exceptions and the application in that court for a certificate of probable cause.—People v. Lane, 96 Cal. 596, 31 Pac. 580.

[f] By appeal to superior court enforcement of judgment appealed from is stayed until after determination of appeal; and until its determination proceedings is a pending action in which the rights of neither party have been conclusively determined.—Spears v. County of Modoc, 101 Cal. 303, 35 Pac. 869.

[g] Imprisonment, if part of penalty is not stayed without a certificate of probable cause for appeal.—Fredericks, Ex parte, 104 Cal. 400, 38 Pac. 51.

[h] It is the appeal and not the merit of appellant's contention that operates as stay. Edgar, Ex parte, 119 Cal. 127, 51 Pac. 29.

[i] Appeal from order fixing date of execution does not stay execution without certificate of probable cause.—People v. Durrant, 119 Cal. 209, 51 Pac. 185.

[j] Petitioner having appealed from a judgment of imprisonment, and the judge before whom he was tried, and likewise the presiding judge, being absent, and the judge temporarily acting in his place having refused a stay pending return of the trial judge, the supreme court will stay proceedings till the trial judge returns and hears application for a certificate of probable cause, or till some other judge of the same court appointed to act in his place has heard and decided it.—People v. Clark, 125 Cal. 251, 57 Pac. 986.

[k] Where a defendant was convicted of a felony, and the judgment was affirmed by the supreme court, and defendant was granted a writ of error to the federal supreme court, the sheriff has no authority to deliver the defendant to the warden of the state prison pending the decision of the federal court, since the writ of error operated as a supersedeas.—Rodley, Ex parte, 132 Cal. 40, 64 Pac. 91.

D. RECORD, BILL OF EXCEPTIONS AND STATEMENT OF FACTS.

1. Record, §§ 655-685.
2. Bill of Exceptions, §§ 686-707.
3. Statement of Facts, §§ 708-711.

1. Record.

MATTERS TO BE SHOWN BY RECORD—MATTERS ESSENTIAL TO SUSTAIN OR REVERSE CONVICTION, § 655.
—— MATTERS ESSENTIAL TO MAINTENANCE OF APPEAL, § 656.
SCOPE AND CONTENTS OF RECORD—AFFIDAVITS, § 657.
—— MINUTES OF COURT, § 658.
—— RETURN OF SHERIFF ON VENIRE, § 659.
—— EVIDENCE, § 660.
—— INSTRUCTIONS, § 661.
—— GROUNDS OF MOTION FOR NEW TRIAL, § 662.
—— JUDGMENT, § 663.
—— BILL OF EXCEPTIONS, § 664.
CERTIFICATION, § 665.
—— COMPELLING, § 666.
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TRANSMISSION—TIME, § 668.
CONCLUSIVENESS OF RECITALS, § 669.
AMENDMENT AND CORRECTION, § 670.
IMPEACHING OR CONTRADICTING, § 671.
QUESTIONS PRESENTED FOR REVIEW—IN GENERAL, § 672.
—— OBJECTION TO INDICTMENT, § 673.
—— DELAY IN TRIAL, § 674.
—— PRELIMINARY PROCEEDINGS, § 675.
—— QUALIFICATION AND SELECTION OF JURORS, § 676.
—— ABSENCE OF ACCUSED DURING TRIAL, § 677.
—— REMARKS AND CONDUCT OF JUDGE, § 678.
—— REFUSAL TO ALLOW READING OF LAW TO JURY, § 679.
—— ADMISSIBILITY OF EVIDENCE, § 680.
—— SUFFICIENCY OF EVIDENCE, § 681.
—— EXAMINATION OF WITNESSES, § 683.
—— INSTRUCTIONS AND FAILURE TO GIVE INSTRUCTIONS, § 683.
—— GRANT OR DENIAL OF NEW TRIAL, § 684.
—— JUDGMENT, § 685.

§ 655. Matters to be Shown by Record—Matters Essential to Sustain or Reverse Conviction.

[a] Where court in a criminal prosecution gives a charge which could not be correct

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under any circumstances, the judgment will be reversed, even though the facts on which it is based are not brought up in the record. People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; People v. Long, 39 Cal. 694.

[b] Record of trial for murder need not show affirmatively that charge was in writing.—People v. Chung Lit, 17 Cal. 320.

[c] Under Practice Act, if it appears, on appeal, that the court below had no jurisdiction of the offense of an accessary, judgment will be arrested, although the want of jurisdiction is not stated as one of the grounds of the appeal.—People v. Hodges, 27 Cal. 340.

[d] Failure of reporter to take down oral charge must affirmatively appear of record. People v. Johnson, 88 Cal. 175, 25 Pac. 1116; People v. Barton, 88 Cal. 178, 25 Pac. 1117.

[e] Record must affirmatively show that information was not read to jury.—People v. Wheatley, 88 Cal. 120, 26 Pac. 95.

[f] A clerical error in the minutes of the court in stating that "the jury, defendant, and all counsel" were present at a time specified will be disregarded where the bill of exceptions states that "defendants and respective counsel" were then present, nor can the defendants impeach the verity of the bill of exceptions, and if any of them were not present, that fact should have been made affirmatively to appear; nor is the silence of the record in failing to show that defendants were present when the verdict was rendered ground for reversal, all intendments upon appeal being in favor of the regularity of the judgment, and error will not be presumed, but the absence of the defendants, or any of them, must be made to appear affirmatively in the record.—People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[g] The record in a criminal case should show that on the hearing of a motion for a new trial on the ground of newly discovered evidence the affidavits in support thereof were offered or read by defendant.—People v. Fitzgerald (Cal. App.), 82 Pac. 555.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 833-842; 15 Cent. Dig., cols. 513-552, §§ 2736-2781.

§ 656. —— Matters Essential to Maintenance of Appeal.

[a] Ye Cow is indicted for larceny; Ah Cow is arraigned, and pleads not guilty; Ey Chow demands a separate trial, and is tried; the verdict and judgment are against Ah Cow; Ey Chow moves for a new trial and appeals. Held, that Ey Chow who appeals is sufficiently identified with the proceedings, by being named as the party who was tried, to maintain the appeal.—People v. Ah Cow, 17 Cal. 101.

[b] The transcript upon an appeal in a criminal case must show, expressly, the filing and service of a notice of appeal; otherwise, the court is not required to look into the case. A mere recital in a bill of exceptions that a notice of appeal has been served and filed is not enough, for it is not the office of a bill of exceptions to show that proceedings have been taken to effect an appeal.—People v. Phillips, 45 Cal. 44.

[c] Transcript in a criminal case must show that an appeal has, in fact been taken, otherwise the court is not required to look into the case.—People v. Phillips, 45 Cal. 44.

[d] Where the record fails to show that notice of appeal was given as required by law, the appeal will be dismissed.—(Cal. 1875) People v. Clark, 49 Cal. 455; (1886) People v. Bell, 70 Cal. 33, 11 Pac. 327.

[e] Transcript must show that notice of appeal was served.—People v. Bell, 70 Cal. 34, 11 Pac. 327.

[f] Where record contains no notice of appeal or does not show its service, appeal must be dismissed.—People v. Colon, 119 Cal. 669, 51 Pac. 1082.

[g] On appeal from a conviction and an order denying a new trial, though the opinion of the trial judge attached to the bill of exceptions showed clearly that a new trial should have been granted because of the insufficiency of the evidence, such opinion cannot be considered in determining whether the conviction should be set aside, since it is not a part of the record.—People v. Tapia, 131 Cal. 647, 63 Pac. 1001.

[h] An appeal will be dismissed where the record does not show service of the notice of appeal, required by Penal Code, section 1240, and, no certificate of the clerk that there was service has been filed, though permission to file such certificate, on the ground that the failure of the record to show such service was due to an error of the printer, was asked several months before the dismissal.—People v. Swearinger, 38 Pac. 972.

[i] Where the transcript of a criminal appeal failed to show that the notice of appeal was served on any person, as prescribed by Penal Code, section 1240, the appeal cannot be considered.—People v. Brown (Cal. Sup.), 84 Pac. 204.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 842-845; 15 Cent. Dig., cols. 553-572, §§ 2782-2802.

§ 657. Scope and Contents of Record—Affidavits.

[a] Affidavits used at a hearing are not part of the record unless made so by a bill of exceptions.—People v. Honshell, 10 Cal. 83.

[b] Affidavits on motion for new trial in criminal case, not embodied or referred to in any statement or bill of exceptions, are no part of the record.—People v. Price, 17 Cal. 310.

[c] Affidavits used on motion for new trial will not be considered when not embodied

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in bill of exceptions and not certified by judge, certificate of clerk is insufficient.—People v. Mahony, 77 Cal. 532, 20 Pac. 73.

[d] Affidavit of counsel filed in case long before bill of exceptions was settled, stating question which does not appear in bill of exceptions has no place in record, and cannot be considered.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[e] Where a motion for a new trial is made upon the ground of newly discovered evidence, affidavits inserted in the transcript which are not incorporated in any bill of exceptions, nor identified in any way by the judge as having been used and considered upon the hearing of the motion for a new trial, cannot be considered upon appeal.—People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

[f] Affidavit found in the record purporting to supply a question not appearing in the statement on motion for new trial, and filed on the day that the motion for new trial was filed, cannot be considered as any part of the record, where it is not identified as having been read upon the hearing of the motion, and is not embodied in the statement, or contained in any bill of exceptions. People v. Louie Foo, 112 Cal. 17, 44 Pac. 453.

[g] Affidavit of defendant as to irregularities occurring during trial, printed in the transcript, but not appearing in the bill of exceptions, in no way authenticated, and marked as having been read on motion for new trial, cannot be considered on appeal.—People v. McMahon, 124 Cal. 435, 57 Pac. 224.

[h] Where the bill of exceptions showed that affidavits of defendant's counsel and of the district attorney as to the argument of the district attorney at the trial were filed, but failed to show that they were called to the attention of the court, and did not set forth the use of the language alleged, nor show a finding as to whether or not it was used, the affidavits cannot be considered on appeal.—People v. Philbon, 138 Cal. 530, 71 Pac. 650.

[i] Where affidavits used in support of a motion to set aside the verdict on the ground that defendant had not been legally committed by a magistrate were not included in the judgment-roll, nor incorporated in the record by a bill of exceptions, or otherwise authenticated as required by Supreme Court Rule 29 (64 Pac. xii), the denial of such motion could not be reviewed on appeal.—People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

§ 658. —— Minutes of Court.

[a] Upon appeal by the people from order sustaining demurrer to indictment, provision of section 1207, Penal Code, making minutes of court part of the judgment-roll upon appeal from judgment of conviction, has no application; and exceptions merely noted in minutes cannot be reviewed upon appeal from such order.—People v. Long, 121 Cal. 494, 53 Pac. 1097.

§ 659. —— Return of Sheriff on Venire.

[a] Return of sheriff upon venire under which trial jury was summoned in a criminal case is not a part of the judgment-roll, and constitutes no part of the record upon appeal from the judgment when not incorporated in a bill of exceptions.—People v. O'Brien, 88 Cal. 483, 26 Pac. 362.

§ 660. —— Evidence.

[a] Notes of evidence taken by phonographic reporter at the trial, and transcribed into longhand, even if verified by his affidavit, do not constitute a part of the record on appeal for any purpose.—People v. Armstrong, 44 Cal. 326.

[b] Statement of evidence which is not part of bill of exceptions certified by the judge, will not be taken into consideration by the appellate court.—People v. Brown, 48 Cal. 253.

[c] A statement of defendant's testimony in the assignment of errors, in a criminal cause, cannot be considered as a part of the record in determining whether or not the court below erred in permitting certain questions to be asked him.—(1892) People v. Faulke, 96 Cal. 17, 30 Pac. 837; (1893) People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

[d] When only evidence of defendant's guilt consisted in comparison of handwriting by jury, it was sufficient for the state, in response to an exception to the sufficiency of the evidence, merely to specify, in the bill of exceptions, of what the evidence consisted; since it could not incorporate such evidence into the bill, or provide fac similes of the writings.—People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

[e] A discrepancy between the shorthand notes and the transcript, principally in the matter of punctuation, causing a dispute whether the prosecuting witness had said that he went to bed or got up "at 7 o'clock," is presumed harmless, in the absence of any evidence in the record upon appeal showing the materiality of the variance. If the variance was in fact material, the defendant should have embodied enough of the evidence in the record to show its materiality. People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

§ 661. —— Instructions.

[a] Instructions not authenticated by the trial judge, nor shown by the bill of exceptions to have been either given or refused by him, form no part of the judgment-roll, and will not be considered by the supreme court.—(1856) People v. Lockwood, 6 Cal. 205; (1870) People v. Tetherow, 40 Cal. 286; (1889) People v. Rogers, 81 Cal. 209, 22 Pac. 592; (1889) People v. Keeley, 81 Cal. 210, 22 Pac. 593; (1890) People v. Beaver, 83 Cal. 419, 23 Pac. 321.

[b] Instructions given to the jury upon the trial of a criminal cause, by the court, of its own motion, do not form part of the judg-

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ment-roll, and are not reviewable on appeal, unless brought up by bill of exceptions.—People v. Hart, 44 Cal. 598.

[c] Papers purporting to be instructions inserted by clerk in record cannot be considered unless authenticated by indorsement of the court.—People v. Flahave, 58 Cal. 249.

[d] The charge of the court of its own motion is not required to be marked by the judge. It is sufficient if it appear that the charge was given.—People v. Samsels, 66 Cal. 99, 4 Pac. 1061.

[e] Alleged errors in instructions will not be considered if instructions are not in record.—People v. Marseller, 70 Cal. 99, 11 Pac. 503.

[f] Instructions without indorsement of judge are not part of record.—People v. January, 77 Cal. 182, 19 Pac. 258.

[g] Instructions in transcript, certified to by clerk but not authenticated by judge, will not be considered.—People v. O'Brien, 78 Cal. 48, 20 Pac. 359.

[h] Manuscript attached to judgment-roll purporting to be oral charge, but not incorporated in bill of exceptions nor authenticated, will not be considered.—People v. Von, 78 Cal. 3, 4, 20 Pac. 35.

[i] Instructions not authenticated by judge nor incorporated in bill cannot be considered.—People v. Rogers, 81 Cal. 210, 22 Pac. 592; People v. Keeley, 81 Cal. 212, 22 Pac. 592.

[j] Courts and prosecuting attorneys should avoid loading up record with mass of doubtful and unnecessary instructions of their own drafting.—People v. Mullings, 83 Cal. 147, 17 Am. St. Rep. 223, 23 Pac. 229.

[k] Charge not incorporated in bill of exceptions nor authenticated in any manner by the judge cannot be considered on appeal.—People v. Beaver, 83 Cal. 419, 23 Pac. 321.

[l] A copy of the judge's charge, made from the official reporter's notes, and certified by the county clerk, and which is materially different from the copy in the printed record, is no part of such record, and cannot be used to correct the charge as contained in the bill of exceptions, which has been indorsed and authenticated by the judge.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[m] Where instructions are properly authenticated by the judge they are a part of the judgment-roll, and do not properly belong in a bill of exceptions; and it is only where an oral charge is given and not otherwise authenticated, or modifications are made in written instructions which it is desired to show, that it is either necessary or proper to preserve instructions in a bill of exceptions.—People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[n] Where charge to jury has been properly certified by court, it is part of record and should not be repeated in bill of exceptions.—People v. Padilla, 143 Cal. 158, 76 Pac. 889.

§ 662. —— Grounds of Motion for New Trial.

[a] If record fails to disclose grounds upon which motion for a new trial was heard and determined, ruling of court upon the motion cannot be reviewed on appeal.—People v. McCoy, 71 Cal. 395, 12 Pac. 272.

§ 663. —— Judgment.

[a] The transcript does not contain the judgment from which the appeal purports to be taken, and the appeal therefore cannot be entertained.—People v. Sing Lum, 60 Cal. 6.

[b] Appeal is ineffectual where judgment appealed from is not embodied in record.—People v. Lenon, 77 Cal. 309, 19 Pac. 524.

§ 664. —— Bill of Exceptions.

[a] A bill of exceptions, when properly constituted and authenticated, as required by Criminal Practice Act, sections 433-438, is a part of the record in a criminal prosecution, if it is duly signed and settled by the judge, and contains evidence necessary to illustrate points of exception.—People v. Trim, 37 Cal. 274.

§ 665. Certification.

[a] It is duty of clerk to furnish or certify true copies of papers on file in his office, such as the statements on appeal and on new trial, and the exhibits on file in his office; but he is not required to certify a document made up by incorporating one or more of such papers within another.—People v. Bartlett. 40 Cal. 142.

[b] It is not duty of clerk of district court to engross statement either on new trial or appeal; nor is it his duty when a copy of a statement is required to insert any document which is merely referred to and directed to be inserted.—People v. Bartlett, 40 Cal. 142.

[c] The refusal of the court to certify, on the stenographer's transcript of certain oral instructions, that they were given, so as to make them a part of the record, is not ground for reversal, where such instructions are made a part of the record by bill of exceptions.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

[d] A certificate that a transcript of evidence contains a "full and complete record of the testimony" is a substantial compliance with Penal Code, section 869, requiring the certificate to state that the transcript is a "correct statement of the testimony."—People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 858; 15 Cent. Dig., cols. 627-629, §§ 2887-2889.

§ 666. —— Compelling.

[a] Proper remedy to compel clerk to certify to correctness of a transcript or certify

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to a statement is by motion in court where record in cause remains, and not by mandamus.—People v. Bartlett, 40 Cal. 142.

§ 667. Printing.

[a] Under Penal Code, section 1246, requiring the clerk of the court to transmit to the appellate court printed copies of the record and bill of exceptions, and providing that the cost of the printing shall be a charge on the county, such printing and transmitting is an official duty, which the clerk must perform, although the board of supervisors have made no allowance with which to pay for the same.—People v. Black, 120 Cal. 553, 52 Pac. 840.

[b] Where an appeal is pending from an order directing a judgment to be entered nunc pro tunc as of a former date, and the bill of exceptions to that order has been settled and the transcript printed and filed, and that appeal will determine whether the case is ended or whether an appeal from the judgment is premature, this court will not grant a motion to compel the clerk of the superior court to print a transcript upon appeal from the judgment.—People v. Ward, 138 Cal. 684, 72 Pac. 343.

For Authorities from Other States:

See 12 Cyc. 859; 15 Cent. Dig., col. 636, § 2893.

§ 668. Transmission—Time.

[a] Under Penal Code, section 1246, requiring the clerk with whom the notice of appeal is filed, within ten days thereafter, or within ten days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the record, an appeal will be dismissed on a showing by certificate of the clerk below that four years have elapsed since the taking of the appeal, that defendant has never requested the clerk to make up a transcript, that the bill of exceptions has never been filed, though settled, and that no transcript has been sent to the supreme court.—People v. Frink, 12 Pac. 616.

For Authorities from Other States:

See 12 Cyc. 859; 15 Cent. Dig., cols. 629-636, §§ 2890-2892.

§ 669. Conclusiveness of Recitals.

[a] When record contains nothing to controvert truth of recitals in judgment they are binding on appeal.—People v. Rozelle, 78 Cal. 91, 20 Pac. 36.

[b] Where a defendant charged with an assault with intent to kill, and also with having suffered a prior conviction of another felony, when arraigned, pleaded not guilty of the offense charged, and denied the prior conviction, and the verdict passed only on the plea of not guilty, but the sentence was too great, unless based on the prior conviction, and the judgment recited that defendant subsequently, on a specified day, confessed the prior conviction, the truth of which recital was not controverted, the verity of the recital must be accepted.—People v. McNeill, 118 Cal. 388, 50 Pac. 538.

For Authorities from Other States:

See 12 Cyc. 859, 860; 15 Cent. Dig., cols. 636-644, §§ 2894-2896.

§ 670. Amendment and Correction.

[a] Errors in dates, in copies of documents, in the description of premises taken from conveyances, and the like, can be corrected by a resettlement; and, upon proper showing, made before argument, the supreme court may send the record back to the court below for that purpose. So where the errors are admitted.—People v. Romero, 18 Cal. 89.

[b] After transcript on appeal in a criminal case has been filed in the supreme court, it will not be sent back in order that the statement or bill of exceptions may be changed by a resettlement, except upon like proof or admission of the mistake or omission alleged. This court will not listen to affidavits or statements of parties as to what was admitted or proved in the course of proceedings in the court below; and the certificate of the judge, independent of the settled bill of exceptions, ranks no higher than such affidavits.—People v. Romero, 18 Cal. 89.

[c] The district judge should always be ready to relieve parties convicted of murder from any omission of counsel in preparing papers for the appellate court, where no fault is imputable to the prisoner, and he applies immediately upon discovery of the neglect or omission, though it should first be shown that the appeal is based upon reasonable grounds, and is not intended merely for delay.—People v. Kahl, 18 Cal. 432.

[d] A mistake in the entry of a statement by the court to defendant of the nature of the offense for which he has been convicted may be corrected by order of the court made pending an appeal from the judgment.—People v. Murback, 64 Cal. 369, 30 Pac. 605.

[e] Record upon appeal cannot be amended or added to by the filing of a paper consisting of copies, certified by the private secretary of the governor, of certain correspondence between the regular judge of the trial court and the county clerk on the one side, and the governor on the other, relating to the designation of another judge to preside in the place of the regular judge for the trial of the defendant and others whose prosecution had been commenced by the regular judge while district attorney. To make them part of the record they should have been embodied in the bill of exceptions.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[f] Paper filed in supreme court as attempted amendment or addition to record upon appeal, which consists of what appears to be a certified copy of the longhand transcript of official reporter's notes of the trial

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judge's charge to the jury, filed with the clerk, but never indorsed or authenticated by the judge, is no part of the record, and cannot be used to correct the copy of the charge which is embraced in the bill of exceptions settled and allowed by the judge.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[g] Papers filed as proposed amendments to the record must be disregarded, when not embodied in the bill of exceptions.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[h] Court has inherent right to correct its records so as to comport with verity.—People v. Durrant, 116 Cal. 193, 48 Pac. 75.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 861-864; 15 Cent. Dig., cols. 647-658, §§ 2903-2917.

§ 671. Impeaching or Contradicting.

[a] The verity of a transcript cannot be attacked in the appellate court by affidavits filed in support of a motion to dismiss.—People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73, 4 Pac. 773.

[b] Recorded affidavit of the committing magistrate failed to set out that all the continuances were with the consent of defendant, but the affidavit of the attorney prosecuting so alleged, and was opposed by only the counter-affidavit of defendant. Held, that the record does not show such want of consent as to violate Penal Code, section 861, providing that a postponement cannot be had unless by consent, or on motion of defendant. People v. Grundell, 75 Cal. 301, 17 Pac. 214.

[c] Record of the discharge of a jury, in a criminal case, for failure to agree, cannot be impeached by extrinsic evidence showing an abuse of judicial discretion; and the exclusion of a transcript of the proceedings, offered to show, by the answers of the jurors to the court's questions, that the judge abused his discretion, if error, is harmless.—People v. Smalling, 94 Cal. 112, 29 Pac. 421.

[d] Where the commissioner's report, in a proceeding under Penal Code, section 1174, to prove an exception, presents a conflict of testimony as to whether the language complained of was in fact used by the prosecuting attorney, the action of the trial court in striking it from the bill of exceptions must be sustained.—In re Howard, 108 Cal. 31, 40 Pac. 1043.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 641-644, § 2896

§ 672. Questions Presented for Review—In General.

[a] The appellate court cannot take the oral suggestion of the district attorney that any evidence was given which is omitted from the bill of exceptions.—People v. English, 52 Cal. 211.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 864; 15 Cent. Dig., cols. 659-662, § 2918.

§ 673. —— Objection to Indictment.

[a] An objection to an indictment for incest, that defendant was on the same day indicted for rape upon the same person at the same time and place, cannot be considered on appeal when the record does not show that any such indictment was found.—People v. Kaiser, 119 Cal. 456, 51 Pac. 702.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 865; 15 Cent. Dig., cols. 666 668, § 2924.

§ 674. —— Delay in Trial.

[a] Refusal to discharge defendant under Penal Code, section 1382, could not be reversed on appeal, when it did not appear from bill of exceptions that a previous postponement of the trial was not assented to by defendant, nor that there was not good cause shown for such refusal.—People v. Douglass, 100 Cal. 1, 34 Pac. 490.

§ 675. —— Preliminary Proceedings.

[a] Error cannot be predicated on the failure of the record to show the appointment of a shorthand reporter at a preliminary examination, in the absence of proof that he acted, or reported the evidence, or certified thereto.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

[b] Record showed that a complaint was filed with the justice, a warrant issued, and defendant arrested, and committed for examination on the 17th of September, and held to answer on the 4th of October. Held, on appeal from a refusal to set aside the information because such examination was not given until the last-named date, when the justice had lost jurisdiction of the case, that it did not appear but that such examination occupied the entire time intervening between the two dates.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 866; 15 Cent. Dig., cols. 665-667, §§ 2922-2927.

§ 676. —— Qualification and Selection of Jurors.

[a] Appellate court will not set aside a conviction because the trial court erred in its ruling on a challenge to a juror for cause, unless it clearly appears from the juror's answer that the court erred.—People v. Henderson, 28 Cal. 465.

[b] Challenge to entire panel will not be reviewed when transcript does not disclose any evidence in support thereof.—People v. Goldenson, 76 Cal. 346, 19 Pac. 161.

[c] A record on an appeal from a conviction of manslaughter, after showing the ex-

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cusing of a juror, recited: "Examination of jurors continued. Prosecution and defendant exercise desired challenges, leaving four talesmen in the box." It then disclosed a colloquy between defendant's counsel and the court as to the right of defendant to exercise a challenge on a full panel, defendant's counsel stating that he desired to reserve the right to do so. There was nothing to show that defendant's counsel ever asked any right to challenge that was denied him. Held, that the record was insufficient to present the question of error in compelling defendant to exercise his right of challenge without a full panel of jurors.—People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

§ 677. —— Absence of Accused During Trial.

[a] Fact that record states generally that prisoner was absent during a portion of the trial is sufficient to reverse the judgment. The record should show when, or for what time, or at what part of the proceedings the prisoner was absent, so that this court can judge of the effect to be given to such absence.—People v. Bealoba, 17 Cal. 389.

§ 678. —— Remarks and Conduct of Judge.

[a] Whether conduct of trial judge shows hostility to accused so as to prejudice jury can only be ascertained when record shows that conduct and remarks contained something from which supreme court can say that jurors were prejudiced.—People v. Goldenson, 76 Cal. 353, 19 Pac. 161.

§ 679. —— Refusal to Allow Reading of Law to Jury.

[a] Refusal to allow the reading of a law book to the jury is not ground for reversal where the record does not show the abstract sought to be read.—People v. Godwin, 123 Cal. 374, 55 Pac. 1059.

§ 680. —— Admissibility of Evidence.

[a] Bill of exceptions which sets up a question the objection to which was overruled is defective when it omits an answer to the question.—People v. White, 34 Cal. 183.

[b] When a question which is not per se objectionable, and which might be admissible under some circumstances, is put to a witness, and answered under objection, the record must show the facts previously established in evidence, or the court will not be able to pass on the propriety of the question or answer.—People v. Williams, 45 Cal. 25.

[c] If a defendant who is jointly indicted with another for a crime relies, on appeal, on the fact that the declarations of his confederate were received in evidence against him on his trial, and that he was not present when the declarations were made, the bill of exceptions must show that he was not present when the declarations were made, or it will show error.—People v. Williams, 45 Cal. 25.

[d] Where record does not show that improper question was answered no prejudice is shown.—People v. Marseiler, 70 Cal. 101, 11 Pac. 503.

[e] Where record does not show that overruled question was answered, ruling is immaterial.—People v. Lee Chuck, 78 Cal. 322, 20 Pac. 719.

[f] The action of the trial court in overruling an objection to evidence cannot be reviewed when the evidence is not before the appellate court; and the case will not be reversed when it appears that the jury were instructed not to consider the evidence, unless it is shown that the substantial rights of defendants were affected by its admission.—People v. Olsen, 80 Cal. 122, 22 Pac. 125.

[g] Where the record on appeal in a criminal cause does not contain defendant's testimony in the court below, an objection that the court erred in permitting the district attorney to cross-examine him upon matters not brought out in direct examination will not be considered.—People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

[h] Exception to reading in evidence in a criminal case of pleadings in a civil action cannot be considered if the record does not contain the papers offered, nor substance of them, nor even show what action was about. People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[i] Where the record does not affirmatively show whether a deposition taken at the preliminary examination of the defendant before the committing magistrate was not properly transcribed, certified, and filed, and does not show any specific objection to have been taken on that ground in the court below, it must be presumed upon appeal that the court rightfully performed its duty in admitting the deposition in evidence.—People v. Reilly, 106 Cal. 648, 40 Pac. 13.

[j] On error assigned to the admission of the reporter's record of evidence on preliminary examination, the certificate, if not set out in the record, is presumed to have been in proper form.—People v. Davis, 36 Pac. 96.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 867, 868; 15 Cent. Dig., cols. 679-691, §§ 2931-2937.

§ 681. —— Sufficiency of Evidence.

[a] On a motion for a new trial on ground that the verdict is against the evidence, it is usual to set out in the statement on which the motion is made all the material portions of the testimony, and, as a general rule, the court will not review on appeal, unless such testimony is in the record.—People v. York, 9 Cal. 421.

[b] When record states that it gives "in substance all that was proven on the part of the state," it is sufficient. The facts, as proved, being given, there is no necessity of setting forth the testimony.—People v. York, 9 Cal. 421.

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[c] Unless whole of the evidence is preserved in the record, the supreme court will not inquire whether the verdict is against the evidence.—People v. McAusland, 43 Cal. 55; People v. Woods, 43 Cal. 176; (1874) People v. Perdue, 49 Cal. 425.

[d] It is not necessary in bill of exceptions in a criminal case for the defendant to specify the respects in which the evidence is alleged to be insufficient to sustain the verdict; but it is sufficient to say that the evidence is insufficient to sustain the verdict.—People v. Fisher, 51 Cal. 319.

[e] In absence of bill of exceptions containing the evidence, it will not be reviewed. Ott v. Tailors' P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

[f] When transcript does not purport to contain all evidence, sufficiency of proof of venue will not be reviewed.—People v. Carroll, 80 Cal. 157, 22 Pac. 129.

[g] An objection that the venue was not proved will not be heard on appeal, where the record does not affirmatively show that fact, nor that it contains all the evidence in the case.—People v. Tonielli, 81 Cal. 275, 22 Pac. 678.

[h] Although it is not necessary for the appellant in a criminal proceeding to state the particulars in which the evidence is insufficient to sustain the verdict, yet it must appear somewhere in the record that the point of the insufficiency of the evidence was made in the court below in order to entitle the appellant to raise the point upon appeal.—People v. Crowley, 100 Cal. 478, 35 Pac. 84.

[i] Where accused was charged with robbing a room-mate in a hotel, and the evidence tending to show accused left the room at 5 o'clock in the morning, as claimed by him, is not in the record, a variance between the shorthand notes of the room-mate's former testimony and the transcript thereof, leaving it in doubt whether witness retired at 7 o'clock or arose at that hour, will be treated as immaterial.—People v. McIntyre, 127 Cal. 423, 59 Pac. 779.

[j] On an appeal from the judgment under Penal Code, section 1259, providing that on appeal from a judgment the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment, the question of the sufficiency of the evidence to sustain the verdict is presented for review on exception to the refusal of a motion at the close of the people's evidence to instruct the jury to acquit.—People v. Ward, 145 Cal. 736, 79 Pac. 448.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 691-698, §§ 2938, 2939.

§ 682. —— Examination of Witnesses.

[a] Where the printed record does not disclose the motive of the trial court in permitting the asking of leading questions of the prosecution's principal witness, such trial court will not be declared to have abused its discretion.—People v. Brown, 130 Cal. 591, 62 Pac. 1072.

§ 683. —— Instructions and Failure to Give Instructions.

[a] Error in a charge cannot be considered when there is no statement of facts.—People v. McCauley, 1 Cal. 379; People v. Baker, 1 Cal. 403; (1885) People v. Johnson, 8 Pac. 690.

[b] Where instructions are correct as abstract propositions of law, and evidence is not fully set out in record, judgment will be affirmed.—People v. Lafuente, 6 Cal. 202; People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. English, 30 Cal. 215; People v. Dick, 34 Cal. 663; People v. Strong, 46 Cal. 302.

[c] Instructions will not be considered on appeal, where they are not embodied in the bill of exceptions.—People v. Thompson, 28 Cal. 214; People v. Marseiler, 70 Cal. 98, 11 Pac. 503.

[d] If the court below has based a charge upon an assumption that a certain state of facts had been proved, which shows the applicability of instructions given or refused, the appellate court will review the action of the court therein, although the evidence is not embodied in the record.—People v. Dick, 32 Cal. 213.

[e] Where the facts brought up in the record do not show whether a charge was erroneous or correct, error will not be presumed, and the charge will be sustained.—People v. Best, 39 Cal. 690.

[f] When the evidence is not brought up in the transcript the judgment will not usually be reversed for an alleged error in the instructions.—People v. Long, 39 Cal. 694.

[g] Objections to instructions will not be considered unless the instructions are brought before the court as provided by the practice act.—People v. Tetherow, 40 Cal. 286.

[h] Exceptions to the refusal of charges will not be considered on appeal where the evidence, or so much thereof as would warrant such an instruction, is not in the record. People v. Bourke, 66 Cal. 455, 6 Pac. 89.

[i] Where an appeal is taken on the judgment-roll alone, and the record shows that oral instructions, not made part of it, were given, the judgment will not be reversed for the erroneous refusal to give instructions requested, as the same propositions may have been covered by the oral instructions.—People v. Von, 78 Cal. 1, 20 Pac. 35.

[j] Where the evidence is not made part of the record on appeal, an alleged error, committed by the court in reading to the jury a case decided by the supreme court, saying that the case reported "was in many respects similar to the one at bar," is not sufficient to cause a reversal of the conviction, as the defendant might, under the facts

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of the case, have been benefited, instead of prejudiced, by the remark.—People v. McNabb, 79 Cal. 419, 21 Pac. 843.

[k] Modification of requested instructions must be shown by judge's indorsement or bill of exceptions.—People v. Clark, 84 Cal. 581, 24 Pac. 313.

[l] In absence of indorsement showing that instruction was given it will not be reviewed. People v. Bemmerly, 87 Cal. 121, 25 Pac. 266.

[m] Refusal of instructions as to insanity as a defense, unobjectionable in form, will be presumed proper, the record not showing that such a defense was made, or that there was any such question in the case.—People v. Clark, 121 Cal. 633, 54 Pac. 147.

[n] The defendant cannot on appeal complain of the refusal of the trial court to give certain instructions, where it does not appear from the transcript that they were requested by defendant.—People v. Hettick, 126 Cal. 425, 58 Pac. 918.

[o] Objection to the manner of a trial judge while charging a jury in a criminal case cannot be reviewed on appeal, unless made to appear in some manner provided for by the code.—People v. DeGraaff, 127 Cal. 676, 60 Pac. 429.

[p] Where error is admitted by the state on appeal, as to material portions of the charge, the court will not consider certified copies of instructions alleged to have been given at the request of defendant, similar to those of the state, when such instructions do not bear the signature of the trial judge, nor purport to have been requested by anyone.—People v. Cole, 127 Cal. 545, 59 Pac. 984.

[q] The supreme court, on appeal, will not reverse a conviction for libel, for refusal to give an alleged requested instruction, where the record does not show that defendant requested the court to give the instruction.—People v. Storke, 60 Pac. 420, order reversed (1900), 128 Cal. 486, 60 Pac. 1090.

[r] An instruction as to the value and effect of the evidence can be reviewed, though the evidence has not been brought up by a bill of exceptions, as the court will presume that there was evidence of some character to which the instruction would apply; and where the instruction would be erroneous, as applied to all possible evidence to which it would be applicable, error has been shown.—People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156.

[s] Instructions based on evidence not embodied in the bill of exceptions cannot be considered on appeal.—People v. Arlington, 131 Cal. 231, 63 Pac. 347.

[t] Where instructions are not contained in transcript, it will be presumed they were proper.—People v. McMahon, 133 Cal. 278, 65 Pac. 571.

[u] Where the evidence is not in the record, a judgment of conviction will not be reversed for the giving of an instruction unless it is erroneous in every conceivable state of the case. Judgment (1901) 63 Pac. 675, reversed.—People v. Mendenhall, 135 Cal. 344, 67 Pac. 325.

[v] Where the record in a murder trial recites that the court read to the jury "instructions asked by the respective parties, and allowed by the court, and those given by the court of its own motion," but does not contain those given by the court of its own motion, or requested by the people, the appellate court will not determine whether or not the trial court erred in refusing to give an instruction asked by defendant, but will set aside a submission of the cause, and restore it to the calendar, to be heard when all the instructions are incorporated into the record.—People v. Vital, 34 Pac. 617.

§ 684. —— Grant or Denial of New Trial.

[a] Record on appeal from order denying new trial must show motion and grounds on which it was made.—People v. Lenon, 77 Cal. 309, 19 Pac. 521.

[b] On appeal from an order granting a new trial in a criminal case the evidence can be reviewed only so far as is necessary to pass upon points of law raised.—People v. Chew Wing Gow, 120 Cal. 298, 52 Pac. 657.

§ 685. —— Judgment.

[a] Where the transcript of the record on appeal showed a complete judgment, from which the appeal was taken, it will be treated as the final judgment, and the sufficiency of a judgment in the case shown by the bill of exceptions to have been rendered in open court will not be determined.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

2. Bill of Exceptions.

BILL OF EXCEPTIONS DEFINED, § 686.
PREPARATION, § 687.
NOTICE OF SETTLEMENT, § 688.
AUTHORITY TO SETTLE AND SIGN, § 689.
SIGNING, § 690.
DUTY OF COURT IN SETTLING, § 691.
APPLICATION TO SUPREME COURT TO PROVE EXCEPTIONS, § 692.
COMPELLING SETTLEMENT AND SIGNING, § 693.
TIME TO PRESENT, SETTLE, SIGN OR FILE, § 694.
RESETTLEMENT, § 695.
CONSTRUCTION AND OPERATION OF BILL, § 696.
—— CONCLUSIVENESS OF RECITALS, § 697.
CORRECTION OF ERRORS, § 698.
NECESSITY TO REVIEW ERRORS, IN GENERAL, § 699.
—— SUSTAINING DEMURRER TO INDICTMENT, § 700.
—— REFUSING TO GRANT CONTINUANCE, § 701.
—— GIVING OR REFUSAL OF INSTRUCTIONS, § 702.
—— GRANT OR REFUSAL OF NEW TRIAL, § 703.

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SCOPE AND CONTENTS OF BILL OF EXCEPTIONS, § 704.
—— EVIDENCE, § 705.
—— INSTRUCTIONS, § 706.
—— INCORPORATION OF DOCUMENT BY IDENTIFYING REFERENCE, § 707.

As part of record. See ante, § 664.

§ 686. Bill of Exceptions Defined.

[a] Bill of exceptions is statement in writing, settled and signed by the judge, of what the ruling was, the facts in view of which it was made, and the protest of counsel.—People v. Torres, 38 Cal. 141.

FOR AUTHORITIES FROM OTHER STATES:
See 12 Cyc. 845-855; 15 Cent. Dig., cols. 573-611, §§ 2803-2861; cols. 1004-1006, § 3204.

§ 687. Preparation.

[a] It is not necessary for the defendants, in making a motion for a new trial, to have a bill of exceptions or statement prepared beforehand; nor, in arguing and submitting their motion without such bill of exceptions or statement, do they waive their right to have a bill of exceptions settled after the motion is determined; but they are entitled to a record of so much of the evidence, proceedings, and decisions had on the trial as may be necessary to explain the grounds of their motion.—People v. Hewill, 56 Cal. 117.

[b] If bill presented to judge is not full and fair, but mere skeleton of evidence and proceedings, he may refuse to settle it.—Sansome v. Myres, 77 Cal. 356, 357, 19 Pac. 577.

[c] It is duty of party desiring settlement of bill of exceptions to prepare a full and fair draught of the bill.—Sansome v. Myres, 77 Cal. 356, 19 Pac. 577.

[d] Time to prepare exceptions may be extended after time when notice may be given to district attorney has expired.—Willard v. Dillard, 86 Cal. 157, 24 Pac. 940.

688. Notice of Settlement.

[a] District judge may refuse to consider or settle a bill of exceptions presented by defendant, unless the notice required by Penal Code, section 1171, has been given to the district attorney.—People v. Sprague, 53 Cal. 22.

[b] Notice of application to prove bill of exceptions must set forth exceptions taken and evidence in support thereof.—People v. Bitancourt, 73 Cal. 2, 14 Pac. 372.

[c] Where it does not appear that any showing was made to the trial court that the two days' notice was given, or that it had been waived, there is no improper refusal to settle the bill of exceptions.—People v. Hill, 78 Cal. 405, 20 Pac. 862.

[d] Waiver of notice of presentation of bill could be made of record or by some writing. People v. Hill, 78 Cal. 406, 20 Pac. 862.

[e] Code should be liberally construed in favor of the right of a defendant in a criminal case to have a bill of exceptions settled by the court; and where, after verbal notice to the district attorney and associate counsel for the prosecution, the settlement of the proposed bill of exceptions has been postponed by consent, such postponement constitutes a waiver of the service of two days' written notice of the settlement required to be served upon the district attorney by the provisions of section 1171 of the Penal Code, and, if the court refuses to settle the bill for want of such notice, a writ of mandate will issue commanding it to settle the bill of exceptions.—Van Eman v. Superior Court, 106 Cal. 643, 40 Pac. 14.

[f] Judge is justified in refusing to settle a bill of exceptions, where no written notice was served on the district attorney.—Page v. Superior Court of City and County of San Francisco, 122 Cal. 209, 54 Pac. 730.

[g] Where two days' notice of the settlement of the bill of exceptions in a criminal case was not given the district attorney, as required by Penal Code, sections 1117, 1174, but he was given an opportunity to propose amendments, and actually did so, and an excuse for failure to give notice was presented, which was satisfactory to the trial judge, the court will not refuse to consider the bill because of the failure to give notice.—People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

§ 689. Authority to Settle and Sign.

[a] A bill of exceptions settled and signed by the district attorney is unauthorized by law, and void.—People v. Ferguson, 34 Cal. 309.

[b] Under sections of the code relating to the settlements of bills of exceptions in criminal cases, and providing that, if the judge who presided at the trial ceases to hold office before the bill was tendered, he may, nevertheless, settle such bill, or the party may apply to the supreme court to prove the same, the judge who heard the motion for a new trial may settle the bill, though the case was originally tried before his predecessor.—People v. Hodgdon, 55 Cal. 72, 36 Am. Rep. 30.

§ 690. Signing.

[a] Bill of exceptions not signed by the trial judge will be disregarded on appeal.—(Cal. 1872) People v. Armstrong, 44 Cal. 326.

§ 691. Duty of Court in Settling.

[a] It is within the general power of the court to add to a proposed bill of exceptions any testimony given at the trial pertinent to the exceptions and necessary to the correct presentation of the errors assigned.—People v. Kelly, 46 Cal. 355.

[b] Court is bound to see that record is correct, whether district attorney objects to proposed bill or not.—People v. Goldenson, 76 Cal. 351, 19 Pac. 161.

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[c] In settling bill judge should insert what he actually said to jury as substitute for what reporter has erroneously stated was said. People v. Cox, 76 Cal. 283, 18 Pac. 332.

§ 692. Application to Supreme Court to Prove Exceptions.

[a] Notice of application to prove bill of exceptions under Penal Code, 1174, must be served on judge and district attorney.—People v. Bitancourt, 73 Cal. 2, 14 Pac. 372.

[b] Application to supreme court to prove facts in support of a settled bill should set forth wherein bill settled is incorrect and specify facts desired to be proved.—People v. Bitancourt, 74 Cal. 190, 15 Pac. 744.

[c] Settlement of bill made two years after presentment to judge is not refused within section 1174, Penal Code, allowing proof of exceptions in supreme court when judge says he knows nothing of it and it is not in his possession.—People v. Pratt, 78 Cal. 347, 20 Pac. 731.

[d] On a trial for assault with intent to murder, the trial court excluded a question, put to the person assaulted, "Did you ever threaten this man's life?" and an exception was taken, but afterward the court allowed the question, and in preparing the bill of exceptions excluded the exception. Held, that defendant's application to the supreme court for leave to prove the exception would be denied, since, though the first ruling and the exception should have been inserted, no real injustice was done to defendant.—People v. Scott, 91 Cal. 563, 27 Pac. 930.

[e] Fact that defendant in criminal action is personally blameless for delay in presenting a bill of exceptions, although a fact to be considered by the trial judge in determining his action in settling the bill, is not conclusive.—Brown v. Prewett, 94 Cal. 502, 29 Pac. 951.

[f] Where evidence as to whether or not certain exceptions were made in conflicting, they will not be ordered to be included in the bill.—People v. Scott, 121 Cal. 101, 53 Pac. 364.

§ 693. Compelling Settlement and Signing.

[a] Mandamus issued to settle the bill first, and then to sign it, where the bill was filed with the clerk on the last day of the extended time and the excuse offered, of inability to find the judge, was reasonable and sufficient.—People v. Lee, 14 Cal. 510.

[b] A motion for a mandamus to compel the district judge to settle and sign a bill of exceptions in a murder case, which was presented after the proper time, because the prisoner had no money to pay his counsel for its preparation within such time, being accompanied by no copy of the statement proposed, was denied.—People v. Kahl, 18 Cal. 432.

[c] Record on application for mandamus to require a judge of an inferior court to settle a bill of exceptions must enable the supreme court to determine whether, if settled and signed, the bill of exceptions would tend to manifest error committed at the trial.—People v. Dickson, 46 Cal. 53.

[d] When a bill of exceptions was presented to the district judge for settlement in a criminal case, after the expiration of the ten days mentioned in section 1171 of the Penal Code, and of the period fixed by order extending the time for presenting or filing such bill, and the district judge, on examination of the affidavits accompanying the draft bill, and purporting to account for and excuse the delay, declined to settle the bill. Mandamus ought not to issue to compel the district judge to settle the proposed bill.—Sprague v. Fawcett, 53 Cal. 408.

[e] Petition for mandamus to compel settlement of bill of exceptions must show that section 1171, Penal Code, has been complied with or sufficient reason why it has not.—Anschlay v. Superior Court, 76 Cal. 514, 18 Pac. 655.

§ 694. Time to Present, Settle, Sign or File.

[a] Fact that bill of exceptions was not signed until more than ten days after trial does not defeat party's right to appeal.—People v. Martin, 6 Cal. 477.

[b] Court was of opinion that a defendant who could not find judge on tenth day, and thereupon filed his bill of exceptions with the clerk, to be handed to the judge at the earliest convenient opportunity, took the most proper course.—People v. Lee, 14 Cal. 510.

[c] When a bill of exceptions is settled, but not within the time required by statute, the reasons of the court for signing it after the prescribed time will not be inquired into, but it will be presumed that they were sufficient. People v. Lee, 14 Cal. 510; People v. White, 34 Cal. 183; People v. Raschke, 73 Cal. 378, 15 Pac. 13.

[d] It is within the power of the court to extend the time for presentation of the draft of a bill of exceptions to an order on motion for new trial.—People v. Keyser, 53 Cal. 183.

[e] Court may refuse to settle bill during trial or delay settlement beyond statutory time.—People v. Goldenson, 76 Cal. 351, 19 Pac. 161.

[f] Rule of statute as to time of presenting the bill of exceptions is directory.—Brown v. Prewett, 94 Cal. 502, 29 Pac. 951.

[g] A bill of exceptions upon appeal in a criminal case will be considered, although the trial judge refused to settle the bill because the statutory time for settlement had expired when it was presented to him.—People v. Almendares, 136 Cal. 660, 69 Pac. 492.

[h] Under Penal Code, sections 1171, 1174, as amended by Statutes of 1905, page 761, chapter 569, the trial judge cannot, in a criminal case, extend the time for presenting

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bills of exceptions without a compliance by defendant with the statutory requirements.—People v. Bliss (Cal. App.), 84 Pac. 676.

§ 695. Resettlement.

[a] When in criminal case a mistake or omission has occurred in a bill of exceptions settled by the judge, he may allow a resettlement, provided it be asked before the transcript on appeal is sent to the supreme court, and the mistake or omission is supported by documentary evidence, or is not denied by the adverse party. But where the existence of the alleged mistake or omission rests in the mere recollection of the judge or of counsel in the case, and it is not admitted by the parties, resettlement should be denied.—People v. Romero, 18 Cal. 89.

§ 696. Construction and Operation of Bill.

[a] Provisions of section 435 of Criminal Practice Act, prescribing time within which bills of exceptions shall be tendered and settled, are directory.—People v. White, 34 Cal. 183.

[b] All omissions and uncertainties in bill of exceptions are construed against appellant.—People v. Leong Sing, 77 Cal. 119, 19 Pac. 254.

[c] All omissions and uncertainties in bill of exceptions are construed against party presenting it.—People v. Huff, 72 Cal. 119, 13 Pac. 168.

[d] A bill of exceptions showing that an oral charge was given, "a written charge having been waived by counsel on both sides," shows a consent that the jury be charged orally.—People v. Lang, 142 Cal. 482, 76 Pac. 232.

§ 697. —— Conclusiveness of Recitals.

[a] Recital in bill of exceptions cannot prove that an appeal was taken.—People v. Phillips, 45 Cal. 44.

[b] Bill of exceptions imports absolute verity and no suggestion can be received as to elimination of material matters therefrom.—People v. Goldenson, 76 Cal. 351, 19 Pac. 161.

[c] Settled and certified bill of exceptions, not attacked in statutory mode imports absolute verity.—People v. Cox, 76 Cal. 283, 284, 18 Pac. 332.

[d] Where the assignment of error in charging the jury differs from the charge itself, as particularly set forth in the bill of exceptions, the latter will ordinarily control.—People v. Ferry, 84 Cal. 31, 24 Pac. 33.

[e] Where bill of exceptions states that defendant did not offer to challenge, and did not challenge, any of the jurors, and the minutes of the court show that six jurors were peremptorily challenged by the defendant, the statement in the minutes will be accepted, upon appeal, as true.—People v. O'Brien, 88 Cal. 483, 26 Pac. 362.

[f] When, on joint trial of several defendants, the record entry says that the "defendant" was present at the trial, and the bill of exceptions says that the "defendants" were present, there is no error, the bill of exceptions being conclusive against the defendants.—People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[g] Where defendant moved to vacate a judgment and correct the minutes on the ground that they incorrectly stated that before sentence the defendant was informed of the nature of the charge and of the verdict, and asked if he had any cause why judgment should not be pronounced, an order refusing the motions could not imply a finding that the minutes were correct, in view of a statement in the bill of exceptions settled by the judge in which he found facts substantially negativing the facts recited in the minutes. Judgment (1900) 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

§ 698. Correction of Errors.

[a] If a bill prepared by defendant in criminal case does not contain all evidence given bearing on the point made, the district attorney should be permitted to suggest the addition to the bill of such evidence, but the appellate court cannot take his suggestion that such evidence was given.—People v. English, 52 Cal. 211.

[b] One convicted of a felony need not be present at the hearing of a motion by the state to correct a mistake in the bill of exceptions.—People v. Southern, 118 Cal. 359, 50 Pac. 545.

[c] One convicted of a felony is not entitled to five days' notice of a proceeding by the state to correct a mistake in the bill of exceptions, where the course adopted is in full accord with the practice recognized by Code of Civil Procedure, section 473, which does not contemplate notice in the correction of a mistake.—People v. Southern, 118 Cal. 359, 50 Pac. 545.

§ 699. Necessity to Review Errors in General.

[a] Supreme court will not review action of the court below in criminal case unless the record contains a bill of exceptions, or a correct statement of the facts which transpired at the trial, signed and settled by the judge. People v. Martin, 32 Cal. 91.

[b] Exceptions to the rulings of the court below must be preserved by a bill of exceptions signed and sealed by the trial judge.—People v. Martin, 32 Cal. 91.

[c] Errors occurring at the trial of a criminal case cannot be reviewed on appeal, except on bill of exceptions settled and signed by the judge of the court wherein the trial took place.—People v. Ferguson, 34 Cal. 309.

[d] On appeal from a judgment, without moving for new trial, accused may rely on any of the grounds of exception mentioned

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in the Penal Code, and in such case must have a bill of exceptions settled as provided therein.—People v. Keyser, 53 Cal. 183.

[e] Exceptions to instructions in a criminal case need not be incorporated in a bill of exceptions; but the law preserves an exception to each instruction as fully as though stated in terms in the record, and the defendant has the same advantage of every objection to an erroneous instruction when properly authenticated in the judgment-roll, as when set out in a bill of exceptions and formal exception made.—People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[f] Rule 29 of the supreme court provides that, in all cases of appeal to the supreme court from orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions. Held, that where an information was set aside on the ground that the defendant had not been legally committed by a magistrate, and the record, on an appeal from the order, did not include the affidavits and papers used on the preliminary examination in a bill of exceptions, the order must be affirmed.—People v. Terrill, 131 Cal. 112, 63 Pac. 141.

§ 700. —— Sustaining Demurrer to Indictment.

[a] Order sustaining demurrer to indictment can be reviewed only on exceptions and bill of exceptions provided by Penal Code, sections 1172, 1174, there being no judgment-roll or record in a criminal case, except on conviction (section 1207).—People v. Long, 121 Cal. 494, 53 Pac. 1097.

[b] Sustaining of a demurrer to an indictment cannot be reviewed on appeal in the absence of a bill of exceptions.—People v. Druffel (Cal. App.), 86 Pac. 907.

§ 701. —— Refusing to Grant Continuance.

[a] Exception to ruling of the court in refusing a continuance must be presented on appeal by a bill of exceptions.—People v. Ashnauer, 47 Cal. 98.

[b] Exceptions to order overruling a motion for a continuance must be presented to the supreme court by embodying the affidavit in a bill of exceptions, or in some mode clearly identifying it as having been read on the hearing of the motion.—People v. Weaver, 47 Cal. 106.

§ 702. —— Giving or Refusal of Instructions.

[a] Where there is no bill of exceptions, certain instructions asked by defendant, not shown by the transcript as either given or refused, and which are in no manner authenticated by the trial judge, do not form a part of the judgment-roll, and will not be considered on appeal from the judgment.—People v. Rogers, 81 Cal. 209, 22 Pac. 592.

[b] On appeal on judgment-roll alone, the judgment will not be reversed for the giving of an instruction, unless such instruction would be erroneous in every conceivable state of the case.—People v. Wong Fook Sam, 146 Cal. 114, 79 Pac. 848.

§ 703. —— Grant or Refusal of New Trial.

[a] Motion for a new trial must be made viva voce, and if desired, the grounds of a motion and of rulings of the court may be embodied in a bill of exceptions, and can be reviewed by the supreme court in no other way.—People v. Ah Sam, 41 Cal. 645.

[b] Where a motion for a new trial is granted, on the ground of the insufficiency of the evidence, the only manner in which the question can be presented to the supreme court is by bill of exception.—People v. Padillia, 42 Cal. 535.

[c] Ruling disallowing a new trial will not be reviewed unless a bill of exceptions is reserved to its refusal.—People v. Ah Fat, 47 Cal. 631.

§ 704. Scope and Contents of Bill of Exceptions.

[a] Affidavits to incompetency of juror must be embodied in a bill of exceptions, or they will not be examined by the appellate court. People v. Stonecifer, 6 Cal. 405.

[b] Bill of exceptions must state ruling, facts upon which it was made, and protest of counsel. Failure to state ruling is fatal.—People v. Torres, 38 Cal. 141.

[c] Judge is justified in refusing to settle a proposed statement or bill of exceptions which consists of the reporter's notes written out, containing questions and answers and remarks of counsel, judge, and jurors during the trial.—People v. Getty, 49 Cal. 581; Valleau v. Superior Court, 62 Cal. 290; Frazer v. Superior Court, 62 Cal. 49.

[d] After refusal of a new trial, accused may present the draft of a bill of exceptions containing any of the grounds relied on for a new trial. It should contain also so much of the evidence, proceedings, and decisions as necessary to explain such ground, and no more. People v. Keyser, 53 Cal. 183.

[e] Trial court certified that, in the examination of proposed jurors, no question as to their competency was disallowed, no evidence rejected, no objection to the admission or rejection of any testimony sustained, and no objection or exception to the allowing or disallowing of any question, evidence, or testimony on said examination was made or saved, except as set forth. Held, on an intimation that the court, in settling the bill of exceptions, had eliminated material matters, that the court properly declined to incorporate into the bill the testimony of the jurors in their examination voir dire.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[f] Bill of exceptions should show answers to questions objected to.—People v. Neyce, 86 Cal. 394, 24 Pac. 1091.

[g] Specification of error in bill of exceptions in a criminal case, as to certain re-

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marks claimed to have been made by the district attorney in his closing argument to jury, outside of the evidence in the case, and prejudicial to the defendant, will not be considered where the bill of exceptions does not show, other than by such specifications, that the district attorney did in fact make such remarks.—People v. Faulke, 96 Cal. 17, 30 Pac. 837.

[h] Where, upon appeal from an order denying a viva voce motion for a new trial, in a criminal case, the bill of exceptions fails to show that the alleged error was stated as a ground of the motion, or that the attention of the trial court was called to it, the alleged error must be regarded as waived.—People v. Sansome, 98 Cal. 235, 33 Pac. 202.

[i] Where bill of exceptions does not show that objection was made, or any exception taken to action of court in permitting change or amendment of verdict by jury after it was presented to court its action cannot be reviewed upon appeal.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[j] On appeal from order refusing to entertain defendant's motion for new trial on the ground that right thereto is barred by a former motion therefor, its denial, anl lapse of time for appeal therefrom, defendant may have included in the bill of exceptions only the fact of and the circumstances attending the former motion, the denial thereof, the presentation of the new motion, and the proceedings had in regard thereto, and may not have a bill of exceptions covering all the points made on the new motion.—Walker v. Superior Court of City and County of San Francisco, 135 Cal. 369, 67 Pac. 336.

[k] Under Penal Code, section 1185, providing that a motion in arrest of judgment may be "founded on any defects in the indictment or information mentioned in section 1004," a bill of exceptions, prepared for and used only on a motion in arrest, cannot properly contain a written plea offered by defendant; and the contents of such writing cannot be looked to in the supreme court to aid the pleas actually entered on the minutes.—People v. O'Leary, 22 Pac. 24.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 586-592, §§ 2828-2833.

§ 705. —— Evidence.

[a] Notes of evidence taken by a stenographer, as provided by act of March 28, 1868, must be written out in longhand and authenticated by the affidavit of the stenographer, showing that the report is a full and true statement of all the evidence.—People v. Tetherow, 40 Cal. 286.

[b] Evidence on new trial motion must be embodied in a bill of exceptions.—People v. Padilla, 42 Cal. 535.

[c] A bill of exceptions showing error in the exclusion of evidence, on a trial in a criminal case, must also show that the excluded testimony was material to the defendant, and that he was injured by its exclusion, or the judgment will not be disturbed.—People v. Brotherton, 47 Cal. 388.

[d] A bill of exceptions should state the evidence relating to the point presented in a narrative form, or by a statement of its substance, or what it tended to prove.—People v. Getty, 49 Cal. 581.

[e] If motion for new trial is denied, and a bill of exceptions is afterward prepared and settled and signed, it is necessary that the bill should show that evidence was introduced tending to prove every material issue.—People v. Fisher, 51 Cal. 319.

[f] The reporter's notes will not constitute a part of the bill of exceptions, unless embodied therein, or referred to in the bill, so as to identify them.—People v. Taing, 53 Cal. 602.

[g] If bill of exceptions does not contain any of the evidence given at the trial, and the charge to the jury only is given with an exception noted to the charge as an entirety, and no objection to the charge is urged in the brief for the appellant, the judgment will be affirmed.—People v. Sing Lum, 60 Cal. 6.

[h] Reporter's notes, though contained in transcript, cannot be considered, unless made a part of the record by bill of exceptions.—People v. Herbert, 61 Cal. 544.

[i] A bill of exceptions stated merely that each party "introduced evidence to sustain the issue on their respective parts." Held, that this was enough, without a further setting out of the testimony, and, the general statement being insufficient to show that there was no evidence on which to base a verdict of guilty, the objection that the verdict was against evidence was untenable.—People v. Dye, 62 Cal. 523.

[j] If portions of medical works excluded have tendency to discredit witness, they must be incorporated in bill.—People v. Goldenson, 76 Cal. 349, 19 Pac. 161.

[k] Where bill contains none of evidence, alleged error in refusing instructions cannot be considered.—People v. O'Leary, 77 Cal. 32, 18 Pac. 856.

[l] Original papers offered in evidence cannot be incorporated in bill, but it should state what evidence was submitted and perhaps on proper application court might order original papers sent up under Rule 25.—People v. Backley, 116 Cal. 148, 149, 47 Pac. 1009.

[m] Where bill of exceptions of defendant specifies insufficiency of evidence to sustain verdict, prosecution must have evidence showing guilt put in bill.—People v. Buckley, 116 Cal. 147, 148, 47 Pac. 1009.

[n] Defendant, on appeal from judgment of conviction, may not have in the bill of exceptions all the evidence, but only so much as serves to elucidate the matters which, under Penal Code, sections, 1170, 1259, he may have reviewed on such appeal.—Walker v. Superior

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Court of City and County of San Francisco, 135 Cal. 369, 67 Pac. 336.

§ 706. —— Instructions.

[a] Where instructions are in writing, and properly indorsed by the trial judge, they belong in the judgment-roll, and need not appear in the bill of exceptions.—People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[b] Where the charge of the court, and requests to charge, are inserted in the record on appeal as part of the judgment-roll, it is unnecessary to reinsert them as part of the bill of exceptions.—People v. Cole, 127 Cal. 545, 59 Pac. 984.

[c] Where the instructions in a criminal case are certified as provided by law, they constitute a part of the judgment-roll, and should not be reproduced in the bill of exceptions, but affidavits presented on a motion for a new trial and the minutes of the proceedings had on such motion constitute no part of the judgment-roll, and cannot be made a part thereof by the clerk, and should appear only in the bill of exceptions.—People v. Sing Yow, 145 Cal. 1, 78 Pac. 235.

§ 707. —— Incorporation of Document by Identifying Reference.

[a] A document referred to in a bill of exceptions, and set out in another part of the record, may be deemed part of such bill, when sufficiently identified as the one so referred to.—People v. Wallace, 94 Cal. 497, 29 Pac. 950.

3. Statement of Facts.

NECESSITY, § 708.
TIME TO MAKE OR SIGN, § 709.
COMPELLING SETTLEMENT, § 710.
AMENDMENT, § 711.

§ 708. Necessity.

[a] A statement on appeal is not necessary when the error relied on is disclosed by the record.—People v. Maguire, 26 Cal. 635.

[b] On appeal from an order dismissing a motion for a new trial for want of prosecution, in the absence from the record of an engrossed statement on motion for a new trial, signed and certified by the judge, there are no questions of fact to be reviewed.—People v. Center, 61 Cal. 191.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 855; 15 Cent. Dig., cols. 612, 613, §§ 2862-2864.

§ 709. Time to Make or Sign.

[a] Statute directing the judge to make a statement in criminal cases, within ten days after verdict, is directory merely. The judge's delay cannot prejudice the prisoner's rights. (1859) People v. Woppner, 14 Cal. 437; (1860) People v. Lee, 14 Cal. 510.

[b] Defendant must prepare and tender his statement or bill within ten days, or such further time as may be granted by the judge or give sufficient excuse for his failure so to do.—People v. Lee, 14 Cal. 510.

[c] It seems that if the statement of the judge in a criminal case appears to have been signed after the ten days, it will be presumed that cause was shown to induce the judge to allow the delay.—People v. Lee, 14 Cal. 510.

§ 710. Compelling Settlement.

[a] Mandamus lies to compel settlement of statement.—People v. Lee, 14 Cal. 510.

§ 711. Amendment.

[a] Agreed statement of judge in criminal case should not be amended without a clear showing of mistake or fraud.—People v. Lee, 14 Cal. 510.

E. ASSIGNMENTS OF ERROR, AND BRIEFS.

§ 712. Assignments of Error.

[a] Where there are no assignments of error by appellant, judgment of court below will be affirmed.—People v. Goldbury, 10 Cal. 312.

[b] When assignments of error differ from charge as specifically set forth in bill of exceptions, latter controls.—People v. Ferry, 84 Cal. 35, 24 Pac. 33.

[c] In criminal, especially, capital, cases law will not deny defendant full consideration of his points because of technical errors or omissions of his counsel.—People v. Durrant, 116 Cal. 217, 48 Pac. 75.

[d] Mere naked statements that court erred in making certain enumerated rulings, without argument made or reason given why they are erroneous, will not be considered.—People v. Woon Tuck Wo, 120 Cal. 297, 52 Pac. 833.

[e] Assignments, on appeal in a criminal case, that the court erred in certain particulars, without argument or reasons showing wherein there was error, will not be considered by the supreme court, where error is not apparent on the face of the record.—People v. Breen, 130 Cal. 72, 62 Pac. 408.

[f] Assignments of error as to rulings on examination of witnesses referred to in the brief as errors in the examination of a certain witness, without reasons as to why the rulings were erroneous, will not be considered.—People v. McLean, 135 Cal. 306, 67 Pac. 770.

[g] Assignment of error should specify in what particular the error consists and not that court erred in this, that it did so, etc.—People v. Creeks, 141 Cal. 533, 75 Pac. 101.

[h] Counsel for appellant must point out particular upon which he predicates error and quote law he invokes to show error.—People v. Chutnacut, 141 Cal. 685, 75 Pac. 340.

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[i] Supreme court will not look at instructions refused and given at certain folios and examine certain sections of code to discover error for purpose of reversing case.—People v. Chutnacut, 141 Cal. 685, 75 Pac. 340.

[j] On appeal, the supreme court will not examine instructions upon a general statement in appellant's brief that all the instructions requested by him were improperly refused.—People v. Howard (Cal. App.), 84 Pac. 462.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 874-877; 15 Cent. Dig., cols. 715-724, §§ 2954-2964.

§ 713. Briefs.

[a] Assignments of error not argued in brief will not be considered.—People v. Cady, 117 Cal. 11, 48 Pac. 908.

[b] A mere statement in the brief that the evidence is so clear that the homicide was justified under the law of defense of habitation that a reversal is asked on that ground, and that the court erred in admitting certain evidence, without reason, authority, or argument being given as to how the court erred, does not require a review of the record.—People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

[c] This court will not examine record upon a mere statement in the brief of appellant that the court erred in admitting in evidence the guns and cartridges, and the testimony of a witness, where no reasons are given nor authority cited as to why the court erred, and the brief does not state that the defendant excepted, nor show that the testimony was prejudicial.—People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

[d] Where, on appeal in a criminal case, a point is argued at length in the opening brief, but is abandoned in the reply brief, it will not be considered.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

[e] On appeal in a criminal case a portion of appellant's brief, "The court erred in refusing defendant's proposed instructions, Nos. 3, 6, and 7 (folios 40-44, inclusive)," is not an argument, and does not justify any consideration of errors supposed to be presented thereby.—People v. Mead, 145 Cal. 500, 78 Pac. 1047.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 877; 15 Cent. Dig., cols. 724, 725, §§ 2965-2970.

F. DISMISSAL, HEARING AND REHEARING.

DISMISSAL—FOR ESCAPE OF APPELLANT, § 714.
—— FOR FRIVOLITY, § 715.
—— FOR WANT OF ACTUAL CONTROVERSY, § 716.
—— NOTICE OF MOTION TO DISMISS, § 717.
REINSTATEMENT OF AFFIRMED OR DISMISSED APPEAL, § 718.
HEARING, § 719.
—— ARGUMENT OF COUNSEL, § 720.
REHEARING, § 721.
—— EFFECT, § 722.
—— STAY PENDING APPLICATION, § 723.

§ 714. Dismissal—For Escape of Appellant.

[a] Under constitution and code, one charged with a crime can defend only when in custody, and when a defendant charged with murder appealed, and then escaped, the appeal was properly ordered to be dismissed, unless, within a time specified, the defendant should return into custody.—People v. Redinger, 55 Cal. 290, 36 Am. Rep. 32.

[b] Appeal taken by the people from order setting aside information will be dismissed by appellate court of its motion for want of jurisdiction, although objection is not raised by respondent.—People v. Higgins, 114 Cal. 63, 45 Pac. 1004.

[c] Where, pending an appeal from a conviction of murder, accused escapes, the appeal will be dismissed, unless accused returns to custody within a time set by the court.—People v. Elkins, 122 Cal. 654, 55 Pac. 599.

[d] Section 1248, Penal Code, providing for dismissal for irregularity in any substantial particular upon five days' notice, does not permit the consideration of an appeal upon its merits, if no such notice is given, unless it be in cases where the objection to the appeal is not jurisdictional.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

FOR AUTHORITIES FROM OTHER STATES:

Right of fugitive from justice to prosecute an appeal: 41 Am. Dec. 272, note.

Whether appeal of escaped prisoner will be considered: 44 Am. Rep. 88, note. See, also, 12 Cyc. 878-881; 15 Cent. Dig., cols. 726-734, §§ 2971-2979; cols. 738, 739, § 2985.

§ 715. —— For Frivolity.

[a] Under Penal Code, section 1248, providing that an appeal may be dismissed if it "is irregular in any substantial particular, but not otherwise," an appeal cannot be dismissed on the ground that it is frivolous.—People v. McNulty, 95 Cal. 594, 30 Pac. 963.

§ 716. —— For Want of Actual Controversy.

[a] An appeal from an order fixing the day for execution of a sentence of death will be dismissed where the day fixed has passed. People v. Thompson (Cal.), 46 Pac. 907.

§ 717. —— Notice of Motion to Dismiss.

[a] Penal Code, section 1248, requiring five days' notice of motion to dismiss appeals in criminal cases, has no application to such appeals brought after the time limited by section 1239, as the objection to such appeal is jurisdictional. Judgment 61 Pac. 800, modified.—People v. Walker, 132 Cal. 137, 64 Pac. 133.

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§ 718. Reinstatement of Affirmed or Dismissed Appeal.

[a] Where, in a criminal cause, because of the failure of appellant's counsel to file a brief, or to appear at the hearing, an appeal from a conviction has been dismissed, and the judgment affirmed, without examination of the record, as prescribed by Penal Code, section 1253, under section 1265, providing that after the judgment has been remitted to the court below the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, such court has no power to recall such remittitur, and to reinstate such appeal, even though appellant's counsel by inadvertence had failed to file the brief, and to appear at the hearing.—People v. McDermott, 97 Cal. 247, 32 Pac. 7.

[b] Where a conviction is affirmed because of no appearance for appellant, and no brief on file, the appeal will not be reinstated because his counsel was prevented by sickness from preparing a brief and appearing in court, unless he shows plausible claim of error. People v. Busby, 113 Cal. 181, 45 Pac. 191.

§ 719. Hearing.

[a] Penal Code, section 1252, which provides that "all appeals in criminal cases must be heard and determined by the appellate court within sixty days after the record is filed in said appellate court, unless continued on motion or with the consent of the defendant," is merely directory, and a failure to determine a case within the time mentioned does not entitle the defendant to a discharge.—People v. Staples, 91 Cal. 23, 27 Pac. 523.

[b] Where defendant, for delay only, objects to submitting a case for hearing before the time for filing briefs has expired, and no substantive right of defendant would be prejudiced by thus submitting the case, the objection is without merit.—People v. Durrant, 119 Cal. 201, 51 Pac. 185.

For Authorities from Other States:

See 12 Cyc. 881; 15 Cent. Dig., cols. 734-736, §§ 2980-2983.

§ 720. —— Argument of Counsel.

[a] Cases should be fully argued before submission without reservation of other points to be used on petition for rehearing.—People v. Northey, 77 Cal. 635, 19 Pac. 865, 20 Pac. 129.

[b] Upon submission by attorney general without argument of appeal from a conviction of murder in the first degree and a judgment of death, there being no argument or brief of counsel for the appellant, the appellate court will examine the transcript to determine whether error appears in the record.—People v. Clark, 121 Cal. 633, 54 Pac. 147.

[c] An alleged error not argued will not be reviewed.—People v. Monroe, 138 Cal. 97, 70 Pac. 1072.

[d] It is improper for defendant's counsel, in oral argument, to raise a point as to alleged misconduct of the trial court, not referred to in the briefs, and which counsel for the state has had no opportunity to consider and reply to.—People v. Modina, 146 Cal. 142, 79 Pac. 842.

§ 721. Rehearing.

[a] Technical points urged on petition for rehearing, for first time, will not be considered.—People v. Northey, 77 Cal. 635, 19 Pac. 865, 20 Pac. 129.

[b] Court will not consider, on petition for rehearing, any point waived, either expressly or tacitly, at argument upon which case was originally submitted.—People v. Northey, 77 Cal. 635, 19 Pac. 865, 20 Pac. 129.

[c] On appeal from a sentence of death, the supreme court will consider questions raised for the first time in a petition for rehearing.—People v. Bruggy, 26 Pac. 965.

For Authorities from Other States:

See 12 Cyc. 882; 15 Cent. Dig., cols. 736-738, § 2984.

§ 722. —— Effect.

[a] Where rehearing is granted after reversing judgment, it stands unreversed.—People v. Hamberg, 84 Cal. 474, 24 Pac. 298.

§ 723. —— Stay Pending Application.

[a] After judgment affirming a capital conviction, on a petition for rehearing in vacation, a justice of this court ordered the sheriff to stay execution till the petition could be heard by the court.—People v. Tanner, 2 Cal. 257.

G. REVIEW.

SCOPE AND EXTENT, IN GENERAL, § 724.
—— ON APPEAL FROM JUDGMENT, § 725.
ESTOPPEL TO ALLEGE ERROR—ERROR AFFECTING ADVERSE PARTY, § 726.
—— FAILURE TO APPEAR OR FILE BRIEF, § 727.
—— ERROR INVITED BY APPELLANT, § 728.
—— ERROR IN REQUESTED INSTRUCTIONS, § 729.
NEW PROOFS, § 730.
PRESUMPTIONS—IN GENERAL, § 731.
—— PRELIMINARY EXAMINATION, § 732.
—— ARRAIGNMENT AND PLEA, § 733.
—— COMMITMENT, § 734.
—— READING OF INDICTMENT, § 735.
—— TRANSFER OF CAUSE, § 736.
—— CONTINUANCE, § 737.
—— PRESENCE OF ACCUSED AND COUNSEL, § 738.
—— REMARKS OF COURT, § 739.
—— RECEPTION OF EVIDENCE, § 740.
—— SUFFICIENCY OF EVIDENCE, § 741.
—— INSTRUCTIONS, § 742.
—— DISCHARGE OF JURY, § 743.
—— VERDICT, § 744.
—— JUDGMENT, § 745.
—— NEW TRIAL, § 746.
BURDEN OF SHOWING ERROR, § 747.
DISCRETION OF COURT, § 748.
—— INDICTMENT AND PLEAS, § 749.
—— BAIL, § 750.

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— CHANGE OF VENUE, § 751.
— TRANSFER OF CAUSE, § 752.
— CONTINUANCE, § 753.
— DISCHARGE FOR DELAY, § 754.
— PREPARATION OF DEFENSE, § 755.
— APPOINTMENT OF INTERPRETER, § 756.
— SELECTION OF JURY, § 757.
— EXCUSING JURORS, § 758.
— RESTRAINT OF ACCUSED, § 759.
— RECEPTION OF EVIDENCE, § 760.
— ORDER OF PROOF, § 761.
— COMPETENCY OF WITNESSES, § 762.
— EXAMINATION OF WITNESSES, § 763.
— VIEW, § 764.
— TAKING EVIDENCE TO JURY-ROOM, § 765.
— DISCHARGING JURY, § 766.
— NEW TRIAL, § 767.
QUESTIONS OF FACT, VERDICTS AND FINDINGS, § 768.
— VERDICT CONTRARY TO EVIDENCE OR PREPONDERANCE, § 769.
— CONFLICTING EVIDENCE, § 770.
— RULING ON CHALLENGE TO JUROR, § 771.
— RULING ON MOTION FOR NEW TRIAL, § 772.
HARMLESS AND PREJUDICIAL ERROR, § 773.
— PRESUMPTION OF PREJUDICE FROM ERROR, § 774.
— BURDEN TO SHOW PREJUDICE FROM ERROR, § 775.
— ERROR FAVORABLE TO APPELLANT, § 776.
— TECHNICAL ERROR, § 777.
— DEFECTS IN PRELIMINARY EXAMINATION, §§ 778, 779.
— DEFECTS, INDICTMENT OR INFORMATION, § 780.
— DRAWING JURY, § 781.
— INFORMING ACCUSED OF RIGHT TO CHALLENGE JUROR, § 782.
— RULINGS IN CHALLENGE TO JUROR OR PANEL, § 783.
— EXCUSE OF JUROR, § 784.
— TIME OF TRIAL, § 785.
— CONDUCT OF TRIAL IN GENERAL, § 786.
— ADMISSION OF EVIDENCE, § 787.
— EXCLUSION OF EVIDENCE, § 788.
— EXAMINATION OF WITNESSES, § 789.
— ARGUMENTS AND CONDUCT OF COUNSEL, § 790.
— REMARKS AND CONDUCT OF COURT, § 791.
— INSTRUCTIONS, § 792.
— FAILURE OR REFUSAL TO INSTRUCT, § 793.
— CONDUCT AND DELIBERATIONS OF JURY, § 794.
— DISCHARGE OF PART OF PANEL, § 795.
— PROCEEDINGS IN PRESENCE OF JURY, § 796.
— VERDICT, § 797.
— JUDGMENT OF SENTENCE, § 798.
— RULINGS ON MOTION FOR NEW TRIAL, § 799.
WAIVER OF ERROR IN APPELLATE COURT, § 800.
SUBSEQUENT APPEAL, § 801.

§ 724. Scope and Extent in General.

[a] On appeal from order refusing or granting new trial, on ground of error or irregularity arising during the course of trial, appellate court is confined to a review of proceedings between issue joined and rendition of the verdict.—People v. Turner, 39 Cal. 370.

[b] Any action of court during progress of trial for felony, which deprives defendant of substantial legal right in premises, or to his prejudice, to any extent, withholds or abridges a substantial, legal, or constitutional privilege of a defendant, and by him claimed on the trial, is a proper subject matter of review on appeal.—People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.

[c] In reviewing instructions supreme court must take whole charge together, and if thus correctly stating the law, sustain it.—People v. McCurdy, 68 Cal. 582, 10 Pac. 207.

[d] Two modes of procuring review of action of court in giving or refusing instructions, set forth.—People v. January, 77 Cal. 181, 19 Pac. 258.

[e] One convicted of a crime may on appeal attack the existence of the court which assumed to try him.—People v. Toal, 85 Cal. 333, 24 Pac. 603.

[f] Facts that cannot be considered by trial court to determine guilt or innocence of accused cannot be considered by court on appeal.—People v. Page, 116 Cal. 396, 48 Pac. 326.

[g] The refusal of a motion at the close of the people's evidence to instruct the jury to acquit is the subject of an exception under Penal Code, section 1170, subdivision 3, authorizing an exception to the decision of any question of law not a matter of discretion, or to a charge to the jury, and may be reviewed on appeal from the judgment under section 1259, providing that on an appeal from a judgment the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment.—People v. Ward, 145 Cal. 736, 79 Pac. 448.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 883, 884; 15 Cent. Dig., cols. 740-749, §§ 2986-3004.

§ 725. —— On Appeal from Judgment.

[a] Objections which may be presented by demurrer may further be made available after verdict by motion in arrest of judgment, and action of court on this motion can only be reviewed on appeal from the judgment.—People v. Turner, 39 Cal. 370.

[b] Under Penal Code, sections 1170, 1259, 1181, the sufficiency of the evidence to support an instruction in a criminal case cannot be inquired into on an appeal from the judgment alone.—People v. Durand, 1 Cal. App. 71, 81 Pac. 672.

[c] The denial of a motion in arrest of judgment is reviewable on appeal from the judgment.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

§ 726. Estoppel to Allege Error—Error Affecting Adverse Party.

[a] Error in excluding evidence against a defendant, offered by the people, cannot be

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taken advantage of by counsel for the people upon an appeal by the defendant.—People v. Noregea, 48 Cal. 123.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 885; 15 Cent. Dig., cols. 750-753, §§ 3007-3010.

§ 727. —— Failure to Appear or File Brief.

[a] The appellate court is under no duty to examine the record for errors of law in a criminal case not involving capital punishment, where there is no brief for nor appearance by defendant.—People v. Sing (Cal. App.), 84 Pac. 242.

§ 728. —— Error Invited by Appellant.

[a] Appellant cannot complain of error, injurious effects of which he has suffered by reason of his acquiescence or failure to avoid it when he had means and opportunity to do so.—People v. Winthrop, 118 Cal. 88, 50 Pac. 390.

[b] Where improper matters contained in alleged dying declarations of deceased were ruled out by the court in advance of admitting the declarations, but were finally read in evidence because the defendant insisted thereon, the fact that the evidence tended to contradict such improper matters was not cause for reversal.—People v. Thomson, 145 Cal. 717, 79 Pac. 435.

§ 729. —— Error in Requested Instructions.

[a] One cannot object, upon appeal, to the instructions that he himself asked for.—People v. Lopez, 59 Cal. 362; People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984; People v. Holmes, 126 Cal. 462, 58 Pac. 917; People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Biggins, 3 Pac. 853.

§ 730. New Proofs.

[a] Act of 1867-68, page 425, making the reporter's notes prima facie evidence only, refers to the trial court. Such notes cannot be considered in the supreme court.—People v. Woods, 43 Cal. 176.

[b] The appellate court cannot consider the insanity of defendant, disclosed subsequent to the trial, as ground for reversing the judgment. People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[c] Fact that insanity of defendant has become fully developed since the trial, assuming it to be true, does not authorize appellate court to act upon evidence furnished by his present demented condition, and upon that ground reverse a judgment otherwise legal, when it may be true that notwithstanding his present condition, the mental disease may not have so far progressed at the time of the homicide as to relieve the defendant from responsibility for his acts.—People v. Schmitt, 106 Cal. 48, 30 Pac. 204.

[d] Only such evidence which the record shows to have been introduced in a criminal case will be considered on appeal.—People v. Brooks, 131 Cal. 311, 63 Pac. 464.

[e] Where, after defendant appeals, a third person confesses that he committed the crime, and that defendant is innocent, these matters, not being in the record, and there being no law by which they can be for the first time presented to the supreme court, cannot be considered by it.—People v. Bowers, 18 Pac. 660.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., col. 747, § 3000.

§ 731. Presumptions—In General.

[a] Where an indictment appeared to have been presented to a court of sessions consisting of a county judge and two justices of the peace of the courts, the legal presumption was in favor of the validity of the court.—People v. Barbour, 9 Cal. 230.

[b] Presumptions are in favor of regularity of the proceedings of the grand jury.—People v. Mills, 17 Cal. 276.

[c] In the absence of any showing to the contrary, it will be presumed that persons drawn as grand jurors, and excused by the court, were not excused without legal cause.—People v. Millsaps, 35 Cal. 47.

[d] Where record shows that accused was detained upon recommendation of grand jury alone, the usual presumption that the discretion of the court was exercised upon sufficient grounds cannot be indulged.—Bull, Ex parte, 42 Cal. 196.

[e] It will be presumed that bill of exceptions contains all evidence given on the trial bearing on the point of the objection.—People v. English, 52 Cal. 211.

[f] In absence of any showing as to what took place when court made order the appellate court will presume, in support of the action of the court below, that the defendant assented to the order.—People v. Swafford, 65 Cal. 223, 3 Pac. 809.

[g] It is presumed that jurors selected to try a cause are possessed of ordinary intelligence.—People v. Northey, 77 Cal. 630, 19 Pac. 865, 20 Pac. 129.

[h] Where record shows that complaint upon which defendant was examined and held to answer was introduced upon hearing of a motion to set aside the information for variance between complaint and information it will be presumed upon appeal that the trial court, in passing upon and denying the motion, considered the question of variance.—People v. Wallace, 94 Cal. 497, 29 Pac. 250.

[i] Where the minutes of the trial disclose that oral instructions were given to the jury on the trial of a criminal case, it will be presumed that they were taken down by the reporter, as contemplated by Penal Code, section 1093, where there is nothing in the record showing that they were not so taken down.—People v. Ludwig, 118 Cal. 328, 50 Pac. 426.

[j] The presumption that an oral charge was taken down by the reporter is not overthrown

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by the production of the record of the action, as constituted by Penal Code, section 1207, containing no instructions as it more properly establishes the fact that the charge, when transcribed by the reporter, was not indorsed by the trial judge, than the fact that it was not taken down by the reporter.—People v. Ludwig, 118 Cal. 328, 50 Pac. 426.

[k] Judgment of conviction will not be reversed because the record entry does not affirmatively show that the defendants were present when the verdict was rendered, since on appeal all intendments are in favor of the regularity of the proceedings.—People v. Holmes, 118 Cal. 444, 50 Pac. 675.

[l] Presumption is that the trial court, in denying a new trial on the ground of newly-discovered evidence, properly exercised its discretion.—People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742.

[m] In a case of contradiction in the bill of exceptions as to evidence introduced, held, that the presumption is in favor of the regularity of the proceedings below.—People v. Beatty (Cal. App.), 88 Pac. 377.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 887-895; 15 Cent. Dig., cols. 755-805, §§ 3014-3037.

§ 732. —— Preliminary Examination.

[a] A preliminary examination before a magistrate will be presumed to have been conducted according to law, the contrary not appearing. People v. Smith, 59 Cal. 365.

[b] Where an objection that the deposition of a witness on a preliminary examination was not properly certified by the reporter was not made at the trial, and the record did not show that it had not been properly transcribed and certified, it will be presumed on appeal that the objection was not well founded.—People v. Witty, 138 Cal. 576, 72 Pac. 177.

§ 733. —— Arraignment and Plea.

[a] Where, on appeal, the record fails to show that accused was arraigned and pleaded to the indictment, the court will assume that there was no arraignment or plea.—People v. Gaines, 52 Cal. 479.

[b] Record of arraignment need not show that interpreter was appointed.—People v. Samaros, 84 Cal. 486, 24 Pac. 283.

§ 734. —— Commitment.

[a] Where the order committing the defendant to answer is filed on the same day with the filing of the information, it will be presumed, there being no showing to the contrary, that the information was filed subsequent to the commitment.—People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

[b] Unless record show contrary, it will be presumed that proper commitment was made by duly authorized magistrate.—People v. Williams, 84 Cal. 617, 24 Pac. 145.

[c] In support of a judgment of conviction it will be presumed, in the absence of a showing on the matter, that defendant was legally committed.—People v. Jackson, 138 Cal 462, 71 Pac. 566.

§ 735. —— Reading of Indictment.

[a] On appeal in a criminal case, it will be presumed that before proceeding with the trial the clerk read the information, unless the contrary appears from the record.—People v. Wheatley, 88 Cal. 114, 26 Pac. 95.

[b] Where defendant confessed former conviction, it is presumed that clerk performed his duty and omitted to read part of indictment relating thereto.—People v. McGregar, 88 Cal. 141, 26 Pac. 97.

[c] Where record shows that a charge of prior conviction was admitted by the defendant, and also shows that the information was read to the defendant on the arraignment, and no exception appears to have been taken to the failure of the record to show affirmatively whether the clerk read that part of the information relating to the former conviction, it must be presumed that it was properly read.—People v. Ross, 115 Cal. 233, 46 Pac. 1059.

§ 736. —— Transfer of Cause.

[a] It will be presumed that transfer of criminal case from one department to another was regularly made.—People v. Wheatley, 88 Cal. 116, 26 Pac. 95.

§ 737. —— Continuance.

[a] When the record upon appeal does not show that a continuance of a criminal cause was objected to by the defendant it will be presumed in favor of the action or the court below that the defendant consented to the order.—People v. Douglass, 100 Cal. 1, 34 Pac. 490.

§ 738. —— Presence of Accused and Counsel.

[a] A defendant convicted of murder in the first degree is entitled to be present when the order for his execution is made; but, unless the contrary appears from the record, it will be presumed that he was present.—People v. Sing Lum, 61 Cal. 538.

[b] Where entry on the minutes of the court shows that, after the verdict as announced was entered and read, the defendant was remanded to the custody of the sheriff, and where the amended record shows, moreover, that the defendant was present at all times during the trial, it is conclusive evidence as to the fact of the defendant's presence when the verdict was rendered.—People v. Jung Qung Sing, 70 Cal. 469, 11 Pac. 755.

[c] Where the record shows nothing to the contrary, it will be presumed that defendant

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was present when the plea of not guilty was entered for him by his counsel.—People v. Clin, 83 Cal. 374, 23 Pac. 391.

[d]] Where the bill of exceptions does not show that defendant was absent when the case was set for trial, it will be presumed that he was present.—People v. Collins, 105 Cal. 504, 39 Pac. 16.

[e] Where the record is silent as to whether a defendant charged with murder, and who had been duly arraigned and pleaded not guilty, was present when the case was set for trial, it will be presumed that he and his counsel were present.—People v. Rader, 136 Cal. 253, 68 Pac. 707.

§ 739.—— Remarks of Court.

[a] In the absence of a showing to that effect, it will be presumed that the remark of the judge in relation to the defendant's sanity was not made without any call for it, but was properly made in response to a demand made for a trial of the defendant's insanity before a special jury. If the defendant did not wish the trial jury to hear the judge's response, he should have requested the court to direct the jury to retire while the question was being considered and passed upon.—People v. Findley, 132 Cal. 301, 64 Pac. 472.

§ 740. —— Reception of Evidence.

[a] Where court below excluded from jury evidence of threats, on the part of the deceased, against the life of defendant, and the record does not show the character of such threats, this court will presume that such proof was properly excluded.—People v. Glenn, 10 Cal. 32.

[b] If record, in indictment for burglary, only shows exception to exhibit of burglarious tools in evidence, the presumption is that all the facts were proved necessary to entitle them to be shown in evidence.—People v. Winters, 29 Cal. 658.

[c] Exhibition of operation of tools to jury is presumed legitimate, though not offered in evidence.—People v. Hope, 62 Cal. 291.

[d] Where a court, after questioning a witness, sustains an objection to a question propounded to the witness by defendant's counsel as to whether he knows the defendant's reputation for peace and quietude in the community in which he lives, and the questions asked by the court do not appear in the record, nor does it appear therein that the witness knew what community the defendant lived in, it must be presumed that the court was satisfied the witness did not know the defendant's reputation, as asked for, in the community in which he lived.—People v. Marseiler, 70 Cal. 98, 11 Pac. 503.

[e] Under Penal Code, section 686, which provides that a deposition taken on preliminary examination in the presence of accused, who had opportunity to cross-examine, may be read on the trial if it is satisfactorily shown to the court that the witness could not be found in the state, the admission of such deposition will be assumed, on appeal, to have been based on satisfactory evidence.—People v. Reilly, 106 Cal. 648, 40 Pac. 13.

[f] On a trial for crime, the people introduced in evidence as a deposition the testimony of a witness at the preliminary examination as certified and filed by the reporter. The certificate of the reporter was not set forth in the bill of exceptions, but it appeared that the people offered the entire transcript for the purpose of giving character to the entire document and the certificate at the end thereof, and that defendant objected to its admission, on the ground that it had not been shown that the person signing the certificate was an official stenographer, and that the court ordered the admission of the entire transcript for the limited purpose. Held, that the court, on appeal, must presume that the transcript offered was certified by the reporter as being a correct statement of the evidence, and therefore under the statute prima facie a correct statement of the testimony constituting the depositions of the witnesses whose testimony was shown therein.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

§ 741. —— Sufficiency of Evidence.

[a] Where the bill of exceptions states simply what the evidence tended to show as to the commission of the crime charged, and does not purport to contain the whole evidence, the court cannot assume that the venue was not proved.—People v. Marks, 72 Cal. 46, 13 Pac. 149.

[b] Where evidence adduced at trial is not set forth in record upon appeal, and affidavit on motion for new trial for newly discovered evidence sets forth presence of affidavit at marking and branding of calves by father and brothers of defendant about a week before date of alleged larceny, and that the defendant was not then present, it cannot be presumed upon appeal, in favor of the materiality of the evidence, that the larceny was shown to have been committed at the time of such marking and branding.—People v. Warren, 130 Cal. 683, 63 Pac. 86.

[c] On appeal from a conviction for burglary, the bill of exceptions stated that witnesses for the people and for defendant were sworn and examined, and that the testimony included certain testimony set out in detail and relating solely to the time when the burglary was committed. One ground of the motion for new trial was that the verdict was contrary to the evidence. Held that, while it would be presumed that the bill of exceptions contained all the evidence as to the time of the commission of the crime, it could not be presumed that it contained all of the evidence submitted.—People v. Coulter, 145 Cal. 66, 78 Pac. 348.

§ 742. —— Instructions.

[a] Instructions will be presumed to have been in writing.—(1861) People v. Chung Lit, 17 Cal. 320; (1865) People v. Shuler, 28 Cal. 490; (1873) People v. Wright, 45 Cal. 260.

[b] The presumption is that the instructions of the court were given in the manner provided

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by law; and, in a trial for murder, the record need not expressly show that they were given in writing.—People v. Chung Lit, 17 Cal. 320.

[c] Where, it is objected to charge that it, in some parts, assumes the guilt of the prisoner, or assumes as proven certain disputed points of fact, and there is no statement of facts in the record, the supreme court will not interfere unless the ruling of the court below cannot be maintained under any imaginable state of facts. In such case all presumptions are in favor of the correctness of the acts and rulings below.—People v. Bonney, 19 Cal. 426.

[d] An oral charge will not be presumed to have been given to the jury, if this fact does not appear from the record.—People v. Garcia, 25 Cal. 531.

[e] Presumption is that jury are capable of understanding the whole charge of the court in its connected relations, and in its application to the facts of the case.—People v. Bagnell, 31 Cal. 409.

[f] Where evidence to which instruction relates does not appear in record presumption will be in favor of its correctness.—People v. Johnson, 47 Cal. 122; People v. Barry, 31 Cal. 357; People v. Best, 39 Cal. 690.

[g] It cannot be assumed as a question of law that a jury understands an instruction given by the court in a sense different from that in which it is commonly understood by those outside the jury-box.—People v. Welch, 49 Cal. 174.

[h] Statute authorizes oral instructions if taken down by shorthand reporter, and legal presumption is that this was done, unless the contrary affirmatively appears from the record. People v. Ferris, 56 Cal. 442.

[i] Where the oral charge of the court appears in full in the transcript of the record, it will be presumed that it was taken down by the shorthand reporter.—(1885) People v. Bourke, 66 Cal. 455, 6 Pac. 89; (1891) People v. Wheatley, 88 Cal. 114, 26 Pac. 95; (1891) People v. McGregar, 88 Cal. 140, 26 Pac. 97; (1891) People v. Johnson, 88 Cal. 171, 25 Pac. 1116; (1891) People v. Barton, 88 Cal. 176, 25 Pac. 1117.

[j] Where the transcript of the record on appeal shows that a certain instruction was given by the lower court of its own motion, and states that "was all the law so given in the action," it cannot be presumed that the court did not give any instructions at the instance of the parties.—People v. Marks, 72 Cal. 46, 13 Pac. 149.

[k] It must be presumed upon appeal, where additional instructions were given which are not embodied in the record, that under such instructions, taken with those given and refused, the law of the case was properly presented to the jury.—Harris v. Barnhart, 97 Cal. 46, 32 Pac. 589.

[l] It will be presumed that the jury were instructed to disregard statements of counsel outside the record, where such statements were made, and the record on appeal does not contain the instructions.—People v. Molina, 126 Cal. 505, 59 Pac. 34.

[m] Where the transcript on appeal showed a heading, "Instructions asked by the defense and refused," under which were several sentences not numbered, it will be presumed that the whole is one instruction; and, a part of the same being erroneous, a refusal of another part cannot be considered error.—People v. Davis, 135 Cal. 162, 67 Pac. 59.

[n] It will not be presumed on appeal, for the purpose of examination for prejudicial error, that an instruction merely marked "Given" was given at request of the prosecution, or that an instruction not given was requested by defendant.—People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

[o] Where the court, of its own motion, gives an instruction based on a contention which it states was made on the trial, it cannot be presumed on appeal, in the absence of such fact being affirmatively shown by a bill of exceptions, that the contention was not made.—People v. Gonzales, 56 Pac. 804.

§ 743. —— Discharge of Jury.

[a] In absence of bill of exceptions showing that jury was discharged without consent of defendant, it is presumed that consent was given.—People v. Curtis, 76 Cal. 59, 17 Pac. 941.

§ 744. —— Verdict.

[a] If the jury returns a general verdict of guilty, in an indictment charging two distinct offenses, it will be presumed either that the verdict was returned on both offenses, or, if only on one, that the judge who tried the case passed sentence accordingly.—People v. Shotwell, 27 Cal. 394.

[b] Where jury are correctly instructed as to applicability of evidence before them it is a presumption of law that they exercised their jurisdiction soundly.—People v. Rogers, 71 Cal. 565, 12 Pac. 679.

[c] Where jury were fully instructed upon evidence of defendant's previous good character, it must be presumed that instructions were regarded.—People v. Durrant, 116 Cal. 207, 48 Pac. 75.

[d] Where the jury's verdict in a criminal prosecution could only have been reached by a misapprehension of the law as given in ambiguous instructions, or by willfully disregarding their duty, it will not be presumed on appeal that the latter was the case.—People v. Sylva, 143 Cal. 62, 76 Pac. 814.

§ 745. —— Judgment.

[a] Where, to an indictment for murder, in which the degree was not specified, the prisoner pleaded guilty, and was thereupon sentenced to confinement, etc., the judgment was held to be good; the presumption being that

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the court had, from the testimony, ascertained the degree of the crime.—Brown, In re, 32 Cal. 48.

[b] All intendments are in support of judgment in criminal case, so far as such intendments are consistent with the record.—People v. Brotherton, 47 Cal. 388.

[c] It will be presumed, in support of a judgment in a criminal case, that testimony introduced by the prosecution worked no injury to the defendant, if the testimony is not contained in the record.—People v. Brotherton, 47 Cal. 388.

[d] A defendant pleaded guilty to the charge of "prior convictions," and the court did not instruct as to such prior convictions, nor did it appear from the record that any reference was made to them during the trial. The jury found the defendant guilty, but did not find in reference to the prior convictions, which before judgment were withdrawn on motion of the district attorney, and the court only sentenced the prisoner for one crime. Held, that it must be presumed that the clerk had obeyed the law (Pen. Code, sec. 1093) and omitted to read the prior convictions to the jury, and that the court, in view of their withdrawal, had disregarded them in considering the sentence.—People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[e] In cases not requiring written findings it will be presumed that court found facts warranting judgment.—Williams, Ex parte, 87 Cal. 81, 24 Pac. 602.

[f] Though the judgment-roll does not show that when judgment was pronounced defendant was informed by the court of the nature of the charge against him, of his plea, and of the verdict, conceding that these statements are required by Penal Code, section 1200, it will be presumed on appeal that they were made, when the contrary is not shown.—People v. Barton, 8 Cal. 176, 25 Pac. 1117.

[g] Where, on the trial of an indictment charging defendant with forgery and with having suffered a prior conviction of larceny, the jury returned a verdict of "guilty as charged," and the court imposes the maximum penalty for forgery, it will be presumed that the court treated the verdict as a finding against defendant on the issue of prior conviction.—People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

§ 746. —— New Trial.

[a] On appeal from an order granting a new trial, general in its terms, it will not be assumed that it was granted on one particular ground when others were properly presented.—People v. Flood, 102 Cal. 330, 36 Pac. 663.

[b] In reviewing an order denying a new trial for newly discovered evidence, it will not be presumed, in support of an affidavit of a witness to an alibi, that the offense was committed at a time to which the affidavit related; there being no evidence in the record.—People v. Warren, 130 Cal. 683, 63 Pac. 86.

§ 747. Burden of Showing Error.

[a] In a criminal case, to reverse the judgment below, the record must affirmatively show error.—People v. Bealoba, 17 Cal. 389.

[b] Defendant alleging exceptions must show error affirmatively in the record; and, unless a bill of exceptions shows error, none will be presumed.—People v. Connor, 17 Cal. 354; People v. McAuslan, 43 Cal. 55; People v. Lewis, 64 Cal. 401, 1 Pac. 490.

[c] Record must clearly show error, and not leave it to be inferred from argument as to what the language of the record means.—People v. Richmond, 29 Cal. 414; People v. Marks, 72 Cal. 47, 13 Pac. 149; People v. Grundell, 75 Cal. 304, 17 Pac. 214; People v. Leong Sing, 77 Cal. 119, 19 Pac. 254; People v. Johnson, 88 Cal. 175, 25 Pac. 1116; People v. Barton, 88 Cal. 178, 25 Pac. 1117.

[e] Error is not presumed; it must affirmatively appear in record.—People v. Huff, 73 Cal. 119, 13 Pac. 168.

[f] Where error is assigned in refusing to change venue, clear case be shown by record before reversal can be had.—People v. Goldenson, 76 Cal. 339, 19 Pac. 161.

[g] Appellant must affirmatively show that venue was not proven.—People v. Tonielli, 81 Cal. 279, 22 Pac. 658.

[h] Where a defendant is denied the constitutional right of a public trial he is presumed to be prejudiced, and the burden is not upon him to show injury by reason of the deprivation; and when a defendant has been deprived of any constitutional right he has not had that fair and impartial trial to which he is entitled, however bad and degraded.—People v. Hartman, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.

[i] All intendments of the law are in favor of the regularity of the judgment and proceedings of the court below, and it is incumbent upon the appellants to show error affirmatively. People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[j] Error predicated on the cross-examination of defendant as a witness will not be presumed, but must affirmativly appear.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

§ 748. Discretion of Court.

[a] Exercise of discretion will not be reviewed unless record shows cause thereof.—People v. French, 69 Cal. 172, 10 Pac. 378.

[b] Where court refuses to exercise discretion on erroneous ground of want of jurisdiction, order will be reviewed.—People v. Lundquist, 84 Cal. 26, 23 Pac. 1026.

[c] Discretion of trial court will not be reviewed unless abused. Instance.—People v. Manoogian, 141 Cal. 598, 75 Pac. 177.

FOR AUTHORITIES FROM OTHER STATES:
See 12 Cyc. 896-905; 15 Cent. Dig., cols. 805-852, §§ 3038-3073.

§ 749. —— Indictment and Pleas.

[a] Defendant having plead not guilty to an indictment for murder, asked leave to withdraw his plea for the purpose of moving to

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set aside the indictment, on the ground that one Shepheard was present in the grand jury room while the charge in the indictment was under consideration. Leave refused, because the court below knew Shepheard to have been assistant district attorney at the time. Held, that granting leave rested in the discretion of the court below; and, no circumstances being shown indicating any abuse of that discretion, the action of the court must stand.—People v. Lee, 17 Cal. 76.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 896; 15 Cent. Dig., cols. 806-808, §§ 3039-3043.

§ 750. —— Bail.

[a] Supreme court will not interfere with lower court's exercise of discretion in fixing amount of bail unless amount is unreasonably great.—Williams, In re, 82 Cal. 183, 23 Pac. 118.

§ 751. —— Change of Venue.

[a] The supreme court having complete appellate power over right to grant change of venue, it is not to be supposed that it will trust implicitly in the discretion of inferior courts.—People v. Lee, 5 Cal. 353.

[b] An order refusing a change of venue on the application of defendant in a criminal prosecution will only be reviewed in cases of gross abuse of discretion.—People v. Fisher, 6 Cal. 154; People v. Perdue, 49 Cal. 425.

[c] Application for change of venue on ground of local bias and prejudice is addressed to discretion.—People v. Elliott, 80 Cal. 298, 22 Pac. 207.

[d] Although discretion granting or refusing change of venue in a criminal action is not an arbitrary discretion, yet where its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate court.—People v. Vincent, 95 Cal. 25, 30 Pac. 581.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 809-812, § 3044.

752. —— Transfer of Cause.

[a] The fact that defendant's case was transferred to another division of the superior court short time before trial did not constitute an abuse of discretion, in the absence of a showing that defendant suffered any injury.—People v. Owens, 132 Cal. 469, 64 Pac. 770.

753. —— Continuance.

[a] An order of the court denying a new trial, sought on the ground of error in refusing to grant a continuance on account of absence of witnesses, will not be reversed where a counter-affidavit was filed to show that the application for a continuance was not made in good faith, and where on the motion for a new trial the affidavits of the absent witnesses were not produced to show that they could testify to the facts desired to be proved by them.—(1865) People v. De Lacey, 28 Cal. 589; (1866) People v. Jocelyn, 29 Cal. 562.

[b] Refusal of continuance will be upheld unless abuse of discretion clearly appears.—People v. Collins, 75 Cal. 412, 17 Pac. 430.

[c] A refusal to grant defendant a continuance was an abuse of discretion warranting a reversal where it appeared that the wife of defendant, who had been subpoenaed, was a material witness, and the only person who could and would testify to facts showing his innocence, and that she was temporarily sick, as shown by physicians' certificates, so that her attendance would endanger her life—all of which was not contradicted; nor was the error cured by a statement by the state in open court that they had authentic information that she was no longer ill, but about on the streets, and the court's offer to issue an attachment for her, which neither side then requested.—People v. Plyler, 121 Cal. 160, 53 Pac. 553.

[d] Application of defendant for continuance is addressed largely to the discretion of the trial court, and where the court refused a continuance, its decision will not be disturbed upon appeal, if the appellate court cannot say, in view of the facts and circumstances disclosed by the record, that the court below abused its discretion.—People v. Totman, 135 Cal. 133, 67 Pac. 51.

[e] It is only in plain case of abuse of discretion that appellate court will interfere with order denying continuance for absent witness—People v. Chutnacut, 141 Cal. 683, 75 Pac. 340.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 898, 899; 15 Cent. Dig., cols. 812-819, §§ 3045-3049.

§ 754. —— Discharge for Delay.

[a] Under Penal Code, section 1382, requiring the court, unless good cause to the contrary is shown, to dismiss a prosecution not brought to trial within sixty days from the filing of the information, a judgment will not be reversed where it does not appear that the trial judge abused his discretion in refusing to so dismiss the prosecution.—People v. Henry, 77 Cal. 445, 19 Pac. 830.

§ 755. —— Preparation of Defense.

[a] The allowance of time for defendant to prepare the order of his defense at the close of the state's evidence being a matter in the discretion of the trial court, the allowance of thirteen minutes for that purpose will not be reviewed, where no abuse of discretion was shown.—People v. Owens, 132 Cal. 469, 64 Pac. 770.

§ 756. —— Appointment of Interpreter.

[a] Appointment of interpreter at trial is not reviewable on appeal.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

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§ 757. —— Selection of Jury.

[a] The action of trial court in allowing a challenge to a juror for implied bias is not open to review.—People v. Murphy, 45 Cal. 137; People v. Atherton, 51 Cal. 495; People v. Taing, 53 Cal. 602; People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Goldenson, 76 Cal. 346, 19 Pac. 161; People v. Ward, 77 Cal. 113, 19 Pac. 373; People v. Bemmerly, 87 Cal. 120, 25 Pac. 266.

[b] Appellate court will not overrule action of the court below in denying a challenge for implied bias made to a juror in a criminal case, even where the answers of the juror appear contradictory, unless it is apparent that the court below abused its discretion.—People v. Brotherton, 47 Cal. 388.

[c] The action of the court in sustaining the challenge to a juror, in a criminal case, on the ground of implied bias, cannot be excepted to, or reviewed by the appellate court.—People v. Colson, 49 Cal. 679.

[d] Where a challenge is taken to a juror, and there is no denial of the facts upon which it is made, and no exception, the decision of the court is not open to review.—(Per McKee, J.) People v. Cochran, 61 Cal. 548.

[e] The action of the court in sustaining a challenge to a juror, there being no exception to any ruling upon the admission or rejection of evidence, cannot be reviewed on appeal.—People v. Kunz, 73 Cal. 313, 14 Pac. 836.

[f] Penal Code, section 1170, subdivision 2, providing that exceptions may be taken by defendant in a criminal case to a decision of the court "in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias," does not authorize an exception to a ruling on the challenge, or a review of such ruling.—People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115.

[g] Disallowing a challenge to the panel returned under a special venire because that venire was rendered necessary on account of the depletion of the regular venire, due to the liberality on the part of the judge in allowing excuses to those summoned, is not ground for reversal, in the absence of a showing that the judge abused his discretion in the matter of allowing the excuses.—People v. Hickman, 113 Cal. 80, 45 Pac. 175.

[h] Where evidence is such as to be capable of only one construction, and plainly shows bias of juror, action of trial court disallowing challenge is reviewable.—People v. Chutnacut, 141 Cal. 684, 75 Pac. 340.

[i] Under Penal Code, section 1170, permitting exceptions to the decision of the court "in admitting or rejecting testimony on the trial of a challenge of a juror for actual bias," no exception lies to a ruling denying a challenge to a juror for actual cause.—People v. Brown, 13 Pac. 222.

§ 758. —— Excusing Jurors.

[a] A court has broad discretion in excusing jurymen, and a defendant tried by a competent jury cannot object that the judge excused certain of the venire for cause.—People v. Searcy, 121 Cal. 1, 53 Pac. 359.

§ 759. —— Restraint of Accused.

[a] The refusal of the trial court to direct that a prisoner brought up in irons for trial should be set at liberty during the trial is reviewable on appeal, since it involves a substantial right.—People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.

§ 760. Reception of Evidence.

[a] If the trial court admits in evidence a deposition on the ground that the deponent cannot, with reasonable and due diligence, be found in the state, so that he may be summoned as a witness, and there is evidence justifying the finding of the court, its action will not be revised on appeal.—People v. Gannon, 61 Cal. 476.

[b] It is common practice to illustrate upon the wall or upon a door in a courtroom, before the eyes of the jury, the location of a bullet mark; but such matters are largely within the discretion of the trial court, and, in the absence of an abuse of discretion, the appellate court will not interfere.—People v. Chia Hane, 108 Cal. 597, 41 Pac. 697.

[c] The discretion of the trial court in admitting an entry in a family Bible that appears to have been changed is not open to review unless it is made to appear that the discretion was abused.—People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

[d] The court's determination that a witness could not be found within the state by due diligence, in order to permit his deposition to be used by the prosecution, under Penal Code, section 686, will not be set aside, in the absence of an abuse of discretion.—People v. Ballard, 1 Cal. App. 222, 81 Pac. 1040.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 901-903; 15 Cent. Dig., cols. 831-839, §§ 3061-3066.

§ 761. —— Order of Proof.

[a] Reopening case to allow evidence in support of plea of once in jeopardy is in discretion of court, and refusal is not reviewable.—People v. Ross, 65 Cal. 104, 3 Pac. 491.

[b] Under section 1094 of the Penal Code, it is within the sound discretion of the court to depart from the order of evidence prescribed in section 1093 of the same code, and the action of the court will not be disturbed upon appeal unless there has been an abuse of discretion.—People v. Gordan, 103 Cal. 568, 37 Pac. 534.

§ 762. —— Competency of Witnesses.

[a] Whether the opinions of nonexpert witnesses as to the sanity of defendant are based on sufficient observation is for the trial court to determine, and its decision will not be ques-

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tioned on appeal.—(Cal. 1887) People v. Levy, 71 Cal. 618, 12 Pac. 701.

[b] Whether a witness as to the sanity of defendant had such acquaintance with him and opportunity of observing him as to be qualified to express an opinion as to his sanity is a question to be determined by the trial court, and while its ruling may be reviewed upon appeal, it will not be held erroneous upon a mere difference of opinion as to the qualification of the witness, but it must clearly appear that the decision of the trial court was wrong.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[c] The court's ruling that witnesses were "intimate acquaintances" of defendant, so as to be competent, under Code of Civil Procedure, section 1870, subdivision 10, to testify as to his sanity, will not be disturbed, unless abuse of discretion clearly appears.—People v. McCarthy, 115 Cal. 255, 46 Pac. 1073.

[d] The exclusion of expert evidence as to the mental soundness of an accused because the witness was not sufficiently qualified to give an expert opinion will not be disturbed on appeal, where the record does not disclose facts authorizing a holding that the trial court abused its discretion in rejecting the evidence. People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

[e] Whether witness is "intimate acquaintance" and qualified to express opinion as to sanity of accused is within discretion of trial court to determine.—People v. Manoogian, 141 Cal. 598, 75 Pac. 177.

[f] Under Code of Civil Procedure, section 1870, permitting an intimate acquaintance of a party to give in evidence his opinion of the party's sanity, a ruling of the trial court as to whether a witness is an intimate acquaintance of the party will not be disturbed unless clearly wrong.—People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

§ 763. —— Examination of Witnesses.

[a] The matter of permitting a party who has cross-examined a witness to recall him, in order to make a further cross-examination, rests greatly in the discretion of the court, and it is not the practice of the appellate court to disturb the judgment for a refusal to permit a witness to be recalled, unless such discretion has been abused.—People v. Keith, 50 Cal. 137.

[b] Where a witness was on the stand, and the court, having asked whether the counsel desired to ask any further questions, received no answer and thereupon dismissed the witness, and refused to allow him to be recalled, held, that such matters rest in the discretion of the court, and, in the absence of a clear abuse of discretion, will not be interfered with on appeal.—People v. Moan, 65 Cal. 532, 4 Pac. 545.

[c] The allowance of leading questions will not be reviewed, except in a clear case of abuse or prejudice.—People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323.

[d] Refusal of trial court to request a witness, during recess, to ascertain a fact necessary to enable him to answer a question, is not reviewable on appeal.—People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

[e] Leave to re-examine a witness as to matters upon which he has already been examined, having been left by Code of Civil Procedure, section 2050, to the sound discretion of the court, cannot be assigned as error, although the examination is an unnecessary repetition, and tends only to emphasize a particular subject. People v. McNamara, 94 Cal. 509, 29 Pac. 953.

[f] On a trial for burglary, based on accused's entering a building with intent to commit arson, the motive for which was charged to have been to obtain the insurance, the permitting of a witness on cross-examination to state the aggregate of certain policies on the building over objection that it was not proper cross-examination is not reversible error, though the objection should have been sustained, since such evidence would have been competent if offered at the proper time, and the order of admitting competent evidence is largely discretionary with the trial court.—People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

[g] Exclusion of a question asked upon cross-examination, to show interest or bias of witness against defendant will not be reviewed where there is nothing in the record to indicate that testimony sought was material on question of the bias.—People v. Boren, 139 Cal. 210, 72 Pac. 899.

[h] The question of restricting the cross-examination of a witness with respect to questions as to whether or not he had previously talked with certain persons about his testimony is within the discretion of the trial court, not reviewable on appeal in the absence of a clear abuse thereof.—People v. Conness (Cal. Sup.), 88 Pac. 821.

§ 764. —— View.

[a] It is discretionary to allow a view of a scene of a homicide by the jury, and error assigned thereon must be affirmatively shown to warrant a reversal.—People v. Southern, 120 Cal. 645, 53 Pac. 214.

§ 765. —— Taking Evidence to Jury-room.

[a] It cannot be assigned for error that, when the jury retired after the trial of a criminal case, they were not allowed, upon defendant's request, to take with them a diagram which had been used to explain certain testimony. The refusal was within the discretion of the court.—People v. Cochran, 61 Cal. 548.

§ 766. —— Discharging Jury.

[a] Action of court in discharging a jury in a criminal case, because of its inability to agree on a verdict, is subject to review by the appellate court.—McLaughlin, Ex parte, 41 Cal. 211, 10 Am. Rep. 272.

§ 767. —— New Trial.

[a] The grant of a new trial because the verdict was contrary to the evidence will not

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be disturbed on appeal, except for manifest abuse of discretion.—(1887) People v. Hotz, 73 Cal. 241, 14 Pac. 856; People v. Flood, 102 Cal. 330, 36 Pac. 663; People v. Knutte, 111 Cal. 453, 44 Pac. 166.

[b] A motion for a new trial, in a criminal case, on the ground of newly discovered evidence, is addressed to the discretion of the trial judge; and unless his discretion has been abused, or some rule of law violated, the appellate court will not interfere.—People v. Sutton, 73 Cal. 243, 15 Pac. 86.

[c] Grant of new trial sustained on any specified grounds will be reversed only for abuse of discretion.—People v. Lum Yit, 83 Cal. 131, 23 Pac. 228.

[d] Granting or refusing a new trial rests largely in discretion of trial court, and an order denying a new trial will not be reversed, where it appears that question presented by motion for a new trial necessarily involved a consideration of the credibility of the witnesses.—People v. Merkle, 89 Cal. 82, 26 Pac. 642.

[e] A motion for a new trial in a criminal case is largely addressed to the discretion of the trial court; and a motion granted upon the ground that the verdict is not sustained by the evidence will not be reversed, except where there is no evidence which conflicts with that upon which the verdict rests.—People v. Brooks, 90 Cal. 174, 27 Pac. 72.

[f] On appeal from an order granting a new trial, the action of the lower court will be affirmed, if there is any ground on which it can be sustained.—People v. Flood, 102 Cal. 330, 36 Pac. 663.

[g] On appeal from an order granting a new trial, an opinion of the trial court, giving his reasons therefor, cannot be reviewed.—People v. Flood, 102 Cal. 330, 36 Pac. 663.

[h] Where there is evidence to support a verdict of guilty in a criminal case, and the trial court has refused a new trial, its judgment will not be interfered with on appeal.—People v. Curry, 103 Cal. 548, 37 Pac. 503.

[i] Refusal of a new trial on newly discovered evidence that would serve the purpose only of impeaching a witness will not be disturbed, except on a very exceptional showing.—People v. Ah Noon, 116 Cal. 656, 48 Pac. 799.

[j] If, by failure of court to punish newspaper editors for contempt, defendant has failed to obtain fair and impartial trial, and he makes it appear on motion for new trial, question will be reviewed.—People v. Durrant, 116 Cal. 209, 48 Pac. 75.

[k] When, upon motion for a new trial for misconduct of jury, the evidence is conflicting, the ruling of the court on the motion is conclusive on appeal.—People v. Kramer, 117 Cal. 647, 49 Pac. 842.

[l] When the trial judge refused a new trial, it will not be granted on appeal, when the verdict was on conflicting evidence.—People v. Soap, 127 Cal. 408, 59 Pac. 771.

[m] It is in the discretion of the court to allow or refuse to allow the cross-examination of witnesses who testify upon motion for new trial by affidavits or counter-affidavits on the question of misconduct.—People v. Sullivan, 129 Cal. 557, 62 Pac. 101.

[n] Where it does not appear that court abused its discretion in not granting a new trial on the ground of newly discovered evidence, its order denying a new trial will not be disturbed on that ground.—People v. Mitchell, 129 Cal. 584, 62 Pac. 187.

[o] The affidavits for new trial on the ground of misconduct of the district attorney and the judge being contradicted as to all material matters by the affidavits for the prosecution, the denial of new trial will not be disturbed on appeal.—People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742.

[p] Where a motion for a new trial for newly discovered evidence is based on accused's affidavit, stating that his evidence on the trial was false, and on affidavits of others setting out matters merely cumulative, its refusal will not be disturbed on appeal.—People v. Clarke, 130 Cal. 642, 63 Pac. 138.

[q] Order granting a new trial to a defendant convicted of rape will be affirmed upon appeal, if it was properly made on any ground raised in the defendant's motion.—People v. Castro, 133 Cal. 11, 65 Pac. 13.

[r] Where affidavits of defendant for new trial, on the ground of irregularity in action of the court, were disputed by counter-affidavits, determination made thereof by trial court will not be disturbed upon appeal, if no valid ground of complaint is disclosed by record.—People v. Wynn, 133 Cal. 72, 65 Pac. 126.

[s] The action of the trial court in denying a new trial on the ground of newly discovered evidence, because of the insufficiency of the showing that the new evidence is sufficient to render a different result probable, will not be disturbed, except in case of manifest abuse of the court's discretion.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[t] Where the evidence is conflicting, a new trial will not be ordered.—People v. Burt, 3 Pac. 653; (1885) People v. McGinn, 7 Pac. 762.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 904; 15 Cent. Dig., cols. 839-851, §§ 3067-3071.

§ 768. Questions of Fact, Verdicts and Findings.

[a] Indictment and trial in the court of sessions in the city and county of San Francisco for larceny, charged to have been committed within said city and county. The evidence tended to show that the offense was there committed, and the verdict was "guilty as charged in the indictment." Held, that the verdict was conclusive as to the offense being committed within the jurisdiction of

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said court.—People v. Magallones, 15 Cal. 426.

[b] In a criminal case the supreme court will not deal with a question of the mere preponderance of evidence.—People v. Ashnauer, 47 Cal. 98.

[c] Verdict convicting defendant in criminal cases will not be reversed for insufficiency of evidence, if the evidence was prima facie sufficient. The weight to be accorded the evidence is a question for the jury.—People v. Mayes, 66 Cal. 597, 56 Am. Rep. 119, 6 Pac. 691.

[d] Where there is any evidence to support the verdict in a criminal case, it will not be reversed.—People v. Wilson, 66 Cal. 370, 5 Pac. 624; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Nagle, 29 Pac. 640.

[e] New trial will not be ordered, on appeal, on ground of insufficiency of evidence, when there is some evidence of defendant's guilt.—People v. Doane, 77 Cal. 562, 20 Pac. 84.

[f] Jury may find verdict upon testimony of one witness against testimony of any greater number.—People v. Chun Heong, 86 Cal. 333, 24 Pac. 1021.

[g] Verdict will not be disturbed for insufficiency of evidence where evidence and circumstances are such as could be better observed and weighed by jury and trial court than in this court, and judge of trial court, who had advantage of observing witnesses and seeing whole trial, has denied a new trial.—People v. Neary, 104 Cal. 373, 37 Pac. 943.

[h] General verdict of guilty implies proof of all facts necessary to conviction.—People v. Jochinsky, 106 Cal. 638, 39 Pac. 1077.

[i] Decision of a jury in a criminal case, upon legal evidence, is absolutely final and not subject to review upon appeal.—People v. Maroney, 109 Cal. 277, 41 Pac. 1097.

[j] Appellate court has no jurisdiction in criminal cases to review the evidence, although questions of law often arise from the evidence of which the appellate court has jurisdiction.—People v. Lowen, 109 Cal. 381, 42 Pac. 32.

[k] Supreme court has no jurisdiction in criminal cases, except to determine questions of law, and it cannot pass upon the evidence, or look at it, except for purpose of considering question of law, and the only way it can correct error is by granting a new trial. People v. Marshall, 112 Cal. 422, 44 Pac. 718.

[l] Arguments touching credibility of witnesses and weight to be given their testimony cannot be considered by supreme court. People v. Durrant, 116 Cal. 200, 48 Pac. 75.

[m] If there be evidence adduced logically tending and legally sufficient to prove guilt of defendant, supreme court cannot disturb verdict.—People v. Durrant, 116 Cal. 200, 48 Pac. 75.

[n] Where not clear that verdict is based on passion or prejudice, supreme court can only determine whether sufficient legal evidence was offered to sustain conviction. People v. Durrant, 116 Cal. 201, 48 Pac. 75.

[o] That defendant does not testify in his own behalf cannot be considered by an appellate court on the question of sufficiency of the evidence to justify conviction.—People v. Page, 116 Cal. 386, 48 Pac. 326.

[p] Order granting new trial for insufficiency of evidence to sustain conviction will not be reversed.—People v. Chew Wing Gow, 120 Cal. 538, 65 Am. St. Rep. 197, 52 Pac. 846.

[q] Where the evidence makes a case proper to be submitted to the jury, its sufficiency and weight are solely for that body, and not for the court on appeal.—People v. Hough, 120 Cal. 538, 65 Am. St. Rep. 197, 52 Pac. 846.

[r] The supreme court having appellate jurisdiction in criminal cases on questions of law alone, clear failure of proof is necessary to warrant a reversal on appeal for insufficiency of the evidence.—People v. Kuches, 120 Cal. 566, 52 Pac. 1002.

[s] Where the only corroborating evidence given under Penal Code, section 1111, requiring the testimony of an accomplice to be corroborated, was by a witness claimed to be also an accomplice, the question whether he was such was for the jury, and its verdict, from which it must be assumed (defendant being found guilty) that he was found not to be an accomplice, is conclusive of that fact, if the evidence thereon was properly received.—People v. Creegan, 121 Cal. 554, 53 Pac. 1082.

[t] The supreme court's appellate jurisdiction is limited to matters of law alone, hence a verdict of guilty, supported by the evidence of the prosecuting witness, cannot be disturbed, unless such evidence is so incredible and false on its face that the court would deal with it as a matter of law.—People v. Logan, 123 Cal. 414, 56 Pac. 56.

[u] The weight and credibility of evidence showing defendant guilty of the offense charged is for the jury, and their conclusions thereon cannot be disturbed on appeal.—People v. Cummings, 123 Cal. 269, 55 Pac. 898.

[v] Where the testimony or defendant that his confession was not free and voluntary is contradicted, the jury, under proper instructions, are the sole judges of the credibility of the witnesses in regard to the matter, and their verdict will not be disturbed.—People v. Oliveria, 127 Cal. 376, 59 Pac. 772.

[vw] Where the prosecuting witness testified that he left a saloon in defendant's company, and that, soon after, the defendant seized and robbed him, while defendant testified that he remained in the saloon, which statement was corroborated by a woman who worked there, a verdict of guilty will not be set aside, the jury not being bound to de-

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cide in conformity with the testimony of the greater number of witnesses.—People v. Stegenberg, 127 Cal. 510, 59 Pac. 942.

[w] Where there is evidence tending to support the verdict of jury, though it may appear weak, and though it may seem to indicate that the law would have been satisfied with a verdict for an offense less in degree, this court cannot review or set aside the verdict.—People v. Sexton, 132 Cal. 37, 64 Pac. 107.

[x] Where defendant charged with murder is found guilty of murder in first degree, a claim that he should have been acquitted, on the ground of insanity, will not be allowed upon appeal, where there is not doubt of his guilt, if he were not insane at the time of the homicide, and the evidence as to his sanity was not so entirely insufficient as to warrant this court in disturbing the verdict. People v. Daily, 135 Cal. 104, 67 Pac. 16.

[y] Appellate jurisdiction of this court in criminal cases is limited to a review upon questions of law alone, and where there is some evidence tending to support a verdict of guilty upon a prosecution for murder, there can be no question of law as to the sufficiency of the evidence to support the verdict.—People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014.

[z] It is only in extreme cases that supreme court will substitute its judgment for that of jury as to sufficiency of finding on controverted facts.—People v. Glover, 141 Cal. 246, 74 Pac. 745.

[aa] Where legal evidence was introduced to prove all the elements of a crime charged, the verdict of the jury is conclusive on appeal.—People v. Gonzales, 143 Cal. 605, 77 Pac. 448.

[bb] A verdict in a criminal case supported by sufficient evidence is conclusive in the supreme court.—People v. Donnolly, 143 Cal. 394, 77 Pac. 177.

[cc] Under the constitution, giving the court of appeals jurisdiction in criminal cases on questions of law alone, where there is some evidence to sustain the verdict, its sufficiency is not reviewable.—People v. Heart, 1 Cal. App. 166, 81 Pac. 1018.

[dd] The determination of a jury as to the credibility of testimony is not subject to review.—People v. Belardes (Cal.), 48 Pac. 624.

[ee] Where the record on appeal discloses sufficient evidence to uphold a conviction, the judgment will not be disturbed.—People v. Bennett, 50 Pac. 703.

[ff] A verdict of conviction cannot be disturbed on the ground of the insufficiency of evidence.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

FOR AUTHORITIES FROM OTHER STATES:

See 17 L. R. A. 484, note. See, also, 12 Cyc. 906-910; 15 Cent. Dig., cols. 853-872, §§ 3074-3084.

§ 769. —— Verdict Contrary to Evidence or Preponderance.

[a] Where, clearly, evidence does not warrant a conviction, the appellate court will reverse.—People v. San Martin, 2 Cal. 484; People v. Ah Loy, 10 Cal. 301; People v. Lewis, 36 Cal. 531.

[b] When it is manifest, from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the court below has refused a new trial, this court will reverse the judgment and order a new trial.—People v. Acosta, 10 Cal. 195.

[c] A verdict not so contrary to the testimony as to impress the court with the belief that it is the result of passion or prejudice will not be disturbed.—People v. Vance, 21 Cal. 400.

[d] A verdict will not be reversed because a preponderance of the evidence is against it.—People v. Ashnauer, 47 Cal. 98.

[e] Court will not pass on sufficiency of the evidence unless there is an entire failure of proof, but where there is no evidence to sustain the verdict, it must be set aside.—People v. Smallman, 55 Cal. 185.

[f] When there is any evidence legally tending to sustain a fact, the question whether it amounts to proof of that fact is for the jury, and their finding will not be disturbed upon appeal, unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice.—People v. Wong Chung Suey, 110 Cal. 117, 42 Pac. 420.

[g] When verdict and judgment are supported by legal and sufficient evidence, inquiry of supreme court ends except where evidence against defendant is so slight as to clearly show that jury must have been influenced by passion or prejudice.—People v. Durrant, 116 Cal. 206, 207, 48 Pac. 75.

[h] To justify interference with verdict appellate court must be able to say that there was no evidence upon which verdict could be properly based.—People v. Wilson, 119 Cal. 387, 51 Pac. 639.

[i] In a criminal prosecution the supreme court is not authorized to set aside a conviction on the ground of insufficiency of evidence, unless there is a total absence of evidence on an essential point.—People v. Williams, 133 Cal. 165, 65 Pac. 323.

[j] A verdict approved by the judge can only be disturbed when the appellate court can say as a matter of law that there is no evidence to support it.—People v. Mahatch (Cal. Sup.), 82 Pac. 779.

§ 770. —— Conflicting Evidence.

[a] Verdict of guilty will not be set aside by the appellate court on the ground that it is against the weight of conflicting evidence. There must, to authorize an interfer-

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ence by this court, be such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion or prejudice, or bias of some kind.—People v. Vance, 21 Cal. 400.

[b] Where there is sufficient to sustain verdict on conflicting evidence, appellate court will not interfere.—People v. Brown, 27 Cal. 500; People v. Gill, 45 Cal. 285; People v. Simpson, 50 Cal. 304; People v. Dunne, 80 Cal. 34, 21 Pac. 1130; People v. Evans, 41 Pac. 444; People v. Donaldson, 70 Cal. 119, 11 Pac. 681; People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

[c] Although it is the practice of appellate courts to refuse to disturb a verdict in a criminal case on the ground that it is not warranted by the evidence, when there is a substantial conflict in the evidence, yet there are exceptional cases, and one of these is where a rape is alleged to have been committed on a child under ten years of age, and a conviction is had on her uncorroborated testimony, and she makes no complaint for two years, sustains no physical injury, makes no outcry, and the defendant is her stepfather, and physicians testify that it was improbable that bleeding and great bodily pain would not have followed, and the defendant testifies in his own behalf, denying the commission of the offense.—People v. Hamilton, 46 Cal. 540.

[d] Unless evidence is so slight that court below would be justified in directing a verdict for defendant this court is not authorized to reverse the judgment upon the ground that the evidence does not sustain a verdict of guilty. If there is a conflict it is for the jury, under proper instructions, to determine the credibility of witnesses.—People v. Bird, 60 Cal. 7.

[e] Where evidence is conflicting, appellate court will not disturb the verdict, even though it may differ from jury as to preponderance of evidence.—People v. Levy, 71 Cal. 618, 12 Pac. 791; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595.

[f] Where evidence is conflicting, verdict will not be set aside if there is sufficient evidence to support it though preponderance is against it.—People v. Chun Heong, 86 Cal. 331, 24 Pac. 1021.

[g] In prosecution for robbery, where there was positive evidence before the jury on the part of several witnesses that the defendant was the individual who committed the offense charged, a verdict of guilty must be deemed to have determined any conflict of evidence concerning the defense of alibi, or as to the identity of the robber with the person accused.—People v. Fice, 97 Cal. 459, 32 Pac. 531.

[h] Verdict of conviction upon conflicting evidence will not be disturbed for insufficiency of the evidence to support it, even though a portion of the evidence is calculated to cast discredit on the case of the prosecution.—People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

[i] Rule applicable to conflicting evidence does not prevent the review of the sufficiency of evidence to show a case of embezzlement, where the conflicting evidence is as to facts, which, if taken as proven, do not make out a case of embezzlement.—People v. O'Brien, 106 Cal. 104, 39 Pac. 325.

[j] If there is evidence for prosecution sufficient to sustain a verdict against accused, jury is final arbiter of facts, and its determination will not be disturbed upon appeal by reason of conflicting evidence on behalf of the defendant.—People v. Roemer, 114 Cal. 51, 45 Pac. 1003.

[k] Upon a defense of insanity, where the evidence of the expert witnesses was conflicting, the finding of the jury as to the sanity or insanity of the defendant is conclusive. People v. Larrabee, 115 Cal. 158, 46 Pac. 922.

[l] Where evidence in criminal prosecution is conflicting and trial judge considered it sufficient to sustain verdict its insufficiency cannot be assumed on appeal.—People v. Gerger, 116 Cal. 442, 48 Pac. 389.

[m] Verdict for manslaughter will not be disturbed upon appeal, when evidence is conflicting as to whether homicide was or was not committed in self-defense, and there is enough evidence for the prosecution to warrant the verdict, and no such disparity appears in the statement of the witnesses for the prosecution as to render their evidence inherently improbable or necessarily unworthy of belief.—People v. Brittan, 118 Cal. 409, 50 Pac. 664.

[n] Where the evidence in a criminal case is squarely conflicting, and all of the direct evidence in the case comes from Chinese witnesses, whose interests were involved in the litigation, and who flatly contradicted each other, the verdict of the jury will not be disturbed on appeal.—People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984.

[o] Upon appeal from conviction of manslaughter, where evidence conflicts, and there is evidence sufficient to sustain the verdict, the right and province of the jury to determine the credibility of the witnesses and to discredit evidence for the defendant contradictory to that for the prosecution, cannot be questioned in this court.—People v. Lewis, 124 Cal. 551, 57 Pac. 470.

[p] Where, in a criminal case, the evidence on the question of the guilt of the accused was conflicting, the supreme court will not interfere with the verdict of the jury, approved by the trial court.—People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Bowers (Cal. App.), 82 Pac. 553.

[q] Supreme court, under Constitution, article 6, section 4, has appellate jurisdiction in cases prosecuted by indictment in a court of record, in questions of law only, and cannot set a verdict aside where the evidence is conflicting.—People v. Bowers, 18 Pac. 660.

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§ 771. —— —— Ruling on Challenge to Juror.

[a] Supreme court can only review order denying challenge of a juror upon the ground of actual bias, when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law, and where the evidence is conflicting, or shows a state of facts which might have justified the trial court in excluding the juror, the decision by the trial court as to the question of fact is conclusive.—People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

[b] A challenge to a trial juror in a criminal case for actual bias can only be reviewed upon appeal when the question presented is one of law; and the action of the trial court upon such a challenge will not be reviewed where the question is one of fact, or of conflicting statements, or where the evidence would justify a finding either way. People v. Scott, 123 Cal. 434, 56 Pac. 102.

[c] Decision of challenges to jurors for actual bias in having opinion founded on rumors and newspaper statements is largely in the discretion of the court, and when the evidence on the subject presents a question of fact, and not of law, the decision will not be reviewed upon appeal.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

[d] On contradictory testimony by a juror as to bias, the finding of the trial court as to competency is conclusive.—People v. Sowell, 145 Cal. 292, 78 Pac. 717.

§ 772. —— —— Ruling on Motion for New Trial.

[a] Action of the trial court in granting a new trial in a criminal case on the ground that the verdict was not supported by the evidence, which, though ample, was conflicting, will not be disturbed.—People v. Fugitt (Cal.), 46 Pac. 379.

[b] Determination of trial court on issue of fact raised on a motion for a new trial on the ground of the misconduct of a jury in a criminal case is conclusive on appeal.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

§ 773. Harmless and Prejudicial Error.

[a] Judgment on conviction for larceny will be reversed where the evidence, far from proving legal guilt, is not even sufficient to warrant an inference of moral culpability.—People v. Smyth, 11 Cal. 407.

[b] Appellate court will not reverse a judgment of conviction in a criminal case, by reason of alleged error in a proceeding had in course of the trial, by express agreement of the defendant and his counsel, unless bound to do so by some controlling rule of law.—People v. Henderson, 28 Cal. 465.

[c] Judgment of lower court will be reversed where the bill of exceptions shows that there was a total failure to prove the corpus delicti.—People v. Olivie, 60 Cal. 69.

[d] Variance in name of murdered man will not justify reversal when record does not show that there was no evidence as to identity.—People v. Leong Sing, 77 Cal. 119, 19 Pac. 254.

For Authorities from Other States:

See 12 Cyc. 910-935; 15 Cent. Dig., cols. 873-993, §§ 3085-3191.

§ 774. —— Presumption of Prejudice from Error.

[a] In a criminal case it would require the most conclusive showing that the error did not prejudice the party to induce this court to disregard it.—People v. Ybarra, 17 Cal. 166.

[b] Where instruction given could, under no circumstances, be correct the legal presumption is that the error was to the prejudice of the party against whom the error was committed.—People v. Ybarra, 17 Cal. 166.

[c] If the error be in a refusal to allow a question asked by the defense, although it may seem probable that the answer would have been of no material assistance to defendant, prejudice will be presumed.—People v. Williams, 18 Cal. 187.

[d] In criminal cases courts have no power to affirm judgments merely because the judges think that upon the merits the judgment is right. If there be error in the proceedings it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal, having a constitutional right to stand upon strict law.—People v. Williams, 18 Cal. 187.

[e] Where illegal evidence has been admitted, a reversal must follow, unless the court can clearly see that the illegal evidence could not have prejudiced defendant.—People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401.

[f] Error committed at the trial will be presumed to have injured accused, unless the contrary clearly appears.—People v. Murphy, 47 Cal. 103.

[g] When reversal is sought for refusal of proper instruction, appellant must show that it was not given elsewhere or give respondent opportunity to show that it was.—People v. Von, 78 Cal. 3, 20 Pac. 35.

[h] The fact that a juror was engaged in an earnest conversation with the prosecuting witness, while inexcusable, is not sufficient to raise a presumption that the juror was improperly influenced thereby.—People v. Dunne, 80 Cal. 34, 21 Pac. 1130.

[i] Error is presumed to work injury unless record clearly shows contrary.—People v. Sansome, 84 Cal. 451, 24 Pac. 143.

[j] It must be presumed that subsequent proof proposed to be given was given, if no motion was afterward made to strike out the evidence for want of offered proof.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[k] Upon the trial of a defendant accused of murder, whilst it is presumably injurious

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for the court to give, at the request of the district attorney, merely abstract propositions of law having no connection with the evidence, yet the presumption of injury is rebutted and overcome where the record shows affirmatively that the error was harmless.—People v. Smith, 105 Cal. 676, 39 Pac. 38.

[l] Prejudice is presumed from an erroneous instruction in a criminal case; and it cannot be rendered harmless by giving a contradictory instruction which is correct; but the giving of contradictory instructions is itself error, and it is usually impossible to tell whether the jury may not have followed the erroneous instruction.—People v. Marshall, 112 Cal. 422, 44 Pac. 718.

[m] It cannot be assumed that a jury were influenced by statements of the court as to evidence in ruling upon objections, when they were instructed to disregard them.—People v. Mayes, 113 Cal. 618, 45 Pac. 860.

[n] Where the record shows error, and does not show its effect, it is presumed to be prejudicial.—People v. Richards, 136 Cal. 127, 68 Pac. 477.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 912; 15 Cent. Dig., cols. 876-888, §§ 3090-3099.

§ 775. —— Burden to Show Prejudice from Error.

[a] Not only error, but injury, must be shown to justify the reversal of a judgment of conviction.—People v. Moan, 65 Cal. 532, 4 Pac. 545; People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

[b] Appellant must show that error in admitting evidence was harmful to him.—People v. Olsen, 80 Cal. 124, 22 Pac. 125.

[c] It being incumbent on appellant to show error affirmatively, where an instruction to the jury appears twice in the record—the form in one instance being unobjectionable; in another, erroneous—the former will be regarded as the instruction actually given.—People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[d] Where the evidence supports the verdict, and proper instructions were given, and no exceptions were taken to the admission of evidence, error in procedure must be plainly shown to have been prejudicial, to justify a reversal of the judgment or the order denying a new trial.—People v. Molina, 126 Cal. 505, 59 Pac. 34.

§ 776. —— Error Favorable to Appellant.

[a] Defendant cannot complain of error favorable to him.—People v. Bush, 68 Cal. 628, 10 Pac. 169; People v. Lundin, 120 Cal. 310, 52 Pac. 807; People v. Walker, 140 Cal. 156, 73 Pac. 831.

[b] Where jurors in a criminal case were permitted to separate after the case had been submitted to them, and before they had arrived at a verdict of guilty subsequently rendered, prejudice will be presumed.—People v. Adams, 143 Cal. 208, 76 Pac. 954, 66 L. R. A. 247.

[c] Any error in the failure of the court on a prosecution for grand larceny to give the jury a form of verdict permitting them to find defendant guilty of petit larceny is favorable to the defendant, and is not cause for reversal on appeal from a conviction of grand larceny.—People v. Clark, 145 Cal. 727, 79 Pac. 434.

§ 777. —— Technical Error.

[a] That technical error was committed by court during criminal trial is not enough of itself to produce a reversal of the judgment, but it must be such an error as produced an injury to the substantial rights of the defendant, and upon him is cast the burden of showing it.—People v. Brotherton, 47 Cal. 388.

[b] On hearing appeal this court will give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of a defendant.—People v. Sprague, 53 Cal. 491.

§§ 778, 779. —— Defects in Preliminary Examination.

[a] Omission to ask witness, at preliminary examination, his business or profession is not prejudicial to defendant.—People v. Rodrigo, 69 Cal. 602, 11 Pac. 481.

[b] Mere irregularity in preliminary hearing, not affecting substantial rights of defendant, will not justify setting aside conviction on appeal.—People v. Sehorn, 116 Cal. 505, 48 Pac. 495.

[c] Defects in preliminary examination and commitment not affecting substantial rights of accused are harmless.—People v. Van Horn, 119 Cal. 326, 51 Pac. 538.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 914-917; 15 Cent. Dig., cols. 888-910, §§ 3100-3118.

§ 780. —— Defects, Indictment or Information.

[a] Mere formal defects in the indictment, by which no substantial right of the defendant could be affected, will not justify an arrest of the judgment. Thus, where, in an indictment for murder, the initial letters only of the Christian names of the deceased were prefixed to his surname, and it did not appear but that he was generally known, recognized and identified by the name as contained in the indictment this court will not reverse the order of the court below refusing to arrest the judgment.—People v. Dick, 37 Cal. 277.

[ab] Judgment of conviction on information which states no offense will be reversed. People v. Miller, 82 Cal. 108, 22 Pac. 934.

[b] Mere formal defects in information are harmless.—People v. Fowler, 88 Cal. 139, 25 Pac. 1110.

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[c] Where defect in indictment or information is merely technical, and does not affect the substantial rights of parties, a judgment of conviction will not be reversed by reason of such defect.—People v. Hitchcock, 104 Cal. 482, 38 Pac. 198.

[d] Failure of indictment to allege material fact is ground for reversal.—People v. Cohen, 118 Cal. 81, 50 Pac. 20.

[e] An irregularity in indorsing the mere surname of a witness upon the indictment, without giving his Christian name, is harmless. if the defendant, immediately after the finding of the indictment, knew the particular person so named upon the indictment. People v. Quinn, 127 Cal. 542, 59 Pac. 987.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 889-894, §§ 3101-3105.

§ 781. —— Drawing Jury.

[a] Since the only object of the statute in requiring that the clerk's certificate to the list of persons drawn for jurors shall state the date of the order directing drawing is to identify such order, in a case where the record sufficiently identified such order, the omission of the date from the clerk's certificate was an immaterial error.—People v. Iams, 57 Cal. 115.

§ 782. —— Informing Accused of Right to Challenge Juror.

[a] Where defendant had the benefit of all the peremptory challenges to which he was entitled, the omission of the court to inform him that, if he intends to challenge a juror, he must do so when the juror appears, and before he is sworn, as required by Penal Code, section 1066, is not prejudicial error.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[b] Failure of the court to inform defendant, as provided by Penal Code, section 1066, that if he desires to challenge any particular juror he must do so before the juror is sworn, is not ground for reversing the judgment, if it appears that defendant and his counsel were fully aware of his rights, and defendant is not prejudiced thereby.—People v. Mortier, 58 Cal. 262; People v. O'Brien, 88 Cal. 483, 26 Pac. 362.

[c] Where defendant is represented by counsel, the neglect of the court to inform him of his right to challenge jurors, as required by Penal Code, section 1066, is not prejudicial.—People v. Ellsworth, 92 Cal. 594, 28 Pac. 604.

§ 783. —— Rulings on Challenge to Juror or Panel.

[a] Improper allowance of challenge by prosecution is sufficient to cause reversal of judgment on a verdict of guilty.—People v. Stewart, 7 Cal. 140.

[b] If a party attempt to challenge a juror for implied bias, and, the challenge being disallowed, he then challenge peremptorily, and, if it does not appear affirmatively that he had exhausted his peremptory challenges at the time a full panel was sworn, he is not prejudiced by the disallowance of his attempted challenge.—People v. McGungill, 41 Cal. 429.

[c] Where the prosecution in a criminal case passes the jury to the defendant, and the defendant exercises his right of peremptory challenge by objecting to one juror, the action of the court in permitting the prosecution to peremptorily challenge a juror is not ground for reversal.—People v. Majors, 65 Cal. 138.

[d] Where the court in a murder trial sustained an objection to a question asked a talesman during his examination on his voir dire as to his qualifications as a juror, and said talesman was peremptorily challenged by defendant, and the court subsequently permitted another peremptory challenge in addition to the number allowed by law, such ruling, if error, was harmless.—People v. Freeman, 92 Cal. 359, 28 Pac. 261.

[e] In impanelment of jury, where name of a juror has been passed by the people, and thereafter defendant has exercised right to challenge other jurors, peremptorily, it is not prejudicial error for the court to allow the prosecution further to examine the juror who has been passed, and to challenge him peremptorily, if such juror has not been sworn, and the panel is not completed, and the challenges on the part of the people have not been exhausted.—People v. Dolan, 96 Cal. 315, 31 Pac. 107.

[f] Error in disallowing challenge for cause is cured by exercise of peremptory challenge if jury is competent without exhausting all peremptory challenges.—People v. Durrant, 116 Cal. 195, 196, 48 Pac. 75.

[g] When fair and impartial jury was obtained, error in allowing challenge will not be reviewed.—People v. Durrant, 116 Cal. 199, 48 Pac. 75.

[h] Where challenges for actual bias are denied and appellant does not use his peremptory challenges and defendant had unused challenges when jury was completed, ruling will not be reviewed.—People v. Winthrop, 118 Cal. 88, 50 Pac. 390.

[i] Error in denying defendant's challenge to the panel of jurors, without permitting him to make proof, held cured by subsequent proceedings.—People v. Lee, 1 Cal. App. 169, 81 Pac. 969.

§ 784. —— Excuse of Juror.

[a] Accused is not prejudiced by the excuse of a juror whom he has challenged, although the prosecution has concurred in the challenge.—People v. Warner, 147 Cal. 546, 82 Pac. 196.

§ 785. —— Time of Trial.

[a] Compelling accused to go to trial three days after arraignment is not ipso facto

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ground for reversal.—People v. Fredericks, 106 Cal. 557, 39 Pac. 944.

[b] Where it does not appear that defendant's case was prejudiced by action of court in overruling his motion for a postponement, such action will not be reversed on appeal. People v. Puttman, 129 Cal. 258, 61 Pac. 961.

§ 786. —— Conduct of Trial in General.

[a] Temporary suspension of a trial of a criminal case, to dispose of a motion in another cause, is not an error or even an irregularity where the prisoner's rights do not appear to have been injuriously affected.—People v. Lafuente, 6 Cal. 202.

[b] An error in informing a witness for the prosecution that his testimony cannot be used against himself does not prejudice defendant, so as to be ground of reversal.—People v. Rodundo, 44 Cal. 538.

[c] It is error to read to jury portion of information relating to prior conviction where defendant has confessed it.—People v. Sansome, 84 Cal. 450, 24 Pac. 143.

[d] Defendant cannot complain of the court's refusal, during the district attorney's address to the jury, of his request that the stenographer's notes of a witness' evidence be read to the jury on account of an alleged misstatement of it by the district attorney, where the court subsequently offered to the jury, if any of them desired it, to have the notes read after such address.—People v. Faulke, 96 Cal. 17, 30 Pac. 837.

[e] Where, on defendant's challenge to the panel under a special venire, on the ground of bias on the part of the sheriff, testimony was taken, in the absence of all the jurors, which was embodied in an affidavit, whereupon the challenge was sustained, and a venire issued to the coroner, the filing of such affidavit, if irregular, was not prejudicial to defendant.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049.

[f] Case will not be reversed for abuse of discretion in refusing to admit of experiments unless the evidence comes clearly within principles by which it is allowed.—People v. Woon Tuck Wo, 120 Cal. 296, 52 Pac. 833.

§ 787. —— Admission of Evidence.

[a] Evidence that prisoner was a gambler, when gambling was licensed, is not prejudicial.—People v. Butler, 8 Cal. 435.

[b] Conviction will not be reversed for admission of improper evidence, unless defendant was prejudiced thereby.—People v. Plummer, 12 Cal. 256; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; People v. Garcia, 40 Pac. 114; People v. Evans, 41 Pac. 444; People v. Davis, 47 Cal. 93; People v. Lemperle, 94 Cal. 45, 29 Pac. 709; People v. Hawes, 98 Cal. 648, 33 Pac. 791; People v. Kilvington, 36 Pac. 13; People v. Donaldson, 70 Cal. 116, 11 Pac. 681; People v. Nelson, 85 Cal. 429, 24 Pac. 1006; People v. Daniels, 105 Cal. 262, 38 Pac. 720.

[c] Error in admission of evidence is cured by withdrawing such evidence, and directing the jury to disregard it.—People v. Bealoba, 17 Cal. 389; People v. French, 7 Pac. 822.

[d] Where question, the answer to which could not prejudice defendant, or one to which no answer is given, is objected to by defendant and improperly admitted by the court, the error is immaterial.—People v. Dennis, 39 Cal. 625.

[e] If error is committed in admission of portion of dying declaration as to certain fact error does not prejudice defendant in case his witnesses subsequently testify to all particulars and details of such fact.—People v. Montgomery, 53 Cal. 576.

[f] Admission of evidence in chief which is properly rebuttal, is error without injury.—People v. Bennett, 65 Cal. 267, 3 Pac. 868.

[fg] Admission of evidence tending to prejudice jury is reversible.—People v. Hamblin, 68 Cal. 103, 8 Pac. 687.

[g] Error in admitting evidence of fact proved by other competent evidence is immaterial.—People v. De Witt, 68 Cal. 588, 10 Pac. 212; People v. Collins, 75 Cal. 412, 17 Pac. 430; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719; People v. Shaw, 111 Cal. 171, 43 Pac. 593.

[h] Error in admission of evidence is cured by striking it out and instructing jury not to consider it.—People v. French, 69 Cal. 174, 10 Pac. 378.

[i] Erroneous admission of evidence of fact subsequently proved by defendant's testimony is harmless.—People v. Marseiler, 70 Cal. 100, 11 Pac. 503.

[j] Admission of evidence tending to show that the defendant was a person of immoral character is without prejudice if the defendant, when a witness in his own behalf, testifies substantially to the same effect.—People v. Daniels, 70 Cal. 521, 11 Pac. 655.

[k] Erroneous admission of evidence not tending to prove defendant guilty of crime for which he was tried or any similar offense is not prejudicial.—People v. Bolanger, 71 Cal. 18, 11 Pac. 799.

[l] Error of allowing defendant's wife to testify against him is cured by defendant afterward testifying to the same fact.—People v. Ketchum, 73 Cal. 635, 15 Pac. 353.

[lm] Admission of confession without proof that it was voluntary is prejudicial error.—People v. Yeaton, 75 Cal. 418, 17 Pac. 544.

[m] Error in allowing question is immaterial when answer is not prejudicial.—People v. Brown, 76 Cal. 574, 18 Pac. 678.

[n] A witness on trial for robbery having testified that he did not know whether defendant knew that the person robbed had all his money together or not; that he might have seen it for all witness knew; that he might have seen more than ten dollars—the refusal to strike out what the witness testi-

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fied that defendant "might have seen," if error at all, is harmless, as it was so uncertain as not to be likely to have injured defendant. People v. Ward, 77 Cal. 113, 19 Pac. 373.

[no] Admission of evidence of flight of alleged accomplice is reversible error.—People v. Lee Chuck, 78 Cal. 326, 20 Pac. 719.

[np] Erroneous admission of evidence tending to prejudice minds of jury is ground for reversal.—People v. Elliot, 80 Cal. 303, 22 Pac. 207.

[nq] Where giving of note is proved by secondary evidence without objection, it is reversible error to instruct that note is not in evidence.—People v. Mauritzen, 84 Cal. 39, 24 Pac. 33.

[o] Where motion to strike out irrelevant evidence was temporarily denied on the district attorney's assurance that he would produce connecting evidence, and was granted on his failure to do so, there was no error. People v. McLean, 84 Cal. 480, 24 Pac. 32.

[op] Admission of opinion of witness upon facts to which he had testified is reversible error.—People v. Ah Own, 85 Cal. 584, 24 Pac. 780.

[p] Court cannot, on appeal, disregard evidence erroneously admitted, and look into the unobjectionable evidence to determine whether it is sufficient to sustain the verdict. People v. Wallace, 89 Cal. 158, 26 Pac. 650.

[q] Error in the court's refusal to strike out incompetent evidence of declarations is not cured by a subsequent instruction that defendant is not bound by anything said, not in his hearing or presence, by the person who made the remark, such instruction not being a plain and unequivocal direction to disregard the evidence.—People v. Wallace, 89 Cal. 158, 26 Pac. 650.

[r] The refusal of the court to strike out an answer of a witness for the prosecution, on his redirect examination, that he had known the defendant "since he was at San Quentin," is not a material error, where the witness had said the same thing in his cross-examination by the defendant's counsel, without any objection being made to it.—People v. Dollor, 89 Cal. 513, 26 Pac. 1086.

[s] Admission of evidence which at the time appears to be incompetent is harmless error, where it becomes competent at a later stage of the trial, unless it appears that the adverse party was injured by the admission of such evidence at the wrong time.—People v. Squires, 99 Cal. 327, 33 Pac. 1092.

[t] Admission in evidence of declarations of defendant which do not constitute a confession is not a reversible error where there is nothing in the circumstances under which they were made which would justify their exclusion.—People v. Young, 102 Cal. 411, 36 Pac. 770.

[u] Where evidence has been already received without objection a repetition of it against objection is harmless.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[v] A defendant who is convicted of burglary in the second degree, upon evidence which showed that the crime could only have been burglary in the first degree, is not prejudiced by such error, and cannot object thereto on appeal.—People v. Maroney, 109 Cal. 277, 41 Pac. 1097.

[w] One who lived with defendant testified for the state that on the night of the murder defendant, on coming home, told witness that he killed deceased, and warned witness to keep silence. Held, that error in admitting the confession without foundation having been laid therefore was harmless, as the confession was voluntary.—People v. Kamauna, 110 Cal. 609, 42 Pac. 1090.

[x] Error in admitting statements made by an alleged accomplice after the commission of the robbery, and not in defendant's presence, is not cured by the accomplice testifying to the same facts.—People v. Oldham, 111 Cal. 648, 44 Pac. 312.

[y] Error in admitting under objection and exception, statements made by an alleged accomplice, after the crime was committed, and in defendant's absence, is not cured by instructing the jury, after the case is argued, to disregard such evidence in making up their verdict.—People v. Oldham, 111 Cal. 648, 44 Pac. 312.

[z] Evidence of other acts of intercourse of the defendant with the prosecuting witness, besides the specific one charged, is harmless if erroneous, where the materially objectionable features of the evidence were not objected to or any exception reserved by the defendant, and where further evidence of a similar nature was stopped by the judge in a manner indicating to the jury that it should consider only the act charged, and where it further appears that the other evidence in the case was clearly sufficient to establish the act charged.—People v. Rangod, 112 Cal. 669, 44 Pac. 1071.

[aa] Admission of evidence out of regular order is not ground for reversal.—People v. Mayes, 113 Cal. 618, 45 Pac. 860.

[bb] In a prosecution for forging and uttering a check, the admission in evidence of the certificate of protest of the check, while erroneous, was not prejudicial, where the fact of nonpayment of the check was admitted.—People v. Whiteman, 114 Cal. 338, 46 Pac. 99.

[cc] Error in the admission of evidence is cured by an order striking out the same and an instruction that it should be totally disregarded.—People v. Barney, 114 Cal. 554, 47 Pac. 41.

[dd] It is not error to overrule an objection to a question the answer to which may be relevant, though when given it proves not to be.—People v. Durrant, 116 Cal. 179, 48 Pac. 75.

[ee] Rule as to cure of error in a criminal case, where evidence is admitted and subsequently rejected, is different from that which applies where evidence is rejected and subsequently admitted; in the former case, in-

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jury may be done by allowing the incompetent evidence to go to the jury, which cannot be adequately cured by a subsequent ruling; but the reason of the rule is not the same in the latter case, and the error in rejecting the evidence is cured by its subsequent admission.—People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

[ff] A prosecuting witness sought to identify defendant as his assailant, and gave a description of a pistol with which he was threatened, and, over objection, showed that defendant was in possession of a pistol two weeks thereafter, but did not identify it. Defendant showed that he bought it after the assault, whereupon the court struck out all evidence as to defendant's having a pistol after the assault. Held, that the injury resulting from the fact that the jury had heard the stricken testimony was not reversible error.—People v. Turner, 118 Cal. 324, 50 Pac. 537.

[gg] On a trial for rape, admission of a mother's entry in a family Bible of the date of her child's birth was prejudicial error, though the mother had testified as to such date.—People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

[hh] Fact that evidence was admitted before it was shown to be competent is not cause for reversal, unless special injury resulted from its premature admission.—People v. Yokum, 118 Cal. 437, 50 Pac. 686.

[ii] It is error to order execution of defendant at a date within the time allowed by statute for an appeal from the order, and the time allowed for preparing and settling a bill of exceptions, preparatory to an application to the supreme court for a certificate of probable cause, in case such certificate should be refused by the trial court.—People v. Durrant, 119 Cal. 201, 51 Pac. 185.

[jj] Under Penal Code, section 1227, as amended by Statutes of 1891, page 274, expressly providing for the execution of judgments of death by the warden of the state prison, there was no merit in a contention that such warden has no authority to execute such judgments.—People v. Ebanks, 120 Cal. 26, 52 Pac. 1078.

[kk] Error in permitting the prosecution to anticipate the defense and put in evidence out of order will not ordinarily justify reversal.—People v. Arrighini, 122 Cal. 121, 54 Pac. 591.

[ll] If it does not clearly appear that the defendant was prejudiced thereby, a ruling permitting the admission in evidence of the confessions of a defendant accused of arson, before proof of corpus delicti, will not justify reversal of the judgment.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

[mm] Where it was admitted that defendant got over a wire fence before striking deceased, and it appeared that one of the wires at the post where he got over was bent, the admission of evidence that a witness put his weight on the wire next to another post, to observe its effect, and that the wire was bent in the same manner, without showing the conditions to have been the same in both cases, while erroneous, was not prejudicial, since it was immaterial how defendant got over.—People v. Hill, 123 Cal. 571, 56 Pac. 443.

[nn] Where declarations made by defendant's confederate are purely hearsay, but in no way prejudicial to defendant, error in admitting such evidence is no ground for a new trial.—People v. Winters, 125 Cal. 325, 57 Pac. 1067.

[oo] Where defendant testified that he told the prosecuting witness that he did not have his pocketbook, and the latter testified that the defendant was the man who stole the money, the defendant cannot be prejudiced by evidence of any declaration made by the prosecuting witness at the time of or immediately after the theft.—People v. Piggott, 126 Cal. 509, 59 Pac. 31.

[pp] Where the court erroneously admits evidence of an immaterial fact, but it affirmatively appears that such evidence did not injure the defendant, and that, standing alone or in combination with the other evidence in the case, it could not have injured him, such error is harmless.—People v. Matthews, 126 Cal. xvii, 58 Pac. 371.

[qq] Evidence showing that at the time of the murder defendant was sober is not prejudicial to defendant, where he and others have testified to the same effect.—People v. Matthews, 126 Cal. xvii, 58 Pac. 371.

[rr] Where defendant brought out, on cross-examination of witnesses, the fact that he had been previously arrested, the admission of other testimony, tending to show such arrests, was not prejudicial.—People v. Piggott, 126 Cal. 509, 59 Pac. 31.

[ss] Any irregularity in admitting in evidence in a prosecution for murder the deposition of a deceased witness taken at the preliminary examination, where it was not shown that the reporter's stenographic notes had been filed with the county clerk, as required by Penal Code, section 869, subdivision 5, was without injury to the defendant, where the notes were actually so filed before the conclusion of the trial.—People v. Eslabe, 127 Cal. 243, 59 Pac. 577.

[tt] Where, in a prosecution for burglary, an officer testified that he had searched the prisoner's trunk, it was reversible error for the prosecution to ask him how he came to make the search, knowing that the answer would show that the prisoner was suspected of another theft, though the court sustained an objection to the question after the officer's answer to that effect had been given.—People v. Valliere, 127 Cal. 65, 59 Pac. 295.

[uu] Where, on a trial for murder, the court allowed a witness to answer, over defendant's objection, the question how many arms a Mr. C. had, and replied that he had only

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one arm, the error, if any, was harmless.—People v. Sullivan, 129 Cal. 557, 62 Pac. 101.

[vv] Defendant having testified that he did the killing with which he was charged in self-defense, that he had received a letter from friends warning him of the danger of arrest, and that upon such suggestion he had changed his residence, the admission of letters written by one secret society to another to warn defendant that the officers of the law were upon his track, and to advise him to change his residence, was error without prejudice.—People v. Lee Dick Lung, 129 Cal. 491, 62 Pac. 71.

[ww] Where the defendant in a murder prosecution concedes having fired the shot that killed deceased, a refusal of a motion to strike out testimony that deceased stated subsequent to the shooting, "I am shot to kill," is not reversible error, since such statement went no further than defendant's concession.—People v. Brown, 130 Cal. 591, 62 Pac. 1072.

[xx] Where, in a prosecution for the larceny of a cow, a witness testified, without objection, to the finding of the carcasses of two calves in a certain locality, a question calling for their condition, and the answer to the effect that they were very much decomposed, which was favorable to accused as showing that they could not have come from the stolen cow, was properly admitted. People v. Machado, 130 Cal. xviii, 63 Pac. 66.

[yy] On a trial for murder, the motive for which is assigned as robbery, the improper admission of evidence of accused's illicit relations with a certain woman is not reversible error, where evidence of the same general character was introduced by accused.—People v. Clarke, 130 Cal. 642, 63 Pac. 138.

[zz] In a prosecution for perjury in giving false testimony in a previous prosecution for larceny, error in admitting in evidence the verdict and judgment in the larceny case was cured by taking the evidence from the jury and instructing them not to consider it. People v. Prather, 134 Cal. 436, 66 Pac. 589, 863.

[aaa] Evidence of the chief of the fire department that a man was placed in charge of the building after the fire is harmless, even if erroneous, where the only issue in relation thereto is the acts of the man in charge.—People v. Bishop, 134 Cal. 682, 66 Pac. 976.

[bbb] Where evidence is admitted, over objection, in a prosecution for burning a dwelling-house to defraud the insurers, that clothing worn by defendant at the fire retained an odor of kerosene at the time of trial, and on cross-examination the court states that there is no use going on with such testimony, as the clothing has been accessible to persons going in and out of the courtroom, the admission of such evidence in the absence of a request to strike it out is harmless error.—People v. Bishop, 134 Cal. 682, 66 Pac. 976.

[bbc] Upon a prosecution for burglary, where it appeared that the defendant had pawned a stolen overcoat, taken from a lodging-house, it was prejudicial error to permit the pawnbroker to testify to a conversation with defendant's wife, who was not a witness at the trial, in which he stated to her that he was positive of the identity of the defendant, and she stated her opinion that her husband was innocent, but that everything was against him.—People v. Altmeyer, 135 Cal. 80, 66 Pac. 974.

[ccc] A judgment should not be reversed because of error in the admission of evidence merely cumulative to contradict a witness on an immaterial point.—People v. Chrisman, 135 Cal. 282, 67 Pac. 136.

[ddd] In a prosecution for grand larceny, testimony by the officer arresting defendant that he had a conversation with a party who had seen defendant and the prosecutor together, even if immaterial, was not prejudicial, the contents of the conversation not being given.—People v. Taylor, 136 Cal. xix, 69 Pac. 292.

[eee] Where, in a prosecution for homicide, it was proved that defendant struck deceased with an ax, and that, immediately thereafter, S. inflicted a mortal wound with a knife, which was conclusively proved to belong to S, and not to defendant, the admission of evidence against defendant that, on the day after the homicide, S. came to witness' store and purchased a pocketknife, was harmless.—People v. Morine, 138 Cal. 626, 72 Pac. 166.

[fff] Where, in a prosecution for homicide, there was no evidence contradicting proof that a wound in decedent's forehead was inflicted by defendant with an ax, the overruling of an objection to evidence of a witness, who had seen the wound, that the same could have been inflicted with an ax, on the ground that it was an opinion of the witness, was harmless.—People v. Morine, 138 Cal. 626, 72 Pac. 166.

[ggg] Code of Civil Procedure, section 2052, requires that, before a witness can be impeached by showing contradictory statements, such statements must be related to him, and he be asked if he made them, and, if he did, be permitted to explain them. Held that, while it was error to allow proof of a witness' statement to be made after her answer as to whether she made it had been prevented by objection, it was not ground for reversal; the statement itself relating to a matter of exceedingly slight importance, which, as shown by the verdict, did not prejudicially affect accused.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

[hhh] On a prosecution for forgery of a check, reference in the evidence to another check was not prejudicial to defendant, where there was nothing to indicate that the latter check was forged, or that anyone had tried to pass it.—People v. Walker, 140 Cal. 153, 73 Pac. 831.

[iii] Where the jury on trial for murder saw the witness who was with deceased at the

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time of the killing, and could judge of his physical ability to intervene and stop the killing, the error, if any, in admitting evidence of the weight of the witness was not prejudicial.—People v. Glover, 141 Cal. 233, 74 Pac. 745.

[jjj] On a prosecution of defendant for the killing of the father of the girl to whom he was engaged, the evidence of the girl on redirect examination that, while out riding, at defendant's suggestion that he wished to get his mother's picture and a horse collar, they drove to a ranch of a brother of defendant, was not prejudicial to defendant, as it had no bearing on the case.—People v. Glover, 141 Cal. 233, 74 Pac. 745.

[kkk] Admission of irrelevant testimony having no bearing on the case is harmless.—People v. Glover, 141 Cal. 243, 74 Pac. 745.

[lll] In a prosecution for homicide, the admission, in rebuttal, of the report of the autopsy surgeon's evidence at the inquest, though erroneous, is not prejudicial to defendant.—People v. Padilla, 143 Cal. 158, 76 Pac. 889.

[mmm] On a prosecution for assault with intent to commit rape, the father of prosecutrix testified that when he reached defendant's place of business, shortly after the time when it was claimed the assault was committed there, the defendant stated that prosecutrix had been there, but that he had done nothing to her, and defendant's motion to strike such testimony was denied. Held that, as the statement of defendant that he had done prosecutrix no harm was evidence in his favor, its retention in evidence was not prejudicial to him.—People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

[nnn] Where it appeared in a prosecution for robbery that the complaining witness, whose deposition was read in evidence, testified in terms that defendant was the man who at the time of the attack put his hand into the pockets of the complaining witness and took his property from him, and, on being asked whether he saw two of the men in court, testified, "There is one; that fellow (pointing)," any error in the admission of the testimony of the shorthand reporter, who took the testimony, to the effect that the witness pointed to defendant, is not prejudicial to defendant, since the deposition of the complaining witness sufficiently identified the defendant.—People v. Lewandowski, 143 Cal. 74, 77 Pac. 467.

[ooo] Where a police officer testified as to what defendant, on trial for crime, had stated to have been his connection with the crime, it was not prejudicial error to refuse to strike out the officer's testimony that he had told defendant that his story was absurd.—People v. Buckley, 143 Cal. 375, 77 Pac. 169.

[ppp] In a prosecution for robbery, testimony of a witness that he made a visit to the place of the crime with a detective who stated the place where he understood the holdup occurred, followed by testimony as to the condition of the electric light at that point, was harmless in view of evidence that the place shown the witness was midway between two lights, prosecutor having testified that the place where the holdup occurred was an open space in the middle of the block, between certain trees, since, if the place was elsewhere than at the middle of the block, the light would have been stronger.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

[qqq] Where the theory of the prosecution on a trial for homicide was that the murder had been committed in defendant's kitchen by the defendant about 1 o'clock on a particular day, and that defendant's wife had participated in it, any error in permitting a witness to state the appearance of defendant's wife when the defendant and his wife called at the house of the witness at about 3 o'clock of the day in question was harmless as to defendant, the answer being that "she looked all right."—People v. Antony, 146 Cal. 124, 79 Pac. 858.

[rrr] Where evidence, though immaterial, could not have injured accused, the court's refusal to strike it out was not reversible error.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

[sss] On a prosecution for murder, certain evidence held harmless, even if irrelevant.—People v. Woods, 147 Cal. 265, 81 Pac. 652.

[ttt] In a prosecution for murder, defendant held not prejudiced by the admission of the expert opinion of a witness that deceased's wounds were caused by some blunt instrument.—People v. Olsen, 1 Cal. App. 17, 81 Pac. 676.

[uuu] In a prosecution for homicide, the erroneous admission of a hearsay declaration made by deceased concerning defendant's conduct toward her held too trifling to justify a reversal.—People v. Weber (Cal. Sup.), 86 Pac. 671.

[vvv] On a trial for murder the admission of certain evidence held not prejudicial.—People v. Feld (Cal. Sup.), 86 Pac. 1100.

[www] In a prosecution for homicide, evidence of a physician who performed the autopsy that he believed the wound on deceased's body was made by a 32-caliber pistol bullet held not prejudicial.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 921-925; 15 Cent. Dig., cols. 926-947, §§ 3137-3143.

§ 788. —— Exclusion of Evidence.

[a] A prisoner convicted of manslaughter cannot be held to have been prejudiced by the rejection of evidence which, if admitted, would only have had the effect to reduce the offense from murder to manslaughter.—People v. Wyman, 15 Cal. 70.

[b] Where the court improperly rejects the testimony of a witness offered by defendant

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in a trial for murder to prove the testimony of a witness, since deceased, at a former trial, and afterward gives leave to introduce such evidence, and offers to give time to send for the witness, or to allow the minutes taken of the evidence at the former trial to be read to the jury, and such minutes are so read, a new trial will not be granted.—People v Henderson, 28 Cal. 465.

[c] The error of refusing to allow a witness to be asked on cross-examination whether he has not formerly made different statements is not cured by the fact that his testimony is corroborated by other witnesses.—People v. Robles, 29 Cal. 421.

[d] Exclusion of evidence is not ground for reversal if the evidence is subsequently admitted.—People v. Woody, 48 Cal. 80.

[e] Where defendant's request, after the people have rested, to cross-examine the prosecutor on new matter, is denied, the error is harmless where defendant subsequently made the prosecutor his own witness, and it appeared that it was not on new matter that he desired to cross-examine, but on matter inquired into on the former examination. People v. Parton, 49 Cal. 632.

[f] If a magistrate, in taking a deposition, erroneously excludes a question asked of a witness, the error does no injury, if the testimony sought to be elicited was immaterial. People v. Keith, 50 Cal. 137.

[g] If a witness on behalf of the prosecution is erroneously permitted to testify to a part only of a conversation of defendant, the error does not prejudice defendant if he testifies to the remainder of the conversation.—People v. Keith, 50 Cal. 137.

[h] Exclusion of testimony as to fact which has been proved by the uncontradicted testimony of another witness is not a prejudicial error.—People v. Westlake, 62 Cal. 303.

[hi] Offer of evidence improperly rejected is ground of reversal, though ability to make the proof may be highly improbable if not manifestly impossible.—People v. Blake, 65 Cal. 279, 4 Pac. 1.

[i] Refusal to permit answer to proper question is immaterial where other portions of testimony fully answer it.—People v. Fong Ah Sing, 70 Cal. 13, 11 Pac. 323.

[j] Exclusion of evidence as to fact proved by other evidence is harmless.—People v. Kalkman, 72 Cal. 216.

[jk] Exclusion of evidence tending to explain intent in prosecution for larceny is reversible error.—People v. Eastman, 77 Cal. 172, 173, 19 Pac. 266.

[jl] Erroneous exclusion of competent and material evidence which might have changed result is ground for reversal.—People v. Lundquist, 84 Cal. 27, 23 Pac. 153.

[k] Defendant, on trial for assault with intent to kill, was not allowed to ask the prosecuting witness if he had not stated to various parties (naming them) that he (witness) would use his shotgun on defendant, or words to that effect. Subsequently defendant was allowed to prove by these "various parties" the statements made by the prosecuting witness. Held, that the refusal, if error, was harmless.—People v. Scott, 93 Cal. 516, 29 Pac. 123.

[l] Refusal to permit defendant to tell what he understood by prosecutor's threat a few days before the assault, to "fix" defendant, if error, was not prejudicial, where defendant testified that, immediately before that assault, prosecutor threatened to kill him, and made demonstrations as if to draw a weapon.—People v. Lynch, 101 Cal. 229, 35 Pac. 860.

[m] Where an objection to a question is erroneously sustained, and it appears that, notwithstanding the ruling, witness immediately went on, without further objection, and answered the question, the ruling is without prejudice.—People v. Shaw, 111 Cal. 171, 43 Pac. 593.

[n] A witness for the state, who was the first to find deceased's body, testified that a stone was lying near deceased's hand, and denied having made a statement to third persons that the stone was in his hand. There was no evidence that the stone was in deceased's hand after his death. Held, that the exclusion of testimony to impeach the witness—to show that he did make such statement—is not prejudicial, since, as it was inadmissible to prove that the stone was in deceased's hand, its only effect would be to eliminate the testimony as to the position of the stone near deceased's hand, which was favorable to defendant.—People v. Conkling, 111 Cal. 616, 44 Pac. 314.

[o] Any error committed in the sustaining of an objection to questions asked of a witness is cured, where the witness was subsequently recalled, and without objection testified fully in regard to the matter.—People v. Ross, 115 Cal. 233, 46 Pac. 1059.

[p] Exclusion of testimony which the same witness is afterward permitted to give is not prejudical error.—People v. Kramer, 117 Cal. 647, 49 Pac. 842.

[q] Error in striking out testimony is cured by its subsequent admission without objection.—People v. Barthleman, 120 Cal. 15, 52 Pac. 112.

[r] Error in limiting a question as to reputation of witness "for truth, honesty and integrity" to his reputation for truth and veracity is harmless, witness having given evidence of his dishonesty by testifying that with defendant he committed the larceny in question.—People v. Silva, 121 Cal. 668, 54 Pac. 146.

[s] There was evidence that accused confessed that his accomplice told him one H. procured the burning, and was to pay them one hundred dollars. Accused offered to

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prove by H. that this was not so, which was refused. Held, that since H.'s denial would not show that the accomplice had not so told accused, and his admitting it would tend to prove accused guilty, the latter was not injured by the ruling.—People v. Jones, 123 Cal. 65, 55 Pac. 698.

[t] Objection to an order striking out evidence is immaterial, where the same evidence is subsequently given by the witness without objection.—People v. Plyler, 126 Cal. 379, 58 Pac. 904.

[u] Where prosecutrix was asked why she did not say something to M., and, in the next succeeding question, why she did not make complaint to anybody at the "saloon where M. was," which latter question was answered, the exclusion of the first question was not error.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[v] Exclusion of evidence of defendant which did not operate to his injury, and had no bearing upon the material question in the case, is not material; and it is material whether an objection to a question was correctly sustained or not, where the ruling was disregarded and the evidence fully given by the defendant.—People v. Ochoa, 142 Cal. 268, 75 Pac. 847.

[w] Where, in the prosecution for wife murder, an objection by the people is sustained to a question asked defendant as to whether his wife stopped at a certain house with his consent, but defendant without further objection fully details the circumstances under which she went there, and the objections and remonstrances on his part, there is no ground for reversal.—People v. Ochoa, 142 Cal. 268, 75 Pac. 847.

[x] No prejudicial injury results from sustaining an objection to a proper question on cross-examination as to the manner of accused when intoxicated, where, by other questions to the same witness, the information sought is elicited, and the witness further testifies that accused was not intoxicated the day after the commission of the crime, when he confessed having committed it.—People v. Gilmore, 53 Pac. 806.

[y] Where the court had stricken all the evidence with reference to a witness' opinion that all the bullets introduced in evidence had been fired from the same pistol, it was immaterial that the court, in specifically designating the evidence, by oversight failed to note for elimination certain evidence touching a particular exhibit.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 925-927; 15 Cent. Dig., cols. 947-958, §§ 3145-3153.

§ 789. —— Examination of Witnesses.

[a] When question, even if objectionable, is not answered, an objection to it becomes a mere abstraction, and no injury is done to the party excepting.—People v. Williams, 45 Cal. 25.

[b] Refusal to permit cross-examination to show hostility is ground of reversal.—People v. Lee Ah Chuck, 66 Cal. 662.

[c] To permit leading question on important issue is not ground for reversal.—People v. Sheldon, 68 Cal. 437, 9 Pac. 457.

[d] It is not error to permit leading question on unimportant issue in criminal case. People v. Sheldon, 68 Cal. 437, 9 Pac. 457.

[e] Erroneously allowing impeachment of witness who had not testified favorably to appellant is harmless error.—People v. Murray, 85 Cal. 357, 24 Pac. 666.

[f] Cross-examination of defendant in criminal action, as to matters about which he was not examined in chief, is not prejudicial error where the matters were such as could not by any conceivable possibility have prejudiced the defendant.—People v. Winters, 93 Cal. 277, 28 Pac. 940.

[g] A conviction will not be reversed because the prosecuting officer asked an improper question, when an objection to the same was sustained, and the jury was instructed to give it no heed.—People v. Gordon, 103 Cal. 568, 37 Pac. 334.

[h] Whether the court erred or not in putting a leading question to a witness will not be considered upon appeal, where the answer was favorable to the appellant.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

[i] Answer to question which is not proper subject of expert evidence is harmless when it supports only conclusion jury could have reached.—People v. Durrant, 116 Cal. 217, 48 Pac. 75.

[j] Where scope of testimony given by defendant in his examination in chief shows that the questions propounded to him on cross-examination were within the rules enunciated by this court in previous decisions, or were unproductive of injury to the defendant, there is no ground of reversal therefor.—People v. Ebanks, 117 Cal. 652, 49 Pac. 1049.

[k] It is reversible error to refuse witness' right to explain former testimony offered to impeach his present testimony.—People v. Lambert, 120 Cal. 175, 52 Pac. 307.

[l] Informal or inartificial questioning of impeaching witnesses is not reversible error, unless it has resulted in injustice to accused. People v. Roberts, 122 Cal. 377, 55 Pac. 137.

[m] A witness for defendant in a prosecution for seduction was asked on cross-examination if he ever knew of improper conduct on the part of the prosecutrix, and answered that he never had had improper relations with her, as he had testified on his examination in chief. Held that, if the question was improper cross-examination it was harmless error.—People v. Godwin, 123 Cal. 374, 55 Pac. 1059.

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[n] One accused of robbery testified he lodged at a certain house, and was asked by the state, "When did you pay your rent there?" Objection was sustained. Held, that the mere asking of the question was not cause for reversal.—People v. Patterson, 124 Cal. 102, 56 Pac. 882.

[o] Where defendant was charged with an assault to commit rape in a room on the second floor, the mere asking the question in the presence of the jury, in order to get a ruling of the court on it, whether or not a friend of the defendant, on the approach of the marshal, rushed down the back stairs, and threw sticks against the window to warn the defendant, was not prejudicial to defendant. People v. Vann, 129 Cal. 118, 61 Pac. 776.

[p] The fact that a witness for the prosecution, called in rebuttal, is allowed to merely repeat testimony already given in chief is harmless error.—People v. Emerson, 130 Cal. 562, 62 Pac. 1069.

[q] Preliminary questions laying a foundation for the introduction of a dying declaration in a murder prosecution, which declaration was not introduced, will not be considered on appeal, since they are not prejudicial. People v. Brown, 130 Cal. 591, 62 Pac. 1072.

[r] On trial of defendant for assault with intent to commit rape, the fact that the district attorney was permitted to read certain questions and answers to two little girls, while on the witness-stand, from their testimony given on the preliminary examination of the defendant before the magistrate, over defendant's objection that the prosecution was trying to impeach their own witnesses, was not prejudicial error, since the girls were the only material witnesses against him, and he would have been benefited by any weakening of their testimony.—People v. Johnson, 131 Cal. 511, 63 Pac. 842.

[s] On a prosecution for seduction under promise of marriage, it was not error to ask the defendant, on cross-examination, if certain letters were in his handwriting, where the identity of the letters as those of the defendant were fully established before such questions were asked.—People v. Goodwin, 132 Cal. 368, 64 Pac. 561.

[t] It was not prejudicial to the defendant, on a prosecution for seduction under promise of marriage, to ask questions on cross-examination seeking to show that he began the correspondence between the prosecutrix and himself, where they had been answered in the negative.—People v. Goodwin, 132 Cal. 368, 64 Pac. 561.

[u] Where defendant, charged with the crime of rape, testified that he had kept up a course of drinking all during that day, but that he knew what he was doing, there was no prejudicial error in sustaining the objection to a question of defendant's counsel relating to whether or not he had been drinking just before getting into the buggy wherein the crime was committed.—People v. Harlan, 133 Cal. 16, 65 Pac. 9.

[v] Where, in a prosecution for burglary, a pawnbroker, to whom the stolen goods were alleged to have been sold, was asked on cross-examination if he had a conversation with defendant's wife after his arrest, and answered "Yes," but detailed none of it, the admission, on redirect examination, of testimony that defendant's wife had told witness that she thought the case against defendant was strong, and that witness then said that he could not be mistaken as to defendant's identity, was prejudicial error.—People v. Altmeyer, 135 Cal. 80, 66 Pac. 974.

[w] On a trial for manslaughter, a witness testified that after the homicide the defendant made a voluntary statement, without threats or offer of reward or immunity. Defendant's counsel requested leave to inquire as to the conditions under which the statement was made. The request was refused, and the witness testified that defendant was asked why he killed deceased, and answered "that he was on his row, and throwing clods at him, and he told him to get off, and he would not get off, and he got mad and shot him." On cross-examination the witness testified that defendant was under arrest at the time the statement was made, but no further facts were developed. Held, that, though it was error to refuse permission to cross-examine the witness, as the subsequent cross-examination showed that defendant was not prejudiced thereby, the judgment should not be reversed therefor.—People v. Miller, 135 Cal. 69, 67 Pac. 12.

[x] A witness on a prosecution for burglary was shown on cross-examination a memorandum in a diary kept by him, and was asked if an entry therein, stating that on a certain date he left a certain point in company with defendant, was in his handwriting, and on a denial he was again asked the same question, to which he answered that he did not think it was, and was then asked the direct question whether such entry was made by him. Held that, if it was error to make the direct inquiry after denial by the witness, it would not warrant a reversal; the question as to whether defendant and witness left the point in company not being an essential fact necessary to be proven to warrant a conviction.—People v. Dowell, 141 Cal. 493, 75 Pac. 45.

[y] Conceding that objection to question by defendant's counsel on cross-examination of the prosecuting witness should have been overruled, defendants were not prejudiced, where evidence showed that particular fact testified to by witness about which question was asked was not within knowledge of the witness, but was fully proved by other witnesses.—People v. Brittain, 142 Cal. 8, 75 Pac. 314.

[z] Under Code of Civil Procedure, section 2048, providing that the opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, it is reversible error in a prosecution for homicide to permit the prosecution to bring out the account of the quarrel and

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affray in which the witnesses under cross-examination represented the defendant as the murderer and themselves as peacemakers, the witnesses and defendant all being under indictment for the offense, and defendant charging the witnesses with the killing and they charging him with it, where defendant's direct examination of the witnesses was restricted to showing the absence of a conspiracy to meet and overcome the theory of the prosecution of the existence of a conspiracy to waylay and rob the victim of the homicide. People v. Padilla, 143 Cal. 158, 76 Pac. 889.

[aa] Where, in a prosecution for robbery, a witness answered in the negative a question as to whether he had not stated that K., defendant, and himself came to L. together, defendant was not prejudiced thereby.—People v. Kelly, 146 Cal. 119, 79 Pac. 846.

[bb] Where questions put to defendant when on the witness stand elicited only favorable answers, and no attempt was made to contradict him, he could not have been prejudiced by such examination.—People v. Carleton, 4 Pac. 763.

[cc] A judgment will not be reversed because of questions allowed to be asked a witness on cross-examination where he testified to substantially the same things on his direct examination.—People v. Richards (Cal. App.), 82 Pac. 691.

[dd] In a criminal prosecution, defendant held not prejudiced by a question asked of a witness as to whether his ill-feeling toward defendant had colored witness' testimony, which he answered in the affirmative.—People v. Zimmerman (Cal. App.), 84 Pac. 446.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 918-926, §§ 3129-3136.

§ 790. —— Arguments and Conduct of Counsel.

[a] Allowing counsel for prosecution to read law books to jury is not ground for reversal. People v. Treadwell, 69 Cal. 238, 10 Pac. 502.

[b] Admission of prosecuting attorney, in presence of jury that he was biased and prejudiced against accused, though disapproved is not ground for reversal.—People v. Hamberg, 84 Cal. 474, 24 Pac. 298.

[c] Remark of prosecuting attorney herein held not prejudicial though improper.—People v. Ross, 85 Cal. 384, 24 Pac. 789.

[d] Statements, questions, and remarks by the district attorney, in the presence of the jury, in reference to incompetent proposed evidence of previous similar offenses of the defendant, not in issue, for the purpose of leading the jury to believe that the offense charged was committed with felonious intent, the contrary being claimed and testified to on behalf of the defendant, are calculated to prejudice the substantial rights of the defendant.—People v. Devine, 95 Cal. 227, 30 Pac. 378.

[e] District attorney is not guilty of misconduct prejudicial to defendant in asking the defendant on cross-examination if he had been in the prize ring, and withdrawing the question upon suggestion by court that it was not proper cross-examination.—People v. Ward, 105 Cal. 335, 39 Pac. 33.

[f] District attorney is not guilty of misconduct prejudicial to defendant in offering in evidence, in rebuttal to proof of defendant's insanity, record of an investigation as to the sanity of defendant, and verdict of jury pronouncing him sane, which was refused by court, where circumstances are such as to devest offer of evidence of any apparent evil motive.—People v. Ward, 105 Cal. 335, 39 Pac. 945.

[g] A statement by the prosecuting attorney that the court will instruct that, to acquit, the jury must find that defendant "is insane," is not ground for reversal, where, on objection being taken, the court, in its charge, stated that the issue was as to defendant's sanity at the time of the commission of the offense.—People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

[h] Action of district attorney in offering to prove that defendant was drinking beer on day of homicide, which offer was excluded as not proper cross-examination, and in asking defendant how many times his attorneys had visited him, is not of sufficient importance to be seriously considered as a ground of reversal.—People v. Shaw, 111 Cal. 171, 43 Pac. 593.

[i] Misconduct of counsel in argument is not ground for reversal if jury are cautioned to disregard objectionable portions.—People v. Barthleman, 120 Cal. 16, 52 Pac. 112.

[j] Impertinent and objectionable questions by district attorney ruled out by court held harmless though censurable.—People v. Cokahnour, 120 Cal. 254, 52 Pac. 505.

[k] If the prosecuting attorney is guilty of misconduct in attempting to discredit a witness, and, from the circumstances, the jury must see it, the error is harmless.—People v. Phelan, 123 Cal. 551, 56 Pac. 424.

[l] The prosecuting attorney, in argument to the jury, said, speaking of accused's attorney: "Why, this child talks to you as if you were a band of idiots." Held, that, while it was not courteous language, it was not prejudicial to accused.—People v. Paterson, 124 Cal. 102, 56 Pac. 882.

[m] Where, in a prosecution of a witness to a will for perjury in swearing at the probate thereof that it was duly witnessed, when it was not witnessed until after testator's death, it was conceded that the will was bogus, and the evidence showed that the will was not valid, a remark of the district attorney to the jury that the jury in the will contest, within an hour after retiring, brought in a verdict that it was not a valid will, though improper, was not prejudicial to defendant.—People v. Rodley, 131 Cal. 240, 63 Pac. 351.

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[n] Defendant is not harmed by permission given to the prosecuting attorney to read questions and answers given by the prosecuting witnesses at the preliminary examination and to question the witnesses thereupon, against an objection that the prosecution was trying to impeach his own witnesses, when the statements about which the witnesses were questioned were substantially the same as those given at the trial.—People v. Johnson, 131 Cal. 511, 63 Pac. 842.

[o] In a prosecution for assault with intent to commit murder, the prosecuting witness testified to a difficulty at a dance on the night of the alleged assault, but defendant denied that any difficulty occurred, or that he spoke to witness, or that the witness spoke to him at the hall. On cross-examination defendant was asked if he had been married since the difficulty. An objection to the question was sustained. In his argument defendant's counsel said that no motive for the alleged crime had been shown, and that the affair in the dancehall was of no importance. The district attorney, in replying to the argument, said: "Now, I say this little affair about the woman in the dancehall is the only thing we have in the case that tends to show there was a feeling between these parties. We think it does show it, and we think the fact that the defense is so sensitive about it shows it. Else why wasn't the defendant willing to testify that he had been married since? Why withhold such testimony, if these things are not material?" Defendant simply reserved his exception to the argument, and assigned the action of the district attorney as misconduct. Held, that, as the court sustained the objection and excluded the proposed evidence as to defendant's marriage, it was improper for the district attorney to comment on the motive of defendant in excluding it; but, as the defendant's cause could not have been injuriously affected by the remarks, they were not cause for reversal.—People v. Romero, 143 Cal. 458, 77 Pac. 163.

[p] Under Penal Code, section 1258, certain comments of district attorney on testimony in homicide held not to require a reversal.—People v. Warner, 147 Cal. 546, 82 Pac. 196.

[q] Conduct of prosecuting attorney herein held harmless within Penal Code, section 1404. People v. Davis (Cal. App.), 88 Pac. 1101.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 914-917, § 3127.

§ 791. —— Remarks and Conduct of Court.

[a] Where it is attempted on cross-examination of a witness to show a discrepancy between her testimony and that given by her at the preliminary examination, and there is no such discrepancy, a statement by the court to that effect is not a prejudicial error. People v. Elliott, 80 Cal. 296, 22 Pac. 207.

[b] Where record shows that defendant's counsel consumed time unnecessarily in the repetition of questions, a censure for such consumption of time by trial court is not prejudicial error, though language of censure employed by court is more harsh than can be commended.—People v. Baker, 100 Cal. 188, 38 Am. St. Rep. 276, 34 Pac. 649.

[c] A remark of the judge that it seemed to him that the evidence sought to be elicited by the defense from certain medical witnesses upon a material issue was immaterial, and that he would limit them to two expert witnesses, was not prejudicial error, the judge having correctly stated in what the materiality of the inquiry consisted.—People v. Yokum, 118 Cal. 515, 50 Pac. 686.

[d] Reproving remarks by the judge to defendant's counsel, though not courteously addressed, are not reversible error, where the manner of the counsel in asking and repeating many immaterial questions merited some rebuke, and tried the patience of the judge. People v. Oliveria, 127 Cal. 377, 59 Pac. 772.

[e] Suggestion by judge as to a permissible line of cross-examination of the defendant does not tend to show that the judge aided in the prosecution of the case; and where the counsel for the prosecution decided not to pursue such line, and the action of the judge was not excepted to, no error appears in that connection.—People v. Goodwin, 132 Cal. 368, 64 Pac. 561.

[f] Where court in sustaining an objection made by the defendant, remarked, "I don't propose to have this case go up there and be reversed again, if I can help it," the reasonable inference from the remarks is, that the court only desired to be right in his ruling and to avoid error or mistake therein, and though unnecessary, there is no prejudicial error in the remarks.—People v. Keith, 141 Cal. 686, 75 Pac. 304.

[g] Remark by court, "I don't propose to have case reversed again if I can help it," is not reversible error.—People v. Keith, 141 Cal. 691, 75 Pac. 304.

[h] A statement by the court to an expert that he need base his opinion only on the evidence he deemed true was harmless, where the answer was in fact based on the hypothesis that all the evidence was true.—People v. Sowell, 145 Cal. 292, 78 Pac. 717.

[i] In a criminal prosecution, alleged misconduct of the court in addressing defendant's counsel in an emphatic and abrupt manner, criticising him for alleged unnecessary repetition of questions propounded to the prosecuting witness, was not ground for reversal, where it did not appear that accused was prejudiced by such remarks.—People v. Modina, 146 Cal. 142, 79 Pac. 842.

§ 792. —— Instructions.

[a] A judgment will not be disturbed because of an erroneous instruction not applicable to the facts of the case.—People v. March, 6 Cal. 543; People v. Walsh, 43 Cal. 447.

[b] Mere want of perspicuity in instruction which does not injure the prisoner, if erroneous, is not sufficient ground for reversal. The objection must go to this extent, that the instruction is wholly erroneous, or sus-

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ceptible of different and doubtful constructions.—People v. Moore, 8 Cal. 90.

[c] Where the court below gave jury written instructions in a criminal case the failure to file such instructions is not error, on appeal by defendant, sufficient to reverse the judgment, unless more appears than the mere fact that the record on appeal shows that the court gave written instructions and the record does not contain them.—People v. Connor, 17 Cal. 354.

[d] An error of the judge in violating the provision of the constitution forbidding instructions with respect to matters of fact would not, under all circumstances, be sufficient cause for reversal. Prima facie it would be sufficient, but no more importance is to be attached to an error of this nature than any other. If no injury could possibly have resulted from it, it cannot vitiate the judgment.—People v. Ybarra, 17 Cal. 16.

[e] Failure to file instructions given is not error for which judgment can be reversed on appeal unless something be shown beyond the mere fact that written instructions were given and were omitted in the transcript. People v. Robinson, 17 Cal. 363.

[f] In a trial for murder a slight mistake of the judge in reading evidence to the jury, which cannot be conceived to have affected their verdict of guilty is no ground for setting it aside.—People v. Boggs, 20 Cal. 432.

[g] The supreme court will reverse a conviction of manslaughter, where an instruction to the jury containing a correct statement of the law has been partially nullified by a subsequent instruction.—People v. Campbell, 30 Cal. 312.

[h] Where defendant is convicted of the lower grade of the offense, refusal of instructions as to the higher grade is harmless. People v. Nichol, 34 Cal. 211.

[i] Where legal effect of evidence is misdirected by the court so as to confuse and mislead the jury, it is ground for new trial. People v. Taylor, 36 Cal. 255.

[j] Defendant is not prejudiced by instructions, some portions of which, taken by themselves, may be objectionable, but as subsequently qualified embrace a correct exposition of law upon points presented.—People v. Dennis, 39 Cal. 625.

[k] Where, on a trial for murder, two parts of the charge of the court to the jury are contradictory, and one is correct, and the other is erroneous, the judgment of the conviction will be reversed, even though the appellate court may be satisfied from the evidence that the jury ought to have found defendant guilty.—People v. Valencia, 43 Cal. 552.

[l] Rule is that judgments will be reversed for alleged errors in instructions, only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of defendant, or when, in the absence of the testimony, it is apparent that the instructions would be improper under any possible condition of the evidence.—People v. Donahue, 45 Cal. 321.

[m] Although it is error, when there is evidence as to defendant's good character, to instruct the jury that evidence of character can only be considered in cases where the guilt of the accused is doubtful," yet, if the evidence so conclusively establishes the guilt of defendant that no amount of evidence of good character could have changed the result, such error does no injury, and the judgment will not be disturbed.—People v. Fenwick, 45 Cal. 287.

[n] Defendant cannot object to instructions which are more favorable to him than they should be, though erroneous.—People v. Ah Kong, 49 Cal. 6; People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

[o] A conviction will not be reversed for error in an instruction which could not have prejudiced defendant.—People v. Ah Loy, 57 Cal. 566; People v. Smith, 59 Cal. 601.

[p] Contradictory instructions as to proof of insanity required are ground of reversal. People v. Messersmith, 57 Cal. 575.

[q] Instruction as to an irrelevant and immaterial fact cannot prejudice.—People v. Park, 62 Cal. 204.

[r] Where court, in charge to jury, reads whole of section of the code, a part only being relevant, the judgment will not be disturbed if it is not apparent that some substantial right of the accused was affected.—People v. Burns, 63 Cal. 614.

[s] Where a defendant is charged with and convicted of robbery, an erroneous instruction respecting the crime of larceny will not warrant a reversal.—People v. Riley, 65 Cal. 107.

[t] Error in instruction is cured by subsequent explanation leading jury aright.—People v. McCurdy, 68 Cal. 582, 10 Pac. 207.

[u] Instruction assuming admitted fact does not demand reversal.—People v. Phillips, 70 Cal. 68, 11 Pac. 493.

[v] Errors in detached passages are immaterial if charge, as a whole, is correct.—People v. Huff, 72 Cal. 119, 13 Pac. 168.

[w] A deposition was read in which defendant was referred to by name, without further description. The court charged that "identity of person is presumed from identity of name." Held that, as no evidence was introduced to overcome the presumption, the instruction was error without prejudice.—People v. Riley, 75 Cal. 98, 16 Pac. 544.

[x] Appellant cannot complain of charge on higher offense than that for which he was convicted.—People v. Bentley, 75 Cal. 410, 411, 17 Pac. 436.

[y] Failure of reporter to take down part of oral charge is harmless error where por-

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tion omittted did not affect or qualify charge taken down.—People v. Cox, 76 Cal. 283, 18 Pac. 332.

[z] A conviction will not be reversed for refusal of instruction, where verdict shows that defendant could not have been prejudiced by such refusal.—People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27.

[aa] Charge on weight of evidence is reversible error.—People v. Fong Ching, 78 Cal. 173, 20 Pac. 396.

[bb] Instruction in effect excluding defendant's evidence from jury is ground for reversal.—People v. Choy Ah Sing, 84 Cal. 277, 24 Pac. 379.

[cc] If charge taken as a whole is good, defects in portion of it will not warrant reversal.—People v. Levine, 85 Cal. 24, 24 Pac. 631.

[dd] Refusal to instruct on vital point of defense sustained by evidence is reversible error.—People v. Adams, 85 Cal. 237, 24 Pac. 629.

[ee] Error in instruction is not reversible when whole charge taken together is correct.—People v. Chun Heong, 86 Cal. 234, 24 Pac. 1027.

[ff] Where the undisputed evidence shows that defendant committted the burglarly in the night-time, a remark by the judge in charging the jury that the testimony showed the crime to have been committed at 3 or 4 o'clock in the morning could not have prejudiced defendant; and hence the supreme court will not determine whether this language was the mere exercise of the constitutional power of the judge to "state the testimony," or a violation of the mandate that "judges shall not charge juries with respect to matters of fact." Const. art. 6, sec. 19.—People v. McGregar, 88 Cal. 140, 26 Pac. 97.

[gg] Conflict in instructions favorable to defendant is not ground for reversal.—People v. Travers, 88 Cal. 239, 26 Pac. 88.

[hh] Supreme court, cannot weigh the evidence to find that the judgment was warranted, notwithstanding an erroneous charge. People v. Chew Sing Wing, 88 Cal. 268, 25 Pac. 1099.

[ii] Error in instruction on higher offense is harmless if accused was convicted of lower offense.—People v. Gorden, 88 Cal. 425, 26 Pac. 502.

[jj] Where different instructions given, when taken together, must have tended to confuse and cloud minds of the jury, it is ground for reversal of a judgment convicting a defendant of crime.—People v. Elliott, 90 Cal. 586, 27 Pac. 433.

[kk] Although in some cases an inapplicable instruction which is correct as matter of law can do no harm, yet, when it is liable to mislead a jury to the prejudice of one of the parties, it becomes as grave an error as though it were not correct as an abstract proposition of law.—People v. Devine, 95 Cal. 227, 30 Pac. 378.

[ll] It is not error of which defendant can complain for trial court to charge jury that defendant, when witness in his own behalf, having introduced no evidence of his good character, is not to be assailed by the prosecution being permitted to introduce proof of his general bad character.—People v. Dolan, 95 Cal. 315, 31 Pac. 107.

[mm] Omission to mark instruction as refused because given already, if an error, is an immaterial one.—People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Douglass, 100 Cal. 1.

[nn] Words "a circumstance tending to show guilt" would be a more appropriate expression than the phrase "a guilty circumstance" as applied to the possession of stolen property, yet their manifest meaning is the same, and the use of the latter expression in an instruction is not ground for a reversal of a judgment of conviction.—People v. Abbott, 101 Cal. 645, 36 Pac. 129.

[oo] Inconsistency in instructions regarding the materiality of defendant's good or bad faith in trading for the cow after it had been stolen by another is ground for reversal.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[pp] While it is dangerous practice for court, in charge, to undertake to characterize effect of evidence, yet where there is in fact an irreconcilable conflict in evidence as between prosecution and defense, a charge stating that such conflict exists is not prejudicially erroneous.—People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

[qq] Although charge of the court, taken as a whole, may be styled as argumentative, yet if there is nothing in it prejudicial to the appellant's rights judgment will not be reversed.—People v. Stanton, 106 Cal. 139, 39 Pac. 525.

[rr] When the charge, taken as a whole, states the law with sufficient fullness and clearness, it is not ground of reversal that there are verbal inaccuracies in the charge, or that isolated sentences and phrases are open to just criticism; but it is sufficient that the charge, regarded in its entirety, shows no substantial error.—People v. Gibson, 106 Cal. 458, 39 Pac. 864.

[ss] Defendant cannot complain that an instruction declaring that a certain person was an accomplice, and that, therefore, there could not be a conviction on his uncorroborated testimony, was error, as charging on facts; it not only having been invited by him, but also being harmless.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

[tt] Where an instruction was given erroneously imposing on defendant the burden of proof on an issue, and there was evidence tending to support his defense on such issue, a reviewing court cannot weigh the evidence

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on the question, and determine therefrom that the error was not prejudicial.—People v. Marshall, 112 Cal. 422, 44 Pac. 718.

[uu] Defendant cannot be heard to complain upon appeal of error in instructions given at his request.—People v. Rangod, 112 Cal. 669, 44 Pac. 1071.

[vv] Instructions must be construed as a whole, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, the appellate court will not disturb the judgment, because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.—People v. Worden, 113 Cal. 569, 45 Pac. 844.

[ww] The use of the words "wholly satisfied," in defining reasonable doubt, is not ground for reversal, where they could not mislead the jury, when taken with the rest of the charge.—People v. Ross, 115 Cal. 233, 46 Pac. 1059.

[xx] There is no prejudicial error in instructing that on a former trial there was no evidence in support of a plea of former jeopardy urged on both trials; the state of the evidence at the former trial being immaterial.—People v. Tucker, 117 Cal. 229, 49 Pac. 134.

[yy] Charge on question of fact is ground for reversal.—People v. Ellenwood, 119 Cal. 171, 51 Pac. 553.

[zz] Appellant cannot complain of erroneous instruction given at his request.—People v. Van Horn, 119 Cal. 332, 51 Pac. 538.

[aaa] Error in charge influencing jury most favorably toward defendant is harmless.—People v. Dice, 120 Cal. 202, 52 Pac. 477.

[bbb] Court charged in relation to testimony of certain medical experts that such testimony was to be reviewed with scrutiny, and received with great caution; and that the value of such testimony depended on the truth or falsity of the hypothetical facts on which they founded their opinions. Held, that the charge was only objectionable as an encroachment on the province of the jury, and was not prejudicial.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[ccc] In absence of evidence, refusal of abstractly correct instructions requested by defendant upon subject of insanity, and upon other subjects, must be presumed to have been upon the ground that they were not pertinent to any question of fact before the jury; and it cannot be said that their refusal was improper, or in any way prejudicial to the defendant's rights.—People v. Clark, 121 Cal. 633, 54 Pac. 147.

[ddd] Erroneous modification of correct instruction asked by defendant by inserting a negative which made the instruction absurd, and which was equivalent to a refusal to give the instruction, is harmless error, where it appears that the whole substance of the instruction as requested was repeatedly given in the charge of the court.—People v. De Graaf, 127 Cal. 676, 60 Pac. 429.

[eee] An instruction that the state was required to establish defendant's guilt beyond a reasonable doubt, but that defendant might establish any fact by a preponderance of evidence, though incorrect, inasmuch as a defendant is not required to so establish any fact except a claim of insanity, was not reversible error, as it was but an abstract proposition, and did not state that defendant must so establish any certain fact.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670.

[fff] Where there was no evidence that defendant was drunk when he committed the murder, an instruction as to the effect of drunkenness, while unnecessary, was not prejudicial to defendant.—People v. Methever, 132 Cal. 326, 64 Pac. 481.

[ggg] Error in reading a city ordinance in the instructions in a criminal case is not rendered harmless, on the ground that the evidence, aside from the ordinance, is conclusive on defendant's guilt, since the weight of the evidence is for the jury.—People v. Kelly, 133 Cal. 1, 64 Pac. 1091.

[hhh] Where, on a trial for manslaughter, self-defense was no element in the case, an instruction that drawing and displaying an deadly weapon in a rude, angry and threatening manner in the presence of two or more persons is a criminal offense, without stating that the drawing and displaying must not be in necessary self-defense, was harmless error. People v. Smith, 134 Cal. 453, 66 Pac. 669.

[iii] In a prosecution for forging a note, an instruction not in the abstract erroneous, but so given that it may have been taken to intimate that defendant signed the note, which he denied, and leaving to the jury only the question whether or not he was authorized to do so, is prejudicial. Judgment (1901) 67 Pac. 14, reversed.—People v. Lapique, 136 Cal. 503, 69 Pac. 226.

[jjj] An instruction that a fraudulent intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another, while not true to all unlawful acts, is harmless where, on a prosecution for embezzlement, there is no evidence of acts of defendant from which to infer a criminal intent, except for the acts which went to make up the crime and were pertinent to establish it.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

[kkk] Improper instruction as to credibility of witnesses, which merely tells the jurors to do that which they evidently would do without being told, is not prejudicial error. People v. Nong Bin, 139 Cal. 60, 72 Pac. 505.

[lll] In a prosecution for robbery, where prosecuting witness testified directly to unmistakable robbery, and the defense was that defendant was free from all guilt, and defendant was convicted of robbery, instructions on larceny, the giving or refusing of them, and their correctness, were immaterial, and not

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prejudicial to defendant.—People v. Stevens, 141 Cal. 488, 75 Pac. 62.

[mmm] Defendant in a murder case cannot be prejudiced by the use of the word "impression" in an instruction: " 'Moral certainty' is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is also declared to be a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."—People v. Lew Fook, 141 Cal. 548, 75 Pac. 188.

[nnn] An instruction on a trial for murder, that whether defendant does or does not act with malice aforethought is always to be inferred from the circumstances surrounding the case, is not prejudicial to defendant, for, if there are other rules for determining it, defendant cannot complain because the jury is restricted to one, such restriction being favorable to him.—People v. Glover, 141 Cal. 233, 74 Pac. 745.

[ooo] Fact that instruction announcing correct principle of law is not relevant to facts does not constitute reversible error.—People v. Glover, 141 Cal. 240, 74 Pac. 745.

[ppp] Where, in prosecution for burglary, the sole defense was that defendant did not commit or aid in the commission of the crime, or enter the room, the giving of an instruction to the effect that intoxication might be considered for the purpose of determining the degree of the crime was not prejudicial error.—People v. Dowell, 141 Cal. 493, 75 Pac. 45.

[qqq] Improper instruction often approved by supreme court will not be held prejudicially erroneous.—People v. Manoogian, 141 Cal. 598, 75 Pac. 177.

[rrr] Instructions on abstract questions of law, not applicable to facts of case on trial, are not ground for reversal where no injury results therefrom.—People v. Romero, 143 Cal. 458, 77 Pac. 163.

[sss] Where an indictment for perjury charged, not only that the testimony given was false, but that it was willfully given with knowledge on defendant's part that it was false, as provided by Penal Code, section 118, and the court charged in terms that all the allegations of the information except the falsity of the testimony were admitted, an instruction that if the jury believed beyond all reasonable doubt by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances, that the testimony in question was false, they should convict, did not constitute reversible error, on an appeal on the judgment-roll alone.—People v. Wong Fook Sam, 146 Cal. 114, 79 Pac. 848.

[ttt] The giving of a charge in a criminal case, that the jury might consider the manner of a witness, his relation to the controversy, etc., is not ground for reversal.—People v. Jailles, 146 Cal. 301, 79 Pac. 965.

[uuu] On a prosecution for assault with intent to commit murder, an instruction stating to the jury the penalty for an assault with a deadly weapon was no ground for reversal.—People v. Griffith, 146 Cal. 339, 80 Pac. 68.

[vvv] Where the instructions given by the court are contradictory, the judgment will be reversed.—People v. Higgins, 12 Pac. 301.

[www] It was harmless error to charge that "where weaker evidence is produced, when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse, if it had been produced," where the record did not show that defendant offered weaker evidence when it was in his power to produce higher.—People v. Dole, 51 Pac. 945.

[xxx] It was harmless error to charge that defendant was guilty of forgery, if he abetted in the commission of the crime, where there was no evidence that he had done so.—People v. Dole, 51 Pac. 945.

[yyy] Error in an instruction in a criminal case on circumstantial evidence held harmless. Code of Civil Procedure, section 1835.—People v. Taggart (Cal. App.), 82 Pac. 396.

[zzz] An instruction as to evidence of admissions or statements of defendant to witnesses held harmless.—People v. Hill (Cal. App.), 82 Pac. 398.

[aaaa] Instructions as to assault with intent to ravish, with which defendant was charged, were harmless where defendant was convicted only of simple assault.—People v. Green (Cal. App.), 82 Pac. 544.

[bbbb] An instruction on a trial for bribery held not prejudicial.—People v. Bunkers (Cal. App.), 84 Pac. 364.

[cccc] Instruction in rape case herein held harmless in view of omission of evidence.—People v. Beatty, 88 Pac. 377.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 928-933; 15 Cent. Dig., cols. 958-978, §§ 3154-3169.

§ 793. —— Failure or Refusal to Instruct.

[a] Where the instructions asked are not correct the defendant cannot assign the refusal to give them as error, the reason for refusing them being immaterial.—People v. Sears, 18 Cal. 635.

[b] Whether a judgment of conviction will be reversed in any case because a rule requiring written instructions to be handed in before argument was enforced, query?—People v. Sears, 18 Cal. 635.

[a] Refusal of court to give instruction which assumes that no other than circum-

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stantial evidence was introduced by the prosecution will not be held erroneous on appeal if the record fails to show that none but circumstantial evidence was introduced.—People v. Brotherton, 47 Cal. 388.

[b] Refusal to give instructions not applicable is not erroneous.—People v. Daniels, 70 Cal. 521, 11 Pac. 655.

[c] Refusal of proper instructions is ground for reversal.—People v. Dodel, 77 Cal. 294, 19 Pac. 484.

[d] Failure to instruct on "present ability" is harmless when evidence shows that assault was committed by shot from pistol.—People v. Leong Yune Gun, 77 Cal. 636, 637, 20 Pac. 27.

[e] Failure to give instruction not requested is not ground for reversal.—People v. McLean, 84 Cal. 482, 24 Pac. 32.

[f] Failure to instruct on reasonable doubt is not reversible when instruction not asked.—People v. Christensen, 85 Cal. 571, 24 Pac. 888.

[g] Failure of court to admonish jury as to their duty during separation which occurred before trial begun is not reversible error.—People v. Coyne, 116 Cal. 297, 48 Pac. 218.

[h] Where one charged with murdering his wife defended on the ground that he was possessed of an insane delusion that she was poisoning him, and it was taken for granted by everyone that the charge against her was groundless, a refusal to instruct that it must be presumed, in favor of innocence, that the wife did not attempt to poison the defendant, was harmless, as the delusion, if it existed, did not constitute a defense.—People v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72-n, 51 Pac. 329.

[i] Defendant requested a charge that if defendant was, at the time of the homicide, "although only momentarily," incapable, by reason of mental disease, of appreciating the nature of his act, or incapable of appreciating its wrongfulness, he must be acquitted. Held not prejudicial error to modify the instruction by striking out the quoted words, where the instructions on the subject of insanity fully stated the law on such subject.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[j] On a trial for murder, where the only defense was insanity, defendant was not prejudiced by a refusal to instruct that if the evidence "points to" two conclusions, one consistent with guilt, and the other with innocence, the jury were bound to adopt the latter, and acquit.—People v. Barthleman, 120 Cal. 7, 52 Pac. 112.

[k] On a trial of accused for allowing and permitting his wife to remain in a house of prostitution, a refusal to charge that there must be a union of act and intent is harmless error in view of a charge given which defined the legal significance of the words "allow" and "permit."—People v. Streuber, 121 Cal. 431, 53 Pac. 918.

[l] Where no dying declaration of deceased is introduced, an instruction as to the law applicable to such declarations is merely abstract; and hence error in modifying a request is harmless.—People v. Brown, 130 Cal. 591, 62 Pac. 1072.

[m] Where court gave very full instructions as to what constituted embezzlement, and the defendant had requested an instruction to show that there might be an unlawful taking which would not be embezzlement, an instruction as to what constituted "larceny" could not have resulted to the defendant's injury though claimed by him to be inapplicable to the case.—People v. McMahan 133 Cal. 278, 65 Pac. 571.

[n] Where defendant requested instruction to acquit defendant, if jury should find that when defendant shot deceased he was in such a dazed and uncertain condition of mind, produced by a blow upon his head, that he was not capable of exercising ordinary judgment, or was not conscious of his acts, or in a state of mind to consider his acts, or consequences thereof, and judge at first decided to refuse it, but afterward gave it, pen and pencil marks constituting erasures with directions to jury not to consider therein, if it appears that such pen and pencil marks left the instruction legible and intelligible, defendant could not have been injured thereby.—People v. Shears, 133 Cal. 154, 65 Pac. 295.

[o] In a prosecution for murder, refusal of the court to instruct, as required by Code of Civil Procedure, section 2061, that the jury should receive with caution all evidence of oral admissions of defendant against himself, as it states a mere commonplace within the general knowledge of jurors, is not ground for a reversal.—People v. Wardrip, 141 Cal. 229, 74 Pac. 744.

[p] Reason assigned for refusal of instructions is immaterial if they were properly refused.—People v. Keith, 141 Cal. 690, 75 Pac. 304.

[q] Refusal of the court to charge that the presumption of innocence must go with the jury in all their deliberations held not prejudicial.—People v. Jailles, 146 Cal. 301, 79 Pac. 965.

[r] That the court struck from one of accused's proposed instructions the concluding clause that, if the jury should find so and so, they should find defendant not guilty, or acquit him, held not reversible eror.—People v. Weber (Cal. Sup.), 86 Pac. 671.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 932; 15 Cent. Dig., cols. 973-978, §§ 3164-3168.

§ 794. —— Conduct and Deliberations of Jury.

[a] Fact that jury whispered among themselves while viewing place of homicide is not reversible error.—People v. Bush, 68 Cal. 628, 10 Pac. 169.

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[b] Use of intoxicants by jury while deliberating upon verdict in capital case is reversible error.—People v. Lee Chuck, 78 Cal. 332, 20 Pac. 719.

[c] A conviction will not be reversed because it appears from affidavits that one of the jurors drank intoxicating liquor during the trial, and that during a recess of court he was intoxicated, when counter-affidavits by the other jurors, and the officer in charge of the jury, show that the juror was rational and sober at all times while hearing the trial and deliberating on the verdict.—People v. Deegan, 88 Cal. 602, 26 Pac. 500.

[d] After the submission of a criminal case to the jury, the officer in charge took the jurymen to a hotel for dinner, and two of them drank intoxicating liquor, but not sufficient to affect them. Held not to constitute misconduct which would warrant the reversal of the judgment.—People v. Sansome, 98 Cal. 235, 33 Pac. 202.

[e] Where the court sends form of verdict to the jury by the sheriff without objection by defendant or his counsel, and it does not appear that defendant was harmed by such procedure, the judgment should not be reversed therefor.—People v. Hite, 135 Cal. 76, 67 Pac. 57.

[f] Misconduct of jurors in a criminal case having been shown, held, that they could not deny its prejudicial influence.—People v. Chin Non, 146 Cal. 561, 80 Pac. 681.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 933; 15 Cent. Dig., cols. 979-985, §§ 3170-3178.

§ 795. —— Discharge of Part of Panel.

[a] Discharge of part of panel not resulting in injury to appellant is not ground for reversal.—People v. Murray, 85 Cal. 355, 24 Pac. 666.

§ 796. —— Proceedings in Presence of Jury.

[a] Fact that proceedings for contempt against person who made improper remark to juror out of court were had in presence of jury is harmless, especially where defendant did not ask to have jury excused pending the proceeding.—People v. Durrant, 116 Cal. 220, 221, 48 Pac. 75.

§ 797. —— Verdict.

[a] Order allowing sheriff to receive a sealed verdict and allow jury to separate is erroneous, but is cured by consent.—People v. Kelly, 46 Cal. 356.

[b] Judgment of conviction will be reversed unless the verdict finds the defendant guilty of offense charged in indictment, or some offense included within offense so charged.—People v. Ah Gow, 53 Cal. 627.

[c] A slight irregularity in the polling of a jury, not affecting a substantial right, the irregularity consisting in not strictly following the procedure prescribed by the code, will not be deemed ground for setting aside a verdict of guilty otherwise fairly rendered.—People v. Nichols, 62 Cal. 518.

[d] The information, in a prosecution for sending a forged telegram, alleged that defendant had been convicted of a felony. On arraignment defendant pleaded not guilty as to the former conviction, but, after the jury had been impaneled and sworn, defendant, without the hearing of the jury, moved the court to allow him to withdraw his former plea of not guilty as to such conviction and permit him to plead guilty, which was done before the information was read to the jury. The allegations as to the prior conviction were not read to the jury, and no issue was presented thereon. Held, that the failure of the jury to find on the prior conviction was not prejudicial to defendant.—People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

[e] A person convicted of burglary in the second degree cannot complain on appeal that the verdict was contrary to the evidence, because it showed without contradiction that defendant was guilty of burglary in the first degree.—People v. Coulter, 145 Cal. 66, 78 Pac. 348.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 933; 15 Cent. Dig., cols. 985-987, §§ 3179-3182.

§ 798. —— Judgment or Sentence.

[a] Where the mistake in the entry of the statement by the court to defendant of the nature of the offense of which he has been convicted is merely clerical, and does not prejudice defendant in any substantial right (Pen. Code, sec. 1404), the judgment will not be reversed on appeal, though the mistake has not been corrected.—People v. Murback, 64 Cal. 369, 30 Pac. 608.

[b] Defendant was charged with burglary and a prior conviction of petit larceny, and was convicted of burglary in the first degree. He was allowed to plead guilty of the prior conviction without evidence or verdict thereon, and was sentenced to fifteen years' imprisonment, for which term he might have been sentenced without any regard to the charge of petit larceny. Held, that the judgment was proper.—People v. Neason, 67 Cal. 225, 7 Pac 644.

[c] The misstatement of his offense, by the judge, to a prisoner appearing for sentence, is not ground for reversal, especially if the defendant has, after conviction, moved in arrest of judgment on the ground that the information charges no crime.—People v. Johnson, 71 Cal. 384, 12 Pac. 261.

[d] Judgment cannot be reversed because sentence is more severe than it should be.—People v. Huff, 72 Cal. 119, 13 Pac. 168.

[e] In a prosecution under Penal Code, section 476, for uttering a fictitious instrument,

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the fact that the court adjudged the defendant guilty of "forgery" was not reversible error, since the word "forgery," if properly used, could not injure defendant; the record furnishing a complete protection against another prosecution for the same offense.—People v. Terrill, 133 Cal. 120, 65 Pac. 303.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 934; 15 Cent. Dig., cols. 987-991, §§ 3183-3188.

§ 799. —— Rulings on Motion for New Trial.

[a] Permitting the district attorney, on a motion for a new trial, to call jurors to show that they had read nothing which influenced their verdict, is harmless error, where there is no competent evidence before the court showing them guilty of such misconduct.—People v. Azoff, 105 Cal. 632, 39 Pac. 59.

§ 800. Waiver of Error in Appellate Court.

[a] Where, in a prosecution for murder, the death penalty is not imposed, any error in refusing to allow counsel for accused to comment on the state's failure to call certain witnesses is waived by counsel's failure to point out portions of the record showing the materiality of such witnesses' testimony and the possibility of producing them.—People v. Glaze, 139 Cal. 154, 72 Pac. 965.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 886; 15 Cent. Dig., cols. 753-755, §§ 3011-3013.

§ 801. Subsequent Appeal.

[a] A decision on appeal which involves only sufficiency of information, and jurisdiction of court, is not res judicata on appeal presenting question whether offense charged is within the statute under which the indictment was found.—People v. Hamilton, 103 Cal. 488, 37 Pac. 627.

[b] If defendant in case is convicted, and appeals, and asks for a reversal of the judgment, but does not move for a new trial, a reversal of the judgment and an order for a new trial take from him the right of setting up former trial and conviction in bar of another trial.—People v. Olwell, 28 Cal. 456.

[c] Reversal of judgment and of order denying a new trial, upon appeal of defendant, does not have the effect to arrest the judgment, but remits the defendant to his original position upon his plea of not guilty, and leaves the case as though a trial had never been had; and the court may proceed in any way authorized by the criminal law.—People v. Mooney, 132 Cal. 13, 63 Pac. 1070.

[d] Under a charge of assault with intent to commit murder, defendant was convicted of the lesser offense of assault with a deadly weapon, and a new trial was granted him, for insufficient evidence. On a second trial he was convicted of the higher offense, and on his motion a new trial was granted on the sole ground that he had been twice put in jeopardy for the same offense. On appeal by the people the judgment was reversed because he did not plead former jeopardy. The trial court, on return of remittitur, pronounced judgment on the verdict. Held, that the supreme court could not, on appeal by defendant from such judgment, review its former decision.—People v. Bennett, 50 Pac. 703.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 748, 749, §§ 3002-3004.

H. DETERMINATION AND DISPOSITION OF CAUSE.

DECISION, IN GENERAL, 802.
AFFIRMANCE, § 803.
MODIFICATION OR CORRECTION OF JUDGMENT, § 804.
REVERSAL—GROUNDS, IN GENERAL, § 805.
—— WANT OF CONTROVERSY, § 806.
—— ORDERING NEW TRIAL ON REVERSAL, § 807.
—— DIRECTING JUDGMENT IN LOWER COURT, § 808.
—— EFFECT OF REVERSAL, § 809.
JURISDICTION AND PROCEEDINGS IN LOWER COURT AFTER REMAND, § 810.
JURISDICTION AND PROCEEDINGS IN APPELLATE COURT AFTER REMAND, § 811.

§ 802. Decision in General.

[a] Supreme court will not comment on sufficiency of evidence to sustain conviction when new trial is ordered.—People v. Lambert, 120 Cal. 177, 52 Pac. 307.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 935; 15 Cent. Dig., cols. 994-1003, §§ 3192-3202.

§ 803. Affirmance.

[a] Where, upon review of alleged errors on appeal relied on for reversal of a judgment of conviction it appeared to this court that the law had not been misrepresented, or the jury misled to the prejudice of the defendant, held, that the judgment should be affirmed.—People v. Cronin, 34 Cal. 191.

[b] Judgment of affirmance need not order execution of criminal.—People v. Dick, 39 Cal. 102.

[c] If no substantial rights of defendant convicted of criminal offense have been interfered with the judgment will be affirmed.—People v. Turley, 50 Cal. 469.

[d] Where a judgment has been affirmed because of the failure of the counsel for the appellant to file a brief or appear at the hearing, and a remittitur has been issued to the trial court, the supreme court has no power to recall the remittitur and reinstate the ap-

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peal, where the failure of the counsel for appellant to appear was solely due to inadvertence upon their part.—People v. McDermott, 97 Cal. 247, 32 Pac. 7.

[e] Judgment of conviction affirmed by supreme court is past question in superior court. People v. Durrant, 119 Cal. 206, 51 Pac. 185.

[f] Where an appellant files no brief on appeal, and no apearance is made on his behalf at the calling of the case for hearing, and no error is suggested, the judgment will be affirmed.—People v. Fahey, 134 Cal. xix, 66 Pac. 726.

[g] Where an appellant files no brief on appeal, and no appearance is made on his behalf at the calling of the case for hearing in its order on the calender, and no error is suggested, the judgment will be affirmed.—People v. Barber, 134 Cal. xix, 66 Pac. 725.

[h] Where a defendant filed no points or authorities on appeal from a judgment and order denying a new trial on the judgment-roll alone, and no error appeared on the face of the record, the conviction will be affirmed.—People v. Poggi, 137 Cal. xix, 70 Pac. 292.

[i] Under Penal Code, section 1253, providing that a judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear, a judgment of conviction could only be affirmed where defendant filed no brief, made no appearance, and submitted the case on the record without argument.—People v. Gehrig, 139 Cal. xix, 72 Pac. 717.

[j] Where defendant in a criminal case, on appeal by him, files no brief, and no error is apparent of record, the judgment will be affirmed.—People v. Moran, 31 Pac. 853.

[k] On appeal from a conviction in a criminal case, where there has been no oral argument in the supreme court, and appellant has filed no points or authorities, and no error appears in the record, the judgment will be affirmed.—People v. Casteel, 34 Pac. 237.

[l] A judgment in a capital case will not be affirmed merely because no counsel has appeared to support the appeal by brief or oral argument.—People v. Morasco, 38 Pac. 423.

[m] Where no brief is filed, a conviction will be affirmed if it appears that the evidence sustains the verdict, and no exception was taken to any ruling of the court.—People v. Short, 41 Pac. 862.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 936-940; 15 Cent. Dig., cols. 1003-1013, §§ 3203-3214.

§ 804. Modification or Correction of Judgment.

[a] Where judgment imposes fine and imprisonment, and further imprisonment for nonpayment of fine, appellate court will strike out latter portion.—Lowrey v. Hogue, 85 Cal. 603, 24 Pac. 995.

[b] A judgment that a defendant convicted of kidnapping be imprisoned for a stated period, and directing that he also pay the district attorney a specified fee, is unauthorized as to the portion directing the payment of the fee, and will be modified upon appeal by striking out the latter portion, without remanding the case.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 937-939; 15 Cent. Dig., cols. 1001, 1002, §§ 3199, 3200.

§ 805. Reversal—Grounds in General.

[a] Where it is clear that error must have injuriously affected defendant, judgment must be reversed.—People v. Creeks, 141 Cal. 533, 75 Pac. 101.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 940-944; 15 Cent. Dig., cols. 1014-1031, §§ 3215-3230.

§ 806. —— Want of Controversy.

[a] Where, on appeal from a conviction for obtaining money under false pretenses, the state admits that, if defendant is guilty of any crime, it is that of larceny, and not of the crime charged, and it is evident that defendant will not again be tried upon the charge of which he was convicted, the court will not consider moot questions arising upon the evidence, but will reverse the case.—People v. Lewis, 127 Cal. 207, 59 Pac. 830.

§ 807. —— Ordering New Trial on Reversal.

[a] Where, on appeal by a defendant in a trial for murder for error of law occurring in the progress of the trial, the judgment is reversed, the court may order a new trial, although the defendant has not asked for one. People v. Olwell, 28 Cal. 456.

[b] Where a verdict in a criminal case is held on appeal to be a nullity, defendant is not entitled to be discharged, but the supreme court, on reversing the judgment, will order a new trial, and this though defendant did not move for a new trial, but merely for his discharge; since, under Penal Code, section 1260, the appellate court may reverse, affirm, or modify a judgment appealed from, "and may, if proper, order a new trial."—People v. Lee Yune Chong, 94 Cal. 379, 29 Pac. 776.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 942, 943; 15 Cent. Dig., cols. 1024-1029, §§ 3225-3227.

§ 808. —— Directing Judgment in Lower Court.

[a] If court imposes longer term of imprisonment than that fixed by statute for the offense the supreme court, on appeal, will reverse the judgment, and direct the court

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below to proceed to judgment on the verdict.—People v. Riley, 48 Cal. 549.

[b] Where judgment is not for the crime of which the defendant was convicted it should be reversed, with directions to the lower court to render a judgment for embezzlement.—People v. Johnson, 71 Cal. 384, 12 Pac. 261.

[c] That one of the pages of an information on which a conviction was had was missing and not proved at the trial held not to require the appellate court, on reversal, to require the information to be dismissed.—People v. Noon, 1 Cal. App. 44, 81 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 941; 15 Cent. Dig., cols. 1019-1024, §§ 3222-3224.

§ 809. —— Effect of Reversal.

[a] Under Penal Code, section 1262, providing that, if a judgment against a defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom, on the reversal of a conviction for uttering a forged check, for insufficiency in the indictment, the defendant, who was in custody, was entitled to be discharged.—People v. Elphis, 139 Cal. xix, 72 Pac. 838.

[b] Penal Code, section 1262, providing that, if judgment against a defendant is reversed without ordering a new trial, the appellate court must direct defendant's discharge from the judgment against defendant, but also the custody, does not apply where not only denial of a new trial, was reversed.—People v. Lee Look, 143 Cal. 216, 76 Pac. 1028.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 944; 15 Cent. Dig., cols. 1029-1031, §§ 3228, 3229.

§ 810. Jurisdiction and Proceedings in Lower Court After Remand.

[a] Where an appeal is taken, the jurisdiction of the inferior court is only suspended, and, on the return of the remittitur from the appellate court, the latter loses its jurisdiction of the case, and the inferior court resumes its jurisdiction as fully and absolutely as though no suspension had ever occurred.—People v. Dick, 39 Cal. 102.

[b] Where an appeal is taken, and the order or judgment appealed from is simply affirmed, no order of the appellate court is necessary to reinvest the inferior court with jurisdiction.—People v. Dick, 39 Cal. 102.

[c] On reversal of order granting new trial, only duty to be performed by trial court is to render judgment and sentence on the verdict. People v. Woods, 84 Cal. 443, 23 Pac. 111.

[d] Penal Code, section 1262, only gives the appellate court to which an appeal has been taken jurisdiction to order a discharge of defendant, and does not authorize a discharge by any other court.—Ballard, Ex parte (Cal. Sup.), 84 Pac. 833.

[e] Under Penal Code, section 1262, a defendant, where conviction has been reversed on an appeal, held not entitled to a discharge without a showing as to the disposition of appeal from the order denying a new trial.—Ballard, Ex parte (Cal. Sup.), 84 Pac. 833.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 944-946; 15 Cent. Dig., cols. 1021-1039, §§ 3231-3243.

§ 811. Jurisdiction and Proceedings in Appellate Court After Remand.

[a] Where a certified copy of a judgment in an appellate court is remitted to the court from which the appeal is taken, the appellate court loses all jurisdiction of the case; and all orders necessary to carry the judgment into effect must be made by the lower court.—Jones, Ex parte, 41 Cal. 209.

[b] When a certified copy of a judgment in an appellate court is remitted to the court from which the appeal is taken the appellate court loses all jurisdiction of the case; and all orders necessary to carry the judgment into effect must be made by the lower court. This provision of the statute is not confined to judgments in the supreme court, but is applicable to proceedings in the county court. Jones, Ex parte, 41 Cal. 209.

[c] When a remittitur has been regularly issued by supreme court, and filed, and there has been no violation of law or of the rules of this court in ordering the remittitur, and no mistake of facts, and no fraud or imposition practiced by the prevailing party upon the court or upon the losing party, the jurisdiction of the supreme court is at an end, and the judgment final.—People v. McDermott, 97 Cal. 247, 32 Pac. 7.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1036-1038, §§ 3241, 3242.

XVI. SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS.

STATUTORY PROVISIONS, § 812.
PROSECUTIONS FOR SECOND OFFENSES—IN GENERAL, § 813.
—— EVIDENCE, § 814.
—— VERDICT, § 815.
—— JUDGMENT OR SENTENCE, § 816.
PUNISHMENT, § 817.

§ 812. Statutory Provisions.

[a] The provision of the Penal Code, making a second offense of petit larceny a felony, the first being only a misdemeanor, applies where the first offense was committed prior to the taking effect of the code.—Gutierrez, Ex parte, 45 Cal. 429.

[b] Under Penal Code, section 1158, providing for the consideration of the fact of a

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prior conviction, if it is charged in the "indictment," such prior conviction may be considered, though charged in an information.—People v. Carlton, 57 Cal. 559.

[c] Contention that it is a discrimination and destruction of the uniform operation of the general laws in the trial of a case, where a former conviction is relied on to increase the penalty for the offense for which defendant is being tried, that the jury is prejudiced in advance from the fact of the reading of the indictment charging him with the previous conviction, and that thereby defendant is compelled to be a witness against himself, is untenable.—People v. Coleman, 145 Cal. 609, 79 Pac. 283.

FOR AUTHORITIES FROM OTHER STATES:

Validity of statutes imposing heavier penalty for second offense: 64 Am. St. Rep. 378, note.

§ 813. Prosecutions for Second Offenses—In General.

[a] If the defendant pleads "guilty of the offense as charged in the indictment" and the indictment charges the offense of petit larceny committed after a previous conviction for petit larceny, the plea confesses the offense charged, which includes the previous conviction, and the defendant must be sentenced for a felony.—People v. Delany, 49 Cal. 394.

[b] Defendant admitting former conviction on arraignment cannot deny it on trial without first getting leave to withdraw admission. People v. Appleton, 120 Cal. 252, 52 Pac. 582.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 950-953; 15 Cent. Dig., cols. 1047-1053, §§ 3260-3265.

§ 814. —— Evidence.

[a] Where a defendant, accused of burglary and of a prior convicton of burglary, pleads guilty to the prior conviction, and not guilty as to the offense charged, it is the intent of the code in such case to keep all information from the jury as to the previous conviction; and the plea of guilty thereof is only intended for the information of the court in determining the punishment to be imposed in case of conviction; and it is prejudicial error to admit evidence of declarations of the defendant that he had served a term in the state's prison under the prior conviction.—People v. Thomas, 110 Cal. 41, 42 Pac. 456.

§ 815. —— Verdict.

[a] In view of code, section 1093, requiring the clerk to omit all that relates to a prior conviction in reading an indictment to the jury, if defendant confesses the same, it is not necessary for the jury to pass on the question of former conviction, if defendant makes such confession.—People v. Carlton, 57 Cal. 559.

[b] Penal Code, section 1025, provides that, where defendant is charged in the indictment with having suffered a previous conviction of felony, he must be asked, at the time of pleading, whether he has suffered such conviction, and that his affirmative answer shall be conclusive of that fact. Held, since the repeal of that section, that it is necessary that such previous conviction be charged, that defendant plead thereto, and that the plea be passed upon by the jury, notwithstanding an admission of such previous conviction by defendant when improperly asked by the clerk as to the fact.—People v. King, 64 Cal. 338, 30 Pac. 1028.

[c] Where an information charges a felony, together with a prior conviction, and defendant pleads not guilty of the offense charged, but voluntarily confesses the prior conviction, a general verdict that defendant is guilty as charged in the information is regular, and broad enough to cover all issues in the pleading, and it is not necessary that the jury should find specially as to the prior conviction.—People v. Brooks, 65 Cal. 295, 300, 4 Pac. 7, 11.

[d] On the trial, under a plea of not guilty, of an indictment charging defendant with forgery, and with having suffered a prior conviction of larceny, the jury must specifically find on the issue of prior conviction.—People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

[e] On the trial of an indictment charging defendant with forgery, and with having suffered a prior conviction of larceny, a general verdict of "guilty as charged" will be treated as an acquittal of the charge of prior conviction.—People v. Eppinger, 109 Cal. 294, 41 Pac. 1037.

§ 816. —— Judgment or Sentence.

[a] A judgment of conviction of burglary and prior conviction, which recites that defendant, when called for sentence, was informed by the court of the information charging him with the crime of burglary and prior conviction of burglary, of his arraignment and pleas of not guilty as charged in the information, and guilty of the prior conviction, of the trial, and verdict of guilty of burglary, and that he was then asked if he had any legal cause to show why judgment should not be pronounced, is sufficient under Penal Code, section 1200, requiring that defendant, before judgment, must be informed of the nature of the charge, and of his plea, and the verdict, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him; and section 1207, requiring the clerk to enter the judgment on the minutes, stating briefly the offense for which the conviction was had, and the fact of prior conviction, etc.—People v. Wheatley, 88 Cal. 114, 26 Pac. 95.

[b] Penal Code, section 461, declares that burglary in the second degree is punishable by imprisonment in the state prison for not more than five years, and section 666 provides, among other things, that one twice convicted of felony may be punished by ten years' imprisonment therein. Held that, where an in-

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dictment charged three former convictions, and these were admitted of record, a judgment reciting a conviction of burglary in the second, and affixing a sentence of ten years, was valid, without reciting the former convictions.—Williams, Ex parte, 89 Cal. 421, 26 Pac. 887.

[c] The only authority shown in a judgment roll for a conviction under Penal Code, section 666, giving the court the right to consider a former conviction without the jury finding a special verdict therefor, where, as provided by section 1158, "the answer of the defendant admits the charge," was a recital in the judgment that, subsequent to the time defendant was informed of the information against him, he "confesses the prior conviction." Held sufficient, in the absence of specific code requirements as to how the "answer" should be shown.—People v. McNeill, 118 Cal. 388, 50 Pac. 538.

[d] In reviewing a judgment of conviction and extended sentence on account of a prior conviction, the fact that the recital of a prior conviction does not appear as required in the entry of judgment, but is elsewhere stated in the record, may be regarded in determining the validity of the judgment.—People v. Kelley, 120 Cal. 271, 52 Pac. 587.

§ 817. Punishment.

[a] One who pleads guilty of burglary and who has been twice convicted of same offense cannot be sentenced to imprisonment in house of correction.—Mon Fook, Ex parte, 72 Cal. 10-12, 12 Pac. 803.

[b] Assault with deadly weapon may be punished by imprisonment for ten years when there has been prior conviction for manslaughter.—People v. Douglas, 87 Cal. 287, 25 Pac. 417.

[c] One convicted of burglary and confessing prior conviction may be sentenced to ten years' imprisonment.—People v. Johnson, 88 Cal. 174, 25 Pac. 1116.

[d] Where defendant was convicted of a misdemeanor in a police court, and sentenced to imprisonment in the county jail, and before the expiration of his term of imprisonment he was convicted of felony in a superior court, and a certified copy of the latter judgment was given to the sheriff, under which it was his duty to deliver the prisoner forthwith to the warden of the state prison, it was immaterial, as affecting the defendant's right to be held only in proper custody, that the sheriff was at the same time ex-officio county jailer, and as such charged with the execution of the police court judgment.—McGuire, Ex parte, 135 Cal. 339, 67 Pac. 327.

[e] Defendant was not entitled to his liberty on habeas corpus, but only to be placed in the custody of the warden of the penitentiary.—McGuire, Ex parte, 135 Cal. 339, 67 Pac. 327,

[f] The superior court, having the power to bring the prisoner before it and sentence him for the felony, had necessarily the implied power to proceed to judgment and execution, and, the court not having stayed such execution, the sheriff was not warranted in returning the prisoner to the county jail until the expiration of the term there, but should have proceeded under Penal Code, section 1216, requiring him, on receipt of a certified copy of a judgment of imprisonment, to deliver the defendant to the warden of the state prison. McGuire, Ex parte, 135 Cal. 339, 67 Pac. 327.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 954-957; 15 Cent. Dig., cols. 1057-1068, §§ 3271-3280.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

STATUTES CONSTRUED, § 818.
EFFECT OF REPEAL OF STATUTE, § 819.
REPEAL OF INDIAN WHIPPING ACT, § 820.
UNIFORMITY AND EQUALITY OF PUNISHMENT, § 821.
CUMULATIVE SENTENCE, § 822.
FINE AND ORDER FOR IMPRISONMENT UNTIL PAID, § 823.
—— IN CASE OF FINE AND IMPRISONMENT, § 824.
DOUBLE PUNISHMENT, § 825.
CRUEL, UNUSUAL OR EXCESSIVE PUNISHMENT, § 826.
—— RELIEF FOR IMPOSITION OF EXCESSIVE SENTENCE, § 827.
TERM OF IMPRISONMENT, § 828.
—— AMERICAN TABLES OF MORTALITY AS BASIS, § 829.
—— COMPUTATION OF TERM, § 830.
—— CONCURRENT OR CUMULATIVE TERM UNDER SENTENCE FOR SEVERAL OFFENSES, § 831.
—— EFFECT OF ESCAPE AND SENTENCE THEREFOR, § 832.
PLACE OF IMPRISONMENT, § 833.

Punishment for assault and battery. See Assault and Battery, § 51.
Ex post facto laws and bills of attainder. See Constitutional Law, §§ 195, 196.
Punishment for contempt. See Contempt, III.
Forfeiture of property as punishment for crime. See Forfeitures.
Punishment for murder. See Homicide, X.
Death sentence and execution thereof. See Homicide, §§ 222-230.
Punishment for malicious mischief. See Malicious Mischief, § 4.
Punishment for robbery. See Robbery, § 13.
Punishment for sodomy. See Sodomy, § 8.

§ 818. Statutes Construed.

[a] Section 1446, Penal Code, authorizing imprisonment until fine is paid does not authorize imprisonment at hard labor.—Fil Ki, In re, 80 Cal. 203, 22 Pac. 146.

[b] Penal Code, section 1446, relating to proceedings in police courts, provides that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's im-

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prisonment for every dollar of the fine. Section 1205, which was a similar provision, till amended by Statutes of 1891, page 52, provides that the imprisonment "must not exceed one day for every two dollars of the fine." Held, that section 1446 was not affected by the amendment to section 1205, which is a limitation on the powers of superior courts.—Mulholland, In re, 97 Cal. 527, 32 Pac. 568.

[c] Penal Code, section 246, held not unconstitutional as depriving convicts to whom it applied of their life or liberty without due process of law.—Finley, Ex parte, 1 Cal. App. 198, 81 Pac. 1041.

[d] Penal Code, section 246, held not unconstitutional as denying equality to convicts in the class to whom it applied.—Finley, Ex parte, 1 Cal. App. 198, 81 Pac. 1041.

§ 819. Effect of Repeal of Statute.

[a] Repeal of a penal statute without a saving clause has the effect to deprive the court in which a prosecution under the statute is pending of all power to proceed further in the matter.—Spears v. County of Modoc, 101 Cal. 303, 35 Pac. 869.

§ 820. Repeal of Indian Whipping Act.

[a] Act of April 22, 1850, conferring on justices of the peace the power to punish Indians convicted of larceny by whipping, is repealed by the act of 1856, which prescribes punishment for both grand and petit larceny. People v. Antonio, 27 Cal. 404.

§ 821. Uniformity and Equality of Punishment.

[a] Legislature may prescribe different places of punishment for persons convicted in different parts of state or leave it to discretion of court.—Williams, Ex parte, 87 Cal. 80, 24 Pac. 602.

[b] Fact that under a law different degrees of punishment may be imposed by different courts for the same offense does not render it invalid, the degree of punishment within the limits prescribed by law being within the discretion of the court.—Mulholland, In re, 97 Cal. 527, 32 Pac. 568.

[c] Legislature has power to provide different places of punishment for the same offense, and may provide that when imprisonment is ordered by the police court of a city it may be suffered in the city prison or jail, although the same offense, when committed in a county outside of the limits of the city, is made punishable by imprisonment in the county jail.—Matter of Ambrosewf, 109 Cal. 264, 41 Pac. 1101.

[d] Act of March 11, 1889 (Stats. 1889, pp. 100-106), entitled "An act to establish a school of industry," and providing for the detention therein of minors guilty of criminal offenses until majority, which may be a longer period than the term of imprisonment in the county jail provided for such offenses, is not unconstitutional, as providing unequal punishments for the same offense.—Nichols, Ex parte, 110 Cal. 651, 43 Pac. 9.

§ 822. Cumulative Sentence.

[a] Section 669 of the Penal Code only allows successive and cumulative terms of imprisonment, where a person has been convicted of two or more crimes, before sentence has been pronounced upon him for either; which may be done in all cases where two separate crimes are charged against the same person, by postponing judgment on the first conviction until after the verdict in the second case. Morton, Ex parte, 132 Cal. 346, 64 Pac. 469.

[b] Penal Code, section 105, being limited to escapes, does not warrant imposing cumulative sentence on defendant for burglary after a sentence had already been pronounced on him under a former conviction for assault to commit murder.—Morton, Ex parte, 132 Cal. 346, 64 Pac. 469.

[c] Penal Code, section 670, provides that, when any person is convicted of two or more crimes before sentence has been pronounced on him for either, the imprisonment to which he is sentenced on the second must commence at the termination of the first term of imprisonment. Defendant was convicted of an assault with intent to kill, and sentenced to ten years' imprisonment on July 19, 1890, and in the following month was found guilty of burglary, and sentenced to five years' imprisonment, to commence at the expiration of the term under his former sentence. Held, that after a service of ten years in the state's prison defendant was entitled to his discharge, since the second sentence was invalid, because accused was not convicted before the sentence under the first conviction.—Morton, Ex parte, 132 Cal. 346, 64 Pac. 469.

[d] Where defendant has been already sentenced to the state's prison for a term of years for one crime, he cannot, upon subsequent conviction, upon a second charge, be sentenced to a second term of imprisonment to commence at the expiration of the first term of years, and such sentence is invalid and void, and after the expiration of the first term of imprisonment, the prisoner is entitled to be discharged upon habeas corpus.—Morton, Ex parte, 132 Cal. 346, 64 Pac. 469.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 962, 963; 15 Cent. Dig., cols. 1082-1086, §§ 3298-3301.

§ 823. Fine and Order for Imprisonment Until Paid.

See, also, ante, § 590.

[a] Code provision authorizing imprisonment for nonpayment of fine is inapplicable to cases where amount of fine is not discretionary.—Neustadt, Ex parte, 82 Cal. 274, 23 Pac. 124.

[b] Under Penal Code, sections 19 and 1205, court may punish misdemeanor by fine of

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five hundred dollars, with alternative that in default of payment defendant be imprisoned one day for each dollar of fine.—Casey, Ex parte, 85 Cal. 36, 24 Pac. 599.

[c] Where judgment is for fine only, imprisonment until fine paid may exceed maximum imprisonment imposed in case of imprisonment alone.—Casey, Ex parte, 85 Cal. 38, 24 Pac. 599.

[d] Where judgment is for fine only, it may direct imprisonment until fine is paid at the rate of one day for every dollar of fine.—Casey, Ex parte, 85 Cal. 38, 24 Pac. 599.

FOR AUTHORITIES FROM OTHER STATES:

Sentence of imprisonment until a fine is paid: 12 Am. St. Rep. 202, note.

§ 824. —— In Case of Fine and Imprisonment.

[a] Where fine is imposed in addition to imprisonment, court cannot order that fine be enforced by further imprisonment.—Wadleigh, Ex parte, 82 Cal. 520, 23 Pac. 190.

[b] Imprisonment cannot be imposed for nonpayment of fine where sentence already imposes imprisonment.—People v. Hamberg, 84 Cal. 474, 24 Pac. 298.

§ 825. Double Punishment.

[a] If offenses possess different elements, both may be punished though they relate to same transaction.—People v. Bentley, 77 Cal. 3, 11 Am. St. Rep. 225, 18 Pac. 799.

[b] Punishment for crime under federal law would not prevent punishment for same act as violation of state law.—People v. McDonnel, 30 Cal. 290, 13 Am. St. Rep. 159, 22 Pac. 190.

[c] Penal Code, section 496, prescribing the punishment for receiving stolen goods at imprisonment in the penitentiary not exceeding five years, or in the county jail not exceeding six months, or both, is not unconstitutional, in authorizing a double punishment.—People v. Perini, 94 Cal. 573, 29 Pac. 1027.

[d] There is no restriction on power of legislature to prescribe double, treble, or any number of punishments for same offense if not cruel and unusual.—People v. Durrant, 119 Cal. 208, 209, 51 Pac. 185.

[e] The increase in the penalty on subsequent convictions of the same person for crime, required by Penal Code, section 666, does not punish accused twice for the same offense.—People v. Coleman, 145 Cal. 609, 79 Pac. 283.

826. Cruel, Unusual or Excessive Punishment.

[a] Punishment authorized by section 245, Penal Code, is not excessive, cruel, or unusual, Mitchell, Ex parte, 70 Cal. 2, 11 Pac. 488.

[b] Fifty years' imprisonment for robbery held not excessive.—People v. Clary, 72 Cal. 1, 13 Pac. 77.

[c] Four years' imprisonment for conspiracy to obtain money under false pretenses is not excessive or cruel punishment.—Rosenheim, Ex parte, 83 Cal. 389, 23 Pac. 372.

[d] Sentence of imprisonment for twenty years for robbing persons, in their house at night, of one hundred and seventy-five dollars, will not be disturbed as unusual.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

[e] Penal Code, section 246, providing a death penalty for assaults with deadly weapon or likely to produce great bodily injury committed by life convicts, held not invalid as providing a cruel or unusual punishment.—Finley, Ex parte, 1 Cal. App. 198, 81 Pac. 1041.

[f] Statutes of 1891, page 285, chapter 206, punishing a husband placing his wife in a house of prostitution, held not in conflict with the Constitution prohibiting cruel and unusual punishment.—People v. Conness, 88 Pac. 821.

FOR AUTHORITIES FROM OTHER STATES:

See 35 L. R. A. 561, 571, 572, 573, 575, 576, 577, 578, notes. See, also, 12 Cyc. 963-965; 15 Cent. Dig., cols. 1088-1096, §§ 3304-3309.

§ 827. —— Relief for Imposition of Excessive Sentence.

[a] Error in imposition of excessive sentence can only be relieved against by governor on application for commutation or pardon.—People v. Huff, 72 Cal. 119, 13 Pac. 168.

§ 828. Term of Imprisonment.

[a] Court must not sentence prisoner to imprisonment for term longer than that fixed in the statute for the punishment of the crime of which he stands convicted.—People v. Riley, 48 Cal. 549.

[b] Where defendant may be punished by imprisonment for ten years, or any other term less than ten years, a sentence for ten years is not greater than the law allows.—People v. Brooks, 65 Cal. 300, 4 Pac. 11.

[c] Where the punishment for a particular crime is imprisonment for a term not less than ten years, a sentence for thirty-five years is not greater than is allowed by law.—People v. Brooks, 65 Cal. 295, 300; 4 Pac. 7, 11.

[d] Under Penal Code, sections 264, 671, providing that the punishment for certain offenses may be by imprisonment for life, and section 664, providing that an attempt to commit an offense shall be punishable by not more than half the maximum punishment for the commission of the offense itself, a sentence for five years for an attempt to commit an offense punishable by imprisonment for life is within the statute, even assuming that imprisonment for life is a longer term than imprisonment for any stated number of years. People v. Gardner, 98 Cal. 127, 32 Pac. 880.

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[e] Under Penal Code, sections 264, 671, rape may be punished by life imprisonment, or by not less than five years; and section 664 provides that an attempt to commit an offense may be punished by imprisonment not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense. Held, that punishment for attempt to rape by imprisonment for five years cannot be objected to on the ground that the term of half a life cannot be calculated, and that the statute therefore prescribes no punishment for attempt to rape.—People v. Gardner, 98 Cal. 127, 32 Pac. 880.

[f] Under Penal Code, section 213, making robbery punishable by imprisonment in the state prison "not less than one year," a judgment for imprisonment for life may be imposed, any intent that the punishment must be limited to a definite term of years being negatived by section 671, which in terms declares what effect is to be given to section 213.—People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

[g] When no limit to duration of imprisonment is declared, court may impose life sentence.—People v. Winthrop, 118 Cal. 93, 50 Pac. 390,

[h] Attempt to commit crime may be punished by imprisonment for a definite term of years, although the crime, if accomplished, is punishable for a term which may be for life. People v. Stouter, 142 Cal. 146, 75 Pac. 780.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 967-969; 15 Cent. Dig., cols. 1096-1102, §§ 3310-3319.

§ 829. —— American Tables of Mortality as Basis.

[a] American Tables of Mortality cannot be taken as a basis from which to determine the length of a sentence to be imposed on a defendant in a criminal case.—People v. Burns, 138 Cal. 159, 70 Pac. 1087, 60 L. R. A. 270.

§ 830. —— Computation of Term.

[a] Where one is convicted and sentenced in a lower court to a certain term of imprisonment, and is released on bail pending the decision on appeal, he is not, during such time, imprisoned within the meaning of the law, so as to be entitled to be discharged from execution of the sentence.—Jones, Ex parte, 41 Cal. 209.

[b] When appeal is taken after one day's imprisonment under sentence, term for balance of sentence begins to run on day of affirmance of judgment.—Green, Ex parte, 86 Cal. 429, 25 Pac. 21.

[c] Essential part of a sentence of imprisonment is not the time when it should be executed but the extent of the punishment fixed; and expiration of time, without imprisonment, is in no sense an execution of the sentence.—Vance, Ex parte, 90 Cal. 208, 27 Pac. 209.

§ 831. —— Concurrent or Cumulative Term Under Sentence for Several Offenses.

[a] In case of two convictions of same person, judgment should direct that period of imprisonment on second sentence should commence at close of period under first.—Kirby, Ex parte, 76 Cal. 520, 18 Pac. 655.

§ 832. —— Effect of Escape and Sentence Therefor.

[a] Term of imprisonment for escape commences to run from time prisoner would have been discharged had he not escaped.—Irwin, Ex parte, 88 Cal. 170, 25 Pac. 1118.

[b] Unauthorized release or departure of prisoner under sentence of imprisonment, without having been discharged in due course of law, is, in effect, a technical escape, from which he can derive no advantage, and the time of his absence cannot be computed as any part of the term of imprisonment.—Vance, Ex parte, 90 Cal. 208, 27 Pac. 209.

§ 833. Place of Imprisonment.

[a] A judgment upon a conviction of a misdemeanor only, which adjudges the defendant to be punished by imprisonment in the state prison, is absolutely void.—Ah Cha, Ex parte, 40 Cal. 426.

[b] Constitution of 1879, article 22, section 1, retains act of April 1, 1877, section 3, which provides that, in certain courts, persons who might be sentenced to state prison may be sentenced to the house of correction. Constitution, article 22, section 3, abolishes the courts named; and article 6 creates the superior court of San Francisco as their successor, with similar powers. Held, that under these provisions the superior court of San Francisco had jurisdiction to sentence a defendant to the house of correction, instead of to the state prison.—Flood, Ex parte, 64 Cal. 251, 30 Pac. 437.

[c] Imprisonment in state prison can be directed only in case of felony.—Arras, Ex parte, 78 Cal. 306, 20 Pac. 683.

[d] Court has no power to provide for imprisonment in state prison as means of enforcing payment of fine.—Arras, Ex parte, 78 Cal. 307, 20 Pac. 683.

[e] Where ordinance provides for imprisonment in city prison, judgment of imprisonment in county jail is a nullity.—Sylvester, Ex parte, 81 Cal. 200, 22 Pac. 550.

[f] Statutes of 1877-78, page 953, relating to the house of correction in the city and county of San Francisco, provides that the criminal court of such city and county may sentence a prisoner on conviction to the house of correction in any case where he might be imprisoned in the county jail. Held, that this is not a special or local act relating to the punishment of crime, within the meaning of Constitution, article 4, section 25, as it does not change the punishment or degree of any crime under the existing uniform laws,

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but only provides a place where punishment may be inflicted.—Williams, Ex parte, 87 Cal. 78, 25 Pac. 248.

[g] Under Statutes of 1877-78, page 953, authorizing the city criminal court or the municipal criminal court of the city and county of San Francisco, in any case where a prisoner might be sentenced to the county jail or the state prison, instead thereof to commit the prisoner to the house of correction, such person not being over twenty-five years old, and Constitution, article 22, section 3, abolishing said courts, and article 6, section 5, vesting jurisdiction in cases amounting to felony, in the superior court, the latter court has authority to commit to the house of correction in felony cases.—Williams, Ex parte, 87 Cal. 78, 24 Pac. 602.

[h] Under charter of city of Santa Rosa, persons found guilty of violating city ordinances should be committed to the city prison, and those found guilty of violation of the criminal laws of the state, where imprisonment is ordered, should be committed to the county jail.—County of Sonoma v. City of Santa Rosa, 102 Cal. 426, 36 Pac. 810.

[i] Under Statutes of 1885, page 214, and Statutes of 1891, page 292, providing that, when imprisonment is ordered by a police court, it is to be suffered in the city jail, one convicted in such court of violating Statutes of 1877-78, page 918, relating to the practice of medicine, should be confined in the city jail, though such act provides for imprisonment in the county jail.—Ambrosewf, In re, 109 Cal. 264, 41 Pac. 1101.

[j] Where defendant convicted of misdemeanor in a police court, and sentenced to imprisonment for six months in county jail, was, pending his imprisonment, sentenced to the state prison, upon conviction of a felony, on his plea of guilty, his imprisonment in the county jail more than forty days after latter sentence, is unlawful, and upon habeas corpus the prisoner will be remanded to the sheriff for imprisonment in the state prison forthwith.—McGuire, Ex parte, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 969-971; 15 Cent. Dig., cols. 1102-1110, §§ 3320-3328.

CRIMINAL LIBEL AND SLANDER.

See Libel and Slander, VI.

CRIMINAL PLEADING.

See Indictment and Information.

CRIMINAL PROCEDURE.

See Criminal Law.

CRITICISING COURT.

As contempt. See Contempt, § 8.

CROPPING CONTRACTS.

See Crops, § 4.

CROPS.

Include the annual products of the soil while unsevered therefrom, growing spontaneously or by cultivation, immature or ripe; and nature and incidents of rights of property therein in general.

OWNERSHIP—IN GENERAL, § 1.
—— ADVERSE POSSESSORS, § 2.
EFFECT OF SALE, § 2½.
EFFECT OF TRANSFER OF TITLE TO LAND, § 8.
CROPPING CONTRACTS, § 4.
ACTION FOR WRONGFULLY HARVESTING, § 5.

What constitutes agricultural crops. See Agriculture, § 3.
Promotion of agriculture in general, agricultural societies and agricultural liens. See Agriculture.
Liability of growing to seizure under writ of attachment. See Attachment, § 30.
Mode of levying attachment on growing crops. See Attachment, § 89.
Bounty for raising mulberry trees. See Bounties.
Right to mortgage. See Chattel Mortgages, § 10.
Description in chattel mortgage of crops to be grown. See Chattel Mortgages, § 22.
Duration of lien of chattel mortgage on. See Chattel Mortgages, §§ 38-39.
Construction of contract to plant, cultivate and harvest. See Contracts, § 142.
Judicial notice of time of harvesting. See Evidence, § 3.
Liability to execution. See Execution, § 9.
Right of execution purchaser to crops. See Execution, § 118.
Necessity that contract for sale of growing crop be in writing. See Frauds, Statute of, § 33.
Necessity for change of possession of as between transferee and creditor of transferrer of crops. See Fraudulent Conveyances, §§ 66, 67.
Harvested crops as part of homestead. See Homestead, § 54.
Right to enjoin removal of. See Injunction, § 52.
Renting on shares. See Landlord and Tenant, §§ 129-133.
Right to crops grown on mortgaged land. See Mortgages, § 93.
Right to crops on foreclosure sale of mortgaged land. See Mortgages, § 299.
On government lands. See Public Lands, § 9.
Timber culture on government lands. See Public Lands, § 32.
Trees not grown for their fruit or annual products, protection and promotion of growth of such trees and of forests. See Woods and Forests.

FOR AUTHORITIES FROM OTHER STATES:

What are emblements: 40 Am. Rep. 96, notes.

§ 1. Ownership—In General.

[a] Mere cutting of hay beyond actual occupancy does not devest possession so as to give title to hay.—Page v. Fowler, 37 Cal. 100.

[b] Crops raised by a surviving partner in possession of land patented to a deceased

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partner as a homestead claim, under a void contract to the effect that the patent was to be procured for the use and benefit of the copartnership, are not the subject of claim and delivery at the suit of the heirs of the patentee.—Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021.

[c] Right to the fruits of land does not depend upon the amount of labor expended by occupant in their production, and it is immaterial whether hay cut from land was a volunteer crop, or had been sold under a cropping contract with the occupant, and the fruits gathered belong to him as fully as the crops.—Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 976-979; 15 Cent. Dig., cols. 1119, 1120, § 1; cols. 1122, 1123, § 5.

§ 2. —— Adverse Possessors.

[a] The owner of land, after recovery thereof from one in possession under a claim of an interest therein, cannot replevy the crops grown and harvested by defendant while in such adverse possession.—Page v. Fowler, 37 Cal. 100, 39 Cal. 412, 2 Am. Rep. 462; (1894) Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021.

[b] Action cannot be maintained to recover grain sown and harvested by defendant on land to which he claimed title, and of which he had actual and adverse possession.—Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663.

§ 2½. Effect of Sale.

[a] Where the owner of the soil conveys "all the hay now cut or that shall be cut this year on the range," such hay became personalty in the hands of the purchaser.—Allen v. Bryant (Cal. App.), 88 Pac. 294.

§ 3. Effect of Transfer of Title to Land.

[a] Defendant contracted to exchange his fruit farm with plaintiff for certain real estate belonging to plaintiff, and deeds were made out and delivered in escrow, to be delivered to the parties when the title to the properties should be made satisfactory. Thereafter defendant recommended to plaintiff that the person then in charge of the orchard was a competent person to continue in charge thereof, and informed such person that thereafter he would be working for plaintiff instead of defendant; and bills for the expense of carrying on the orchard were sent to plaintiff directly or through defendant, the bills being paid by plaintiff. Thereafter, and prior to the delivery of the deeds, a crop of prunes growing on the orchard were prepared for market and sold by defendant, who refused to pay over the proceeds to plaintiff. Subsequently the deeds were delivered. Held that, the delivery of the deeds relating back to the date of their execution, and plaintiff having been put in possession of the premises and having defrayed the expense of the crop, he was entitled to the proceeds thereof.—Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364.

[b] A grantee in a deed deposited in escrow, to be delivered on the grantor's death, held entitled to the share of the crops growing at grantor's death, to be delivered by a lessee as rent.—Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705,

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 977-979; 15 Cent. Dig., cols. 1120-1122, §§ 2-4.

§ 4. Cropping Contracts.

See, also, Landlord and Tenant, §§ 129-133.

[a] One entitled to two-thirds of the crops and fruits under a cropping contract, and to the remaining one-third by purchase from the occupant in adverse possession, is not affected by a judgment in replevin brought against the occupant for the possession of the crops by the plaintiffs in the ejectment suit, to whom possession was delivered in the replevin suit, and such owner may recover damages from them for the conversion of the crops.—Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979.

[b] Under a cropping contract by the terms of which the entire crop of grain raised was to belong to the owner of the land until division should be made, and one-half of the crop was to be segregated on the ground, to be given to the cropper at the conclusion of the threshing and sacking of the crop, where it appeared that all of the crop, excepting one sack, had been threshed and sacked, and one-half thereof delivered by the cropper to the order of the owner of the land, and the remaining half remained in the field, such remaining half of the threshed and sacked crop is to be deemed the property of the cropper, and is subject to attachment by his creditor. Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404.

FOR AUTHORITIES FROM OTHER STATES:

See 12 Cyc. 977; 15 Cent. Dig., cols. 1123-1125, §§ 6-8.

§ 5. Action for Wrongfully Harvesting.

[a] Evidence that a third person claimed possession of land under lease from defendant is inadmissible in action for wrongful harvesting of crop raised by plaintiff.—West v. Smith, 52 Cal. 322.

CROSS.

Use of cross or mark for signature. See Signature, § 8.

CROSS-ACTION.

See Setoff and Counterclaim.

CROSS-BILL.

In equity. See Equity, § 86.

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CROSS-COMPLAINT.

In divorce action. See Divorce, § 39.
In injunction suit. See Injunction, § 80.
In civil actions in general. See Pleading, § 89.
Amendment of. See Pleading, § 163.

CROSS-DEMANDS.

See Setoff and Counterclaim.

Necessary to account stated. See Account Stated, § 5.

CROSS-EXAMINATION.

Reversible error in cross-examination of witnesses. See Appeal and Error, § 1433.
Of experts at criminal trials. See Criminal Law, § 243.
Of experts at civil trials. See Evidence, § 505.
Of witnesses in general. See Witnesses, §§ 132-162.
To impeach witness. See Witnesses, §§ 185, 186, 205.

CROSSING HIGHWAY.

Care required in crossing roads. See Highways, § 84, 85.

CROSSINGS.

Accidents at railroad crossings and liability of railroad therefor. See Railroads, §§ 35-49.

CROSS-REPLEVIN.

See Replevin, § 7.

CROWDED STREETS.

Care required of drivers on. See Highways, § 87.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, § 826.

CRUELTY.

As ground for divorce. See Divorce, § 11.

CRUELTY TO ANIMALS.

See Animals, § 12.

CULTIVATION.

See Agriculture; Crops.

CULVERTS.

See Waters and Watercourses.

CUMBERSOME PROPERTY.

Mode of levying attachment on property not capable of manual delivery. See Attachment, § 88.

CUMULATIVE EVIDENCE.

Absence of, as ground for continuance. See Criminal Law, § 301.
Newly discovered cumulative evidence as ground for new trial. See Criminal Law, § 553; New Trial, § 59.

CUMULATIVE LEGACIES.

See Wills, § 331.

CUMULATIVE REMEDIES.

See Action, §§ 29, 44.

Writ of assistance as cumulative remedy. See Assistance, Writ of, § 2.
For foreclosure of land mortgages. See Mortgages, § 181.

CUMULATIVE SENTENCE.

See Criminal Law, § 822.

CUMULATIVE TERM OF IMPRISONMENT.

Under sentence for several offenses. See Criminal Law, § 831.

CUMULATIVE VOTING.

At corporate meeting. See Corporations, § 216.

CURATIVE STATUTES.

Validity of. See Constitutional Law, § 189.
Curing defects in articles or certificates of incorporation. See Corporations, § 25.
Statutes curing defectively executed deeds. See Deeds, § 40.
Statutes curing defects in probate sales. See Executors and Administrators, § 437.
Statutes curing defects in conveyances of city property. See Municipal Corporations, § 74.
Statutes curing defects in conveyances by or to cities. See Municipal Corporations, § 78.
Statutes curing defects in state land grants. See Public Lands, § 170.
Validity of special curative acts. See Statutes, § 34.
Retroactive operation of. See Statutes, § 105.
Statutes curing defects in assessment-rolls. See Taxation, § 92.

CURATORS.

See Executors and Administrators; Guardian and Ward; Infants; Insane Persons; Parent and Child.

CURING ERRORS.

By subsequent proceedings in cause. See Appeal and Error, § 1257.
By instructions or rebuke of court. See Criminal Law, § 370.
In equity pleadings by subsequent pleadings. See Equity, § 95.
In parties. See Parties, § 53.
In civil pleadings. See Pleading, §§ 226-228.
In civil process. See Process, § 61.

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CURRENT OF ELECTRICITY.

Injuries from. See Electricity, §§ 4-7.

CURSING.

As public offense. See Blasphemy.

CURTESY.

Include nature and incidents of the interest in the real property of a deceased wife to which her husband is entitled, for his life or absolutely, at common law or by statute; abolition of curtesy and its effect; rights, powers, and liabilities of husbands in respect of their curtesy; releasing, barring, or defeating rights of curtesy; and remedies relating thereto.

§ 1. Abolition.

[a] Curtesy is abolished by Civil Code, section 173.

For Authorities from Other States:

See 19 L. R. A. 256, note. See, also, 12 Cyc. 1021; 15 Cent. Dig., cols. 1133-1137, §§ 3, 4.

CURTILAGE.

See Arson; Burglary.

CUSTODIA LEGIS.

See Custody of Law.

CUSTODIANS.

See Bailment; Depositaries; Warehousemen.

Of attached property and compensation for keeping. See Attachment, § 116.

Embezzlement by. See Embezzlement.

CUSTODY OF ACCUSED.

Pending habeas corpus proceedings in federal courts. See Courts, § 155.

Between commitment and trial. See Criminal Law, § 60.

Pending trial. See Criminal Law, § 319.

CUSTODY OF CHILDREN.

See Guardian and Ward, § 34; Infants, §§ 7-9; Parent and Child, § 2.

Award of, on decreeing divorce. See Divorce, VI.

CUSTODY OF JURY.

During trial. See Criminal Law, § 468; Trial, § 126.

CUSTODY OF LAW.

Right to attach property in custody of law. See Attachment, §§ 43-46.

Interference with property in custody of court as contempt. See Contempt, § 16.

CUSTODY OF PARENT.

As element of abduction. See Abduction, § 4.

CUSTODY OF PERSON.

Of ward. See Guardian and Ward, § 34.

Of insane person. See Insane Persons, § 19.

Determination of right to. See Habeas Corpus.

CUSTODY OF PROPERTY.

Custody of attached property. See Attachment, § 113.

Right to custody of attached property after dissolution of attachment. See Attachment, § 146.

And care of property by bailee. See Bailment, § 4.

By common carriers. See Carriers, §§ 18-20.

Mortgaged chattels. See Chattel Mortgages, § 47.

County funds. See Counties, § 130.

Allegations as to, in criminal pleading. See Criminal Law, § 83.

Right to custody of dead bodies. See Dead Bodies, § 2.

Rights of heirs and distributees to. See Descent and Distribution, §§ 47-49.

Custody of funds of drainage districts. See Drains, § 2.

As element of embezzlement. See Embezzlement, § 8.

Of decedents. See Executors and Administrators, §§ 150-152.

Property levied on. See Execution, § 62.

Of wards. See Guardian and Ward, § 36 et seq.

Effect of retention of valuables by guest on liability of hotel-keeper for their loss. See Innkeepers, § 12.

Of insolvents. See Insolvency, § 35.

As element of larceny. See Larceny, § 5.

Custody of public funds by public officers. See Officers, § 51.

CUSTOMS AND USAGES.

Include established methods of dealing in particular occupations or trades, or in transactions of a particular kind, or in particular localities; their operation and effect as to contracts; and pleading such customs and usages, and evidence relating thereto.

APPLICATION AND OPERATION, § 1.
CREATION, CONSTRUCTION, PERFORMANCE, AND BREACH OF CONTRACT, § 2.
VARYING TERMS OF CONTRACT, § 3.
CONTRAVENTION OF LAW, § 4.
PLEADING AND PROOF, § 5.
EXTINGUISHMENT BY LEGISLATION, § 6.

Limitation of carrier's liability by established custom. See Carriers, § 49.

As part of contract. See Contracts, § 114.

Long practice in courts as evidence of correctness of procedure. See Courts, § 78.

Admissibility of evidence of. See Evidence, §§ 104, 140.

Relating to interest. See Interest, § 6.

Local customs of miners. See Mines and Minerals, § 15.

Effect on right to appropriate water. See Waters and Watercourses, § 5.

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§ 1. Application and Operation.

[a] A verdict of a jury will not be disturbed on the ground that evidence was offered and received at the trial, after objection, that a custom had prevailed in California, amongst Spanish and Mexican residents, before the acquisition of the country by the Americans, that no more than two witnesses were requisite to attest the execution of a will, when it appears from such evidence that the custom had prevailed generally and for a long time.—Panaud v. Jones, 1 Cal. 488; Tevis v. Pitcher, 10 Cal. 465.

[b] Where a party's right is fixed by rules of property, which are a part of the general law of the land, it cannot be devested by any mere neighborhood custom or regulation. Waring v. Crow, 11 Cal. 366.

[c] Evidence of a custom of board of brokers as to delivery of contracts is admissible to rebut a receipt of payment.—Winans v. Hassey, 48 Cal. 635.

[d] Landlord may show by parol evidence that "stubble" reserved in lease includes grain uncut after harvest, by custom of locality.—Callahan v. Stanley, 57 Cal. 476.

[e] Though evidence of usage is not admissible to relieve a party from his express stipulation or to vary a contract certain in its terms, it has a legitimate office in aiding to interpret the intention of the parties to a contract, the character of which is to be ascertained from general implications and presumptions.—Burns v. Sennett, 99 Cal. 363, 33 Pac. 916.

For Authorities from Other States:

Validity and effect of customs and usages: 50 Am. Dec. 97, note.

Meaning of words, how and when affected by: 42 Am. Rep. 679, note. See, also, 12 Cyc. 1041-1046, 1056-1096; 15 Cent. Dig., cols. 1219-1301, §§ 11-39.

§ 2. Creation, Construction, Performance, and Breach of Contract.

[a] In an action concerning a disputed boundary between two mining claims, depending on an agreement between the parties, in which the word "north" was used, and parol evidence was admitted to prove that it was the custom of the locality to run boundary lines by the magnetic meridian, and that that was the understanding of the parties, such evidence was admissible, not to contradict or vary the term, but to ascertain the sense in which it was used.—Jenny Lind Co. v. Bower, 11 Cal. 194.

[b] Where a contract for the sale of wool warranted that it should be "in good order," evidence of a custom sought to be incorporated into the contract, the effect of which would be to nullify the legal effect of the warranty, was inadmissible.—Polhemus v. Heiman, 50 Cal, 438.

[c] Where a new and unusual word is used in a contract, or where a word is used in a technical or peculiar sense, as applicable to any trade, or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it.—Callahan v. Stanley, 57 Cal. 476.

[d] Where a person buys wool subject to "grader's rejection," which term had a well-understood meaning, defined by custom, he, having had the wool examined in another manner and having kept it, must pay for it, and it is no defense that afterwards he offered to have it properly examined.—Merehin v. Ball, 68 Cal. 205, 8 Pac. 886.

[e] A custom or usage cannot be proved to explain terms or provisions in contracts or instruments when the meaning of such terms is unambiguous and free from doubt.—Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7.

[f] Where a contract requires a party to plant "grape vines," and the word "vines" does not appear to have been used in any special or local sense expert evidence is not admissible to show its meaning, but it will be held to mean indifferently either cuttings or rooted plants, according to common usage.—Remy v. Olds, 34 Pac. 216, 21 L. R. A. 645.

For Authorities from Other States:

See 12 Cyc. 1033-1056; 15 Cent. Dig., cols. 1193-1219, §§ 1-10.

§ 3. Varying Terms of Contract.

[a] The custom of merchants is not admissible in evidence to vary the plain meaning of a written contract.—Corwin v. Patch, 4 Cal. 204.

[b] Usage of trade cannot be proved contrary to plain meaning of unambiguous contract.—Holloway v. McNear, 81 Cal. 156, 22 Pac. 514.

For Authorities from Other States:

See 12 Cyc. 1082, 1083; 15 Cent. Dig., cols. 1257-1263, §§ 27, 28.

§ 4. Contravention of Law.

[a] Under the Mexican law custom is sometimes allowed not only to control, limit, modify, and interpret the general rules of the system, but even to establish a rule in direct contravention of the positive written law. Thus, custom may attain the force of law, not only when there is no law to the contrary, but when the effect of it is to overturn the previous law which stands in opposition to it. (Per Bennett, J.)—Von Schmidt v. Huntington, 1 Cal. 55.

[b] Proof of usage cannot supersede a positive rule of law.—Langenberger v. Kroeger, 48 Cal. 149, 17 Am. Rep. 418.

[c] Custom to pay more than legal rate of interest is not against law.—Auzerais v. Naglee, 74 Cal. 71, 72, 15 Pac. 371.

For Authorities from Other States:

See 12 Cyc. 1047, 1053-1056; 15 Cent. Dig., cols. 1211-1219, §§ 8-10.

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§ 5. Pleading and Proof.

Admissibility of opinions of experts to prove custom or usage. See Evidence, § 484.

[a] Proof of custom in force in California previous to the formation of the state government is admissible.—Tevis v. Pitcher, 10 Cal. 465.

[b] Where a contract was made with reference to rules of a brokers' board, not usages of the trade in general, such rules become special terms of the contract, and must be specially pleaded.—Goldsmith v. Sawyer, 46 Cal. 209.

[c] In an action by a surgeon to recover for the value of services in attending persons wounded in a railroad collision, and placed in a private hospital, evidence for defendant of the usual and customary charge in this state for all necessary medical and other attendance on patients in hospitals received for treatment for wounds is irrelevant, since it did not relate to the value of services of the same character as those sued for.—Trenor v. Central Pac. R. Co., 50 Cal. 222.

[d] It was not error to exclude evidence of a local custom of real estate agents which was not material to the case, and could not have affected the conclusions reached by the court.—Lambert v. Gerner, 142 Cal. 399, 76 Pac. 63.

[e] Where the court holds that a contract has not been made with reference to a custom, evidence as to the existence of the custom is properly struck out as immaterial.—Withers v. Moore, 71 Pac. 697.

FOR AUTHORITIES FROM OTHER STATES:

Effect and proof of: 18 Am. Rep. 204, note. See, also, 12 Cyc. 1097; 15 Cent. Dig., cols. 1302, 1303, § 40.

§ 6. Extinguishment by Legislation.

[a] General custom is extinguished by legislation on same subject.—Lux v. Haggin, 69 Cal. 334, 10 Pac. 674.

CUSTOMS DUTIES.

See Internal Revenue; Licenses; Taxation.

Power of states to levy duties on imports and exports. See Commerce, § 8.

CUTTING TIMBER.

See Logs and Logging; Waste.

As actual possession sufficient to base title by prescription. See Adverse Possession, § 55.
Right to enjoin. See Injunction, § 51.
On government lands. See Public Lands, § 8.
As waste. See Waste, § 4.

CYCLOMETRY.

Judicial notice of. See Evidence, § 23.

CY PRES.

Application of doctrine of, in construing charitable trust. See Charities, § 23.

DAILY PAPERS.

In which legal notices may be published. See Newspapers.

DAMAGES.

Include pecuniary compensation, indemnity, or satisfaction, allowed by law for injuries by the unlawful act or default of another; nature and grounds of recovery thereof in general; rights to substantial or nominal damages, to immediate, consequential, remote, or prospective damages, and to compensatory or exemplary damages; penalties and liquidated damages and measure of damages for breach of contract in general; measure of damages for torts in general; interest as an element of damages; what amounts are inadequate or excessive as awards of damages; and proceedings relating to recovery and assessment of damages in general.

I. NATURE AND GROUNDS IN GENERAL, §§ 1-6.
II. NOMINAL DAMAGES, §§ 7-13.
III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES, §§ 14-44.
A. Direct or Remote, and Contingent or Prospective, Consequences, §§ 14-34.
B. Aggravation, Mitigation and Reduction of Loss, §§ 35-39.
C. Interests, Costs, and Expenses of Litigations, §§ 40-44.
IV. LIQUIDATED DAMAGES AND PENALTIES, §§ 45-51.
V. EXEMPLARY DAMAGES, §§ 52-60.
VI. MEASURE OF DAMAGES, §§ 61-87.
A. Injuries to the Person, §§ 61-66.
B. Injuries to Property, §§ 67-73.
C. Breach of Contract, §§ 74-87.
VII. INADEQUATE AND EXCESSIVE DAMAGES, §§ 88-94.
VIII. PLEADING, EVIDENCE, AND TRIAL, §§ 95-135.
A. Pleading, §§ 95-108.
B. Evidence, §§ 109-120.
C. Trial, §§ 121-130.
D. Computation and Amount, Double and Treble Damages and Remission, §§ 131-135.

Joinder of action for damages and demand for equitable relief. See Action, §§ 47, 48.
For assault and battery. See Assault and Battery, §§ 11-13.
For wrongful attachment. See Attachment, § 185.
Recoverable in action on attachment bond. See Attachment, § 180.
For breach of promise to marry. See Breach of Marriage Promise, §§ 6-9.
In establishing public bridge. See Bridges, § 3.
For wrongful ejection of passenger from train or street-car. See Carriers, § 162.
Right to exemplary damages for violation of civil rights. See Civil Rights, § 6.
Damages for frivolous or delay appeal. See Costs, §§ 87-94.
For breach of covenant. See Covenants, §§ 41-43.

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For wrongfully causing death. See Death, §§ 36-52.
From construction or maintenance of drains. See Drains, § 33.
Recoverable in ejectment. See Ejectment, V, A.
Action for damages for property taken for public use. See Eminent Domain, § 156.
Compensation for property taken in exercise of power of eminent domain. See Eminent Domain, II.
Measure and amount of compensation for property taken in exercise of power of eminent domain. See Eminent Domain, §§ 61-81.
Competency of experts to testify as to. See Evidence, § 495.
Admissibility of opinion evidence to prove. See Evidence, §§ 465, 473, 488.
For wrongful execution. See Execution, § 224.
For false imprisonment. See False Imprisonment, § 8.
In actions of forcible entry and detainer. See Forcible Entry and Detainer, § 68.
For fraud. See Fraud, § 53.
From construction of public road. See Highways, § 64.
As community property. See Husband and Wife, §§ 142, 143.
For enticing or alienating affections of spouse. See Husband and Wife, § 194.
Recoverable in actions on injunction bonds. See Injunction, § 160.
Instead of injunction. See Injunction, § 121.
Assessment of damages on granting injunction. See Injunction, § 122.
On dissolution of preliminary injunction. See Injunction, § 115.
For eviction of tenant. See Landlord and Tenant, § 92.
From construction or maintenance of levee. See Levees, § 8.
For libel or slander. See Libel and Slander, §§ 42-45.
For malicious prosecution. See Malicious Prosecution, §§ 34, 35.
For breach of contract of employment. See Master and Servant, § 10.
For injuries to servant. See Master and Servant, § 82.
For municipal improvements. See Municipal Corporations, §§ 165-174.
Proximate and remote. See Negligence, § 25.
Excessive damages as ground for new trial. See New Trial, § 41.
Inadequate damages as ground for new trial. See New Trial, § 40.
For nuisance. See Nuisance, § 19.
Actions by parent for damages for injuries to child. See Parent and Child, § 5.
For wrongful detention of personal property. See Replevin, §§ 24-27.
For breach of contract of sale. See Sales, §§ 70, 80.
For seduction. See Seduction, § 3.
Recoverable against sheriffs or their indemnitors. See Sheriffs and Constables, § 26.
Recoverable against telegraph companies for nondelivery or misdelivery of telegram. See Telegraphs and Telephones, § 9.
Proximate cause of injury. See Torts, § 3.
For trespass. See Trespass, §§ 19-23.
In action for trespass to try title. See Trespass to Try Title, § 1.
For wrongful conversion. See Trover and Conversion, §§ 21-23.
Recoverable by purchaser for failure of vendor to convey land. See Vendor and Purchaser, § 151.
For breach of contract to purchase price of land. See Vendor and Purchaser, § 132.
For waste. See Waste, § 8.
For diversion of water. See Waters and Watercourses, § 58.
For failure of witness to obey subpoena. See Witnesses, § 7.

I. NATURE AND GROUNDS IN GENERAL.

OBJECT OF DAMAGES, § 1.
UNLIQUIDATED DAMAGES, § 2.
INJURIES FOR WHICH DAMAGES ARE RECOVERABLE—INEVITABLE ACCIDENT, § 3.
—— INJURY INCIDENT TO EXERCISE OF LAWFUL RIGHT, § 4.
PRESUMPTION AS TO DAMAGE FROM INJURY, § 5.
SEVERANCE OF DAMAGES, § 6.

§ 1. Object of Damages.

[a] Object of damages is to give compensation for loss from injury sustained.—Donelly v. Hufschmidt, 79 Cal. 76, 21 Pac. 546.

§ 2. Unliquidated Damages.

[a] Term "unliquidated damages" applies equally to cases of tort, as slander, assault, etc., and to cases upon quantum meruit, for goods sold or services rendered.—Cox v. McLaughlin, 76 Cal. 67, 9 Am. St. Rep. 164, 18 Pac. 100.

§ 3. Injuries for Which Damages are Recoverable—Inevitable Accident.

[a] For inevitable accident occurring when one with due care is engaged in lawful business, damages are not recoverable.—Niosi v. Empire Steam Laundry, 117 Cal. 261, 49 Pac. 185.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 13.

§ 4. —— Injury Incident to Exercise of Lawful Right.

[a] The increase in the rate of fire insurance upon plaintiff's property, and the depreciation of his property in market value, alleged to have been occasioned by the construction of a house by the defendant so that the second story thereof overhangs the sidewalk of a public street, are not such elements of special damage as will give a right of action to the plaintiff. They constitute a detriment incident to the right of owning and enjoying property in a city or town, and for which there is no redress.—Siskiyou Lumber etc. Co. v. Rostel, 121 Cal. 511, 53 Pac. 1118.

§ 5. Presumption as to Damage from Injury.

[a] Law will presume damage from infringement of a legal right.—Browner v. Davis, 15 Cal. 9.

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[b] Nominal damages are presumed to follow as a conclusion of law from proof of the breach of a contract.—Browner v. Davis, 15 Cal. 9.

[c] Law presumes damages from a trespass. Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 12, 13; 15 Cent. Dig., col. 1645, § 3.

§ 6. Severance of Damages.

[a] There can be no severing of damages against the several defendants in joint action. Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

II. NOMINAL DAMAGES.

AWARD IRRESPECTIVE OF ACTUAL DAMAGE, § 7.
—— BREACH OF CONTRACT, § 8.
—— TRESPASS, § 9.
—— OVERFLOWING LANDS, AND INJURIES TO RIPARIAN RIGHTS, § 10.
NOMINAL OR SUBSTANTIAL DAMAGES—BREACH OF CONTRACT, § 11.
—— OVERFLOWING LAND, § 12.
—— TAKING OR DETAINING PERSONAL PROPERTY, § 13.

§ 7. Award Irrespective of Actual Damage.

[a] Party who has suffered no actual damage is not entitled to nominal damages.—McAllister v. Clement, 75 Cal. 184, 16 Pac. 775.

[b] In actions ex delicto nominal damages are often given, though no actual damage has been suffered; but a judgment for nominal damage is justified only on the ground that it can conserve some right of the plaintiff which has been nominally infringed, and which might be lost by acquiescence and lapse of time, and such judgment is not required where no right or title of the plaintiff is jeopardized.—Stewart v. Sefton, 108 Cal. 197, 41 Pac. 293.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 16; 15 Cent. Dig. cols. 1647-1658, §§ 7-18.

§ 8. —— Breach of Contract.

[a] Nominal damages will be given for breach of a valid contract, although it does not appear that the plaintiff has sustained actual damage.—McCarty v. Beach, 10 Cal. 461; Browner v. Davis, 15 Cal. 9.

[b] Where a party to a contract of exchange is induced by fraud to substitute another agreement, and bring an action for damages upon the first contract, and the court instructed the jury that they could not find for the plaintiff unless he had proved by a preponderance of evidence that he was damaged by the agreement to take the lots last contracted for in lieu of those first contracted for, and the evidence does not show that he was damaged thereby in any appreciable sum, the damages allowed should at most be only nominal, and a verdict in favor of the plaintiff for damages in the sum of two thousand five hundred dollars is contrary to the instructions of the court and should be set aside for that reason.—Marriner v. Dennison, 91 Cal. 555, 27 Pac. 927, 1091.

§ 9. —— Trespass.

[a] The measure of damages for the injury to a mining claim by wrongfully removing gold-bearing earth therefrom will be the value of the gold produced, less the necessary expense of extracting the gold, but defendant, who has committed a trespass, cannot obtain a verdict by showing the value of the property taken to be less than the expense of its severance from the realty, but nominal damages, at least, should be given.—Empire Gravel Min. Co. v. Bonanza Gravel Min. Co., 7 Pac. 810.

§ 10. —— Overflowing Lands, and Injuries to Riparian Rights.

[a] Interference with a riparian owner's right to the stream imports nominal damages, though there be no actual damages.—Creighton v. Evans, 53 Cal. 55.

§ 11. Nominal or Substantial Damages—Breach of Contract.

[a] Where a vendor breaks a contract for the conveyance of land because it has depreciated in value since the making of the contract, more than nominal damages may be recovered by the purchaser.—Morgan v. Stearns, 40 Cal. 434.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1658-1676, §§ 19-33.

§ 12. —— Overflowing Land.

[a] Where plaintiffs were largely and seriously damaged by water flowing on their land, a large part of which was caused to flow there by defendants, though a larger part came from other sources, a finding that plaintiffs' damage from the acts of defendants was but one dollar cannot be sustained.—Learned v. Castle, 78 Cal. 454, 21 Pac. 11.

§ 13. —— Taking or Detaining Personal Property.

[a] When property is delivered and accepted pending suit, that is, before verdict, the damages should be merely nominal.—Conroy v. Flint, 5 Cal. 327.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGE.

A. Direct or Remote, and Contingent or Prospective, Consequences, §§ 14-34.
B. Aggravation, Mitigation and Reduction of Loss, §§ 35-39.
C. Interests, Costs and Expenses of Litigations, §§ 40-44.

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A. DIRECT OR REMOTE, AND CONTINGENT OR PROSPECTIVE, CONSEQUENCES.

CONSEQUENTIAL DAMAGES DEFINED, § 14.
PROXIMATE CAUSE DEFINED, § 15.
PROXIMATE OR REMOTE CONSEQUENCE, § 16.
— CONSEQUENCES FLOWING FROM TORTS, IN GENERAL, § 17.
— CONSEQUENCES RESULTING FROM TRESPASS, § 18.
— CONSEQUENCES RESULTING FROM BREACH OF CONTRACT, § 19.
— DAMAGES FLOWING DIRECTLY FROM INTERVENING AGENCY OF THIRD PERSON, § 20.
— QUESTIONS FOR JURY, § 21.
NATURAL AND PROBABLE CONSEQUENCES OF BREACHES OF CONTRACT—WHAT ARE NATURAL, OR PROBABLE CONSEQUENCES OF BREACH OF CONTRACT, § 22.
CONTINGENT AND POSSIBLE CONSEQUENCES, § 23.
AGGRAVATION OF EXISTING DISEASE, § 24.
SPECULATIVE CONSEQUENCES, § 25.
PECUNIARY LOSS, § 26.
IMPAIRMENT OF BUSINESS ABILITY OR PERSONAL ACCOMPLISHMENTS, § 27.
LOSS OF PROFITS, § 28.
— BREACH OF CONTRACT, § 29.
PROSPECTIVE PROFITS, § 30.
EXPENSES INCURRED—IN RELIANCE UPON CONTRACT, § 31.
— NURSE HIRE AND MEDICAL TREATMENT, § 32.
MENTAL SUFFERING, § 33.
— INJURY TO PROPERTY, § 34.

Proximate cause of injury at railroad crossing. See Railroads, § 43.
Proximate cause of injury in operating street-cars. See Street Railroads, § 26.
Direct and remote consequences of trespass. See Trespass, § 20.

§ 14. Consequential Damages Defined.

[a] Consequential damages are such as are not proximately caused by breach of contract or would not likely result therefrom in ordinary course of things.—Savings Bank etc. v. Asbury, 117 Cal. 104, 48 Pac. 1081.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 22.

§ 15. Proximate Cause Defined.

[a] Proximate cause is the efficient cause; the one that necessarily sets the other cause in operation.—Hawthorne v. Siegel, 88 Cal. 165, 22 Am. St. Rep. 291, 25 Pac. 1114.

[b] Proximate cause is that which is actual cause of loss, whether operating directly or by putting intervening agencies in motion.—Hawthorne v. Siegel, 88 Cal. 166, 22 Am. St. Rep. 291, 25 Pac. 1114.

§ 16. Proximate or Remote Consequence.

[a] In actions for negligence, as here, damage to land from overflow of a ditch, only damages can be recovered of which the defendant's negligent act was the proximate cause.—Chidester v. Consolidated People's Ditch Co., 53 Cal. 56.

[b] Damages, to be recoverable, must be the natural and proximate consequence of the wrongful act complained of.—Anderson v. Taylor, 56 Cal. 131, 38 Am. Rep. 52.

[c] Damages in loss and destruction of materials, by reason of injunction against a street improvement, are proximate.—Dougherty v. Dore, 63 Cal. 170.

[d] Judgment was rendered against defendants for the amount of damages to his merchandise caused, as the court found, by the water being turned into plaintiff's premises by obstructions placed in the street and gutter by defendants, "together with other obstructions therein placed by other parties." Held error, within Civil Code, section 3333, which confines the measure of damages to compensation for detriment "proximately" caused by breach of an obligation not arising from contract.—Durgin v. Neal, 82 Cal. 595, 23 Pac. 133; Durgin v. McNally, 23 Pac. 375.

[e] Damages arising from the sacrifice of property, occasioned by the pressure of creditors, are too remote to be recovered against one who has bound himself to loan money, and failed to do it.—Savings Bank of Southern California v. Asbury, 117 Cal. 96, 48 Pac. 1081.

[f] Injury to trees and fruit crop resulting from failure to furnish water as agreed is not remote and speculative.—Roberts v. Krafts, 141 Cal. 29, 74 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

Proximate and remote, what are: 52 Am. Rep. 157, note.

Necessity that damages be natural and proximate result of act alleged to have caused injury: 69 Am. Dec. 725, note.

Consequential damages, liability for: 36 Am. Rep. 362, note.

Proximate and remote consequences, what are: 36 Am. St. Rep. 807, note; 45 L. R. A. 87, note.

§ 17. —— Consequences Flowing from Torts in General.

[a] Plaintiffs were in possession as lessees of a building which they used as a barber shop, when, by reason of defendants' trespass, the building was rendered unfit for such purpose, and they were compelled to move, losing thereby a hot-water privilege which they had purchased. Held, that they were entitled to damages for loss of the water privilege, the value of permanent improvements abandoned, expense of removal, and loss in their business, under Civil Code, section 3333, which gives the right to recover the amount that will compensate for the detriment "proximately caused" by the trespass. Hawthorne v. Siegel, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114.

[b] In an action for deceit, in selling plaintiff glandered horses, special damages are

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recoverable for medical treatment of the horses, and for the value of the stable, which plaintiff had to burn, to prevent contagion.—Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033.

§ 18. —— Consequences Resulting from Trespass.

[a] Defendant was in possession of a partially inclosed piece of public land on which he was pasturing his cattle. Plaintiff drove his cattle through defendant's inclosure on to the same land for the purpose of pasturage, from which they were driven by defendant. They afterward roamed on land claimed by one G., who gave notice to plaintiff to come and take them, which he neglected to do, and many of them died from starvation. Held that, the loss of the cattle not being the proximate result of the defendant's trespass, he was not liable for damages.—Story v. Robinson, 32 Cal. 205.

§ 19. —— Consequences Resulting from Breach of Contract.

[a] The loss of time, value of services, and wages of employees, caused by the failure of a party to perform his contract, are not remote, but strictly proximate and immediate damages, and ought to be allowed.—Kenyon v. Goodall, 3 Cal. 257.

[b] Person who contracts to deliver freight to a steamboat, and fails to do so, is liable in damages for the actual loss thereby sustained by the steamboat; but he does not become a guarantor against any further loss, such as the boat may sustain by reason of fruitless efforts to procure profitable employment.—Utter v. Chapman, 43 Cal. 279.

[c] In an action to recover the value of certain piles, defendant cannot show that, by reason of plaintiff's delay in furnishing such piles, he was prevented from completing a contract for so long a time that he failed to realize the money on such contract that he would otherwise have received.—Friend & Terry Lumber Co. v. Miller, 67 Cal. 464, 8 Pac. 40.

[d] Loss of the increase in value of land for which one was negotiating, but did not buy for want of money he could have borrowed on other land had the abstract of title been done at the time agreed, is too remote. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659.

[e] Under section 3300 of the Civil Code, an assessment upon stock agreed to be purchased which the vendor is compelled to pay as a consequence of the refusal of the defendants to take the stock at the time they had agreed to do so is a proximate result of their refusal.—Gay v. Dare, 103 Cal. 454, 37 Pac. 466.

[f] Appellant contracted to harvest respondent's grain, agreeing to commence not later than July 5th, and failed to commence until July 15th. A large amount of the grain shelled out before the harvesting was completed. Most of it would have been saved, had work been commenced on time. Held, that the damages were not too remote or speculative.—Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708.

§ 20. —— Damages Flowing Directly from Intervening Agency of Third Person.

[a] In an action for damages for failure of defendant to pay to a creditor of plaintiff money intrusted to him for that purpose, damages caused by the sale of plaintiff's property at a sacrifice, in an action against him by the creditor, cannot be shown, unless facts are alleged in the complaint showing that defendant knew that damages would probably flow from a breach of the contract by him greater than would follow from a breach of contract in the usual course of things.—Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882.

§ 21. —— Questions for Jury.

[a] Whether the humiliation consequent on plaintiff's wrongful expulsion from defendant's car was the proximate cause of her subsequent nervous paroxysms is a question for the jury.—Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320.

§ 22. Natural and Probable Consequences of Breaches of Contract—What are Natural or Probable Consequences of Breach of Contract.

[a] In an action for damages for failure of defendant to pay to a creditor of plaintiff money intrusted to him for that purpose, damages caused by the sale of plaintiff's property at a sacrifice, in an action against him by the creditor, cannot be shown, unless facts are alleged in the complaint showing that defendant knew that damages would probably flow from a breach of contract, in the usual course of things.—Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882.

[b] Damages which accrue subsequent to tort, but of which it is primary cause, are parts of tort itself.—Hawthorne v. Siegel, 83 Cal. 166, 22 Am. St. Rep. 291, 25 Pac. 1114.

FOR AUTHORITIES FROM OTHER STATES:

18 L. R. A. 385, note. See, also, 13 Cyc. 32-36; 15 Cent. Dig., cols. 1704-1713, §§ 58-64.

§ 23. Contingent and Possible Consequences.

[a] Remote and contingent damages cannot be recovered in an action to recover for the breach of a contract.—Yonge v. Pacific Mail S. S. Co., 1 Cal. 353.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 37-46; 15 Cent. Dig., cols. 1714-1718, §§ 65-68.

§ 24. Aggravation of Existing Disease.

[a] All physical suffering and injury caused by violence to the person, including the ag-

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gravation or hastening of the development of a pre-existing disease, are the natural and direct consequences of the wrong, and may be recovered as general damages, without special pleading.—Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 31; 15 Cent. Dig., cols. 1687, 1688, § 42.

§ 25. Speculative Consequences.

[a] Damage for cutting down growing trees should be estimated by all the circumstances, and the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury.—Chipman v. Hibberd, 6 Cal. 162.

§ 26. Pecuniary Loss.

[a] Evidence that the hearing in one of plaintiff's ears had been permanently destroyed, that the sight of one eye had been seriously impaired, and that his nervous system had received a shock from which he might never recover, and which at the time of the trial impaired his faculty for transacting his former business, warrants the granting of substantial damages, though the wages of plaintiff were not cut off or diminished by the injury, and he has not been subjected to any pecuniary loss.—Clare v. Sacramento Electric Power etc. Co., 122 Cal. 504, 55 Pac. 326.

FOR AUTHORITIES FROM OTHER STATES:

62 C. C. A. 612, note. See, also, 13 Cyc. 46-63; 15 Cent. Dig., cols. 1720-1745, §§ 72-88.

§ 27. Impairment of Business Ability or Personal Accomplishments.

[a] Instruction requested, to the effect that the jury could not award any damages for loss which the plaintiff might have suffered because of inability to attend to his business after the accident, was properly refused.—Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

[b] Where a complaint in an action for injuries to a passenger charged that by reason of her injuries plaintiff became sick, sore, lame, and disordered, and that her spine, brain, and nervous system were seriously injured, and evidence that plaintiff's musical abilities had been impaired was admitted without objection, an instruction authorizing the jury, in considering plaintiff's damages, to consider the impairment of her accomplishments, if any, and her ability to play musical instruments and sing, by reason of the accident, was not error.—Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 47.

§ 28. Loss of Profits.

[a] Measure of damages for goods fraudulently obtained is value of goods, and not profits which might have been made upon sales.—Butler v. Collins, 12 Cal. 457.

[b] Damages may sometimes be recovered on account of loss of anticipated profits, but only when there are proper data for the calculation.—Nightingale v. Scannell, 18 Cal. 315.

[c] In an action for damages for destroying an inclosure on plaintiff's farm, whereby his grass was destroyed, plaintiff cannot recover profits he might have made from cattle which he did not have, and had made no arrangement to procure.—Giaccomini v. Bulkeley, 51 Cal. 260.

[d] Owner of established business wrongfully injured or destroyed may recover damage sustained by loss of profits.—Hawthorne v. Siegel, 88 Cal. 167, 22 Am. St. Rep. 291, 25 Pac. 1114.

[e] Damages for unlawful withholding of real estate may not include profits which might have accrued from its use in conjunction with personalty.—Johnson v. Levy (Cal. App.), 86 Pac. 810.

FOR AUTHORITIES FROM OTHER STATES:

Profits, loss of, when an element of damages: 60 Am. Rep. 488, note; 51 L. R. A. 801, 52 L. R. A. 33, 209, 53 L. R. A. 33, 64 L. R. A. 94, notes. See, also, 6 Cyc. 112, 114; 13 Cyc. 49-59; 15 Cent. Dig., cols. 1720-1744, §§ 72-88.

§ 29. Breach of Contract.

[a] In an arbitration of matters arising from a violation of a lease of land, contemplated and contingent profits cannot be allowed as damages.—Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

[b] In an action for a breach of contract for the construction of levees, the probable profits on crops which were not planted, but might have been had the contract been fulfilled, and which were to be raised by a tenant who went into possession under a lease at thirds, executed subsequently to the breach of the contract for the levees, are too remote to form a ground for damages.—Wallace v. Ah Sam, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46.

[c] In an action for damages against a director of a corporation for the prevention of a directors' meeting, whereby the operation of its sawmill was prevented, it is error to consider as damages the prospective profits on the amount of lumber which could have been cut, as they are too remote.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

[d] Prospective profits are recoverable as damages for breach of a partly executed contract, whereby plaintiff was to plant and cultivate an orchard for five years, and share in the profits.—Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

[e] Loss of profits is proper element of damages in an action for a breach of contract

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to furnish and remodel an ice plant.—Bryson v. McCone, 121 Cal. 153, 53 Pac. 637.

§ 30. Prospective Profits.

[a] Prospective damages can be allowed only when it appears that the party will be subjected to the particular loss or injury for which he demands compensation.—De Costa v. Massachusetts Min. Co., 17 Cal. 613.

[b] Loss of prospective profits from probable sale of land is to remote.—Pendleton v. Cline, 85 Cal. 143, 24 Pac. 659.

[c] Prospective profits are sometimes allowed as damages for breach of contract or tort; but they must be the clear, proximate, and natural results of the wrong, and must be confined to the principal thing complained of, and to its naturally attendant consequences.—Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

[d] Prospective profits which are natural and direct consequences of breach of contract may be recovered.—Shoemaker v. Acker, 116 Cal. 245, 48 Pac. 62.

[e] Damages may be recovered for destruction of growing crops, though there is no absolute certainty that they will mature.—Shoemaker v. Acker, 116 Cal. 246, 48 Pac. 62.

[f] In action for breach of contract contemplating long period of time for performance, if trial be delayed, conditions existing at time of trial, as affecting prospective profits, may be shown.—Shoemaker v. Acker, 116 Cal. 246, 247, 48 Pac. 62.

§ 31. Expenses Incurred—In Reliance upon Contract.

[a] Where plaintiffs employed another to furnish a portion of the material called for in a contract, the fact that they paid him for work done and damages sustained for failure of defendant to allow them to continue the work, after suit was brought, does not bar a right of recovery for the amount so paid, especially where it appears that the settlement was advantageous to defendant.—O'Connell v. Main & Tenth St. Hotel Co., 90 Cal. 515, 27 Pac. 373.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 59-63; 15 Cent. Dig., cols. 1745-1756, §§ 89-99; cols. 1971,1972, § 243; cols. 1974, 1975, § 251.

§ 32. —— Nurse Hire and Medical Treatment.

[a] Plaintiff may recover amount incurred for nurse hire, medicines and doctor bills though not actually paid.—Donnelly v. Hufschmidt, 79 Cal. 76, 21 Pac. 546.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 63-66.

§ 33. Mental Suffering.

[a] In suits against common carriers, damages for pain of mind are recoverable where there has been actual injury.—Fairchild v. California Stage Co., 13 Cal. 599.

[b] A shock or injury to the nervous system occasioned by a tort must be regarded as a physical injury producing suffering to the body rather than to the mind, though the mind may be at the same time injuriously affected.—Sloane v. S. Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320.

[c] Although mental suffering alone will not support an action for damages, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of.—Sloane v. S. Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320.

[d] Charge that plaintiff could not recover for his injured feelings and mental anguish was properly refused.—Trabing v. California Nav. etc. Co., 133 Cal. xx, 65 Pac. 478.

FOR AUTHORITIES FROM OTHER STATES:

11 C. C. A. 556, note.

Damages for mental suffering, disconnected from physical injury: 36 Am. Rep. 306, note.

Mental anguish as an element of damages: 7 Am. St. Rep. 534, 30 Am. St. Rep. 711, notes. See, also, 13 Cyc. 39-46; 15 Cent. Dig., cols. 1756-1759, §§ 100-105.

§ 34. —— Injury to Property.

[a] Any personal injury sustained by the plaintiff in the nature of fear and timidity would not be an element of damage done to her property.—Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

B. AGGRAVATION, MITIGATION AND REDUCTION OF LOSS.

MATTER GOING TO MITIGATE OR REDUCE DAMAGES IN GENERAL, § 35.
—— INSURANCE ON PROPERTY LOST, § 36.
—— BENEFITS RESULTING FROM INJURY, § 37.
DUTY OF PERSON INJURED TO PREVENT OR REDUCE DAMAGE, § 38.
RETURN OF PROPERTY WRONGFULLY DETAINED, § 39.

§ 35. Matter Going to Mitigate or Reduce Damages in General.

[a] Suit was brought by one of two partners to recover his interest in property taken wrongfully on an execution against the firm. The other partner, refusing to join plaintiff, was joined as a defendant. Held, that a recaption of the goods, whether before or after suit brought, by defendant partner, was, in legal effect, a recaption on joint account of himself and plaintiff, and to this extent would reduce the damages.—Nightingale v. Scannell, 18 Cal. 315.

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FOR AUTHORITIES FROM OTHER STATES:

Mitigation of damages by proof that an injured person was suffering from disease: 10 Am. St. Rep. 64, note; 67 L. R. A. 87, note. See, also, 13 Cyc. 69, 70; 15 Cent. Dig., cols. 1760-1773, §§ 108-118.

§ 36. —— Insurance on Property Lost.

[a] Fact that vessel lost while being towed out to sea is insured does not devest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance, for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy.—White v. Steam-tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

§ 37. —— Benefits Resulting from Injury.

[a] In an action for damages benefits received by plaintiff from the act causing the damage should be deducted from the damages. Hicks v. Drew, 117 Cal. 305, 49 Pac. 189.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1768-1770, §§ 115, 116.

§ 38. Duty of Person Injured to Prevent or Reduce Damage.

[a] Evidence of professional reputation of physician who was employed by plaintiff to dress his wounds and effect a cure is inadmissible, but it would be competent to prove that plaintiff's injuries were wholly or partially the result of improper treatment on the part of the physician.—Thorne v. California Stage Co., 6 Cal. 232.

[b] In an action for injuries plaintiff may state that he was attended by a certain physician, whose reputation as a physician was good, as showing due care in employing a reputable physician to treat his wounds.—Baker v. Borello, 136 Cal. 160, 68 Pac. 591.

[c] Where plaintiff in an action for injuries employed a physician to treat his wounds, the striking out of testimony by a physician introduced by defendant that the treatment might have been better and that it was probably not the treatment a skillful physician would have administered in 1897 (the time of injury), is not erroneous, as it was of no value as evidence against the exercise of ordinary care in employing medical aid.—Baker v. Borello, 136 Cal. 160, 68 Pac. 591.

[d] Plaintiff held charged with knowledge that defendant's act in directing a water company to withhold water from plaintiff was based on her refusal to pay assessments, and she could not claim that she believed it was on some other ground, and so recover enhanced damages which she might have obviated.—Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

[e] Owner of land and water right could not, in mortgagee's wrongful action in directing the water company to withhold the water from her, recover as damages the full amount of injury to her crops, where she took no steps to secure the necessary water by paying assessments or otherwise.—Mabb v. Stewart, 147 Cal. 363, 81 Pac. 1073.

FOR AUTHORITIES FROM OTHER STATES:

64 C. C. A. 5, note.

Duty of person whose property has been converted or destroyed to reproduce like property to mitigate: 6 Am. St. Rep. 364, note.

Right of party to proceed to execute contracts after his adversary declines to do so: 33 Am. St. Rep. 791, note; 43 L. R. A. 706, note. See, also, 13 Cyc. 74-78; 15 Cent. Dig., cols. 1773-1793, §§ 119-132.

§ 39. Return of Property Wrongfully Detained.

[a] Where a party accepts the goods which are the subject of the suit, the only damages that he can recover are the value of the goods at any time between the detention and the delivery, with interest thereon.—Conroy v. Flint, 5 Cal. 327.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1794-1797, §§ 133, 134.

C. INTERESTS, COSTS AND EXPENSES OF LITIGATIONS.

INTEREST, § 40.
—— RECOVERY ON UNLIQUIDATED DAMAGES—IN GENERAL, § 41.
—— IN ACTIONS FOR BREACH OF CONTRACT, § 42.
ATTORNEY'S FEES, COSTS AND EXPENSES OF LITIGATION—EXPENSE OF PROSECUTION OF PENDING SUIT, § 43.
—— EXPENSES OF FORMER ACTIONS, § 44.

§ 40. Interest.

[a] Though interest is, as general rule, not recoverable except by virtue of statutory regulations, a small rate may be allowed in some cases by way of damages. So held, where a referee, to whom a cause had been referred by consent of parties, had allowed the plaintiff interest at the rate of six per cent per annum on the balance of an account found due to him.—Davis v. Greely, 1 Cal. 422.

[b] Civil Code, section 3287, providing that every person who is entitled to recover damages certain on a certain day is entitled to interest thereon from that day does not apply to a claim against a county.—Hopkins v. Contra Costa County, 106 Cal. 566, 39 Pac. 933.

[c] Interest is properly allowed on damages sustained from date of filing complaint.—Cutting F. P. Co. v. Canty, 141 Cal. 697, 75 Pac. 564.

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FOR AUTHORITIES FROM OTHER STATES:

See 6 Cyc. 112; 13 Cyc. 83-89; 15 Cent. Dig., cols. 1798-1816, §§ 135-145.

§ 41. —— Recovery on Unliquidated Damages in General.

[a] When plaintiff's claim is an uncertain and unliquidated demand, and the amount due cannot be ascertained from the face of the contract in suit, but has to be settled by process of law, he is not entitled to interest, eo nomine, under Civil Code, section 3287.—Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

[b] In an action upon an implied promise of the defendant to recover the reasonable value of services performed by plaintiffs, the amount, character and value of which can only be established by evidence in court, or by an accord between the parties and which are not susceptible of ascertainment by computation or by reference to market rates, the plaintiff is not entitled to interest prior to verdict or judgment.—Swinnerton v. A. L. & D. Co., 112 Cal. 375, 44 Pac. 719.

[c] It is error to allow interest on damages from the date of filing the complaint, when such damages are unliquidated and uncertain until settled by process of law or by the parties.—Hooper v. Patterson, 32 Pac. 514.

§ 42. —— In Actions for Breach of Contract.

[a] Interest can be had, under Civil Code, section 3288, only for the breach of an obligation not arising from contract. Where, therefore, the court finds that plaintiff's case is for a breach of an obligation arising from contract, he is not entitled to interest under that section.—Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

[b] Under Civil Code, section 3287, making interest allowable on damages certain, or those capable of being made certain by calculation, in the absence of a well-known market price on which to calculate the damages, the seller of fruit is not entitled to interest before suit for a breach of contract by the buyer.—Hewes v. Germania Fruit Co., 106 Cal. 441, 39 Pac. 853.

[c] Under Civil Code, section 3287, in an action for breach of contract, the court properly allowed interest from the filing of the complaint on the amount of damages found. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

[d] Under Civil Code, section 3287, interest held properly allowed on account for services from last day of employment.—Mullenary v. Burton (Cal. App.), 84 Pac. 159.

§ 43. Attorney's Fees, Costs, and Expenses of Litigation—Expense of Prosecution of Pending Suit.

[a] If a lessor breaks a covenant for quiet enjoyment by suing lessee to recover possession, lessee's costs and counsel fees are properly allowed as damages in an action for a breach.—Levitzky v. Canning, 33 Cal. 299.

[b] In estimating damages in an action for trespass committed by breaking into plaintiff's rooms and destroying property, plaintiff's attorney's fees and other expenses of litigation cannot be included.—Falk v. Waterman, 49 Cal. 224.

FOR AUTHORITIES FROM OTHER STATES:

Attorneys' fees, when allowable as elements of damages: 8 Am. St. Rep. 153, note. See, also, 13 Cyc. 79-83; 15 Cent. Dig., cols. 1817-1826, §§ 146-153.

§ 44. —— Expenses of Former Actions.

[a] Defendant, who had purchased plaintiff's land at tax sale, agreed to give plaintiff a certain time within which to redeem the land, but instead assigned his tax certificate to a third person, who thereby obtained a tax deed on the land, caused the same to be recorded, and subsequently brought an action against plaintiff to quiet title to the lands in question. Held, in an action by plaintiff against defendant for breach of contract, that the action to quiet title was not a proximate or necessary result of the breach, and, no special damages being pleaded, evidence of expenses and attorney's fees in that case is inadmissible.—Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618.

IV. LIQUIDATED DAMAGES AND PENALTIES.

IN GENERAL, § 45.
CONSTRUCTION OF STIPULATIONS, § 46.
—— INTENT OF PARTIES, § 47.
—— EXPRESS DECLARATIONS AS TO NATURE OF PROVISIONS, § 48.
—— IMPOSSIBILITY OF ASCERTAINING ACTUAL DAMAGES, § 49.
—— PROPORTION OF SUM STIPULATED TO ACTUAL DAMAGE, § 50.
OPERATION AND EFFECT OF STIPULATIONS, § 51.

§ 45. In General.

[a] In general a sum to be paid in gross for nonperformance of an agreement is penalty unless shown to be otherwise considered.—Nash v. Hermosilla, 9 Cal. 588.

[b] Parties may fix by agreement on any mode to liquidate damages. May agree to submit them to arbitration for ascertainment.—Old Saucelito Land etc. Co. v. Commercial Union Ins. Co., 66 Cal. 253, 5 Pac. 232.

[c] Amount mentioned in act granting aid to railroad to be paid by company on failure to perform conditions imposed by act is a penalty and not liquidated damages.—People v. Central Pac. R. Co., 76 Cal. 38, 18 Pac. 90.

[d] Mode of distinguishing penalty from liquidated damages stated and authorities reviewed.—People v. Central Pac. R. R. Co., 76 Cal. 36-38, 18 Pac. 90.

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[e] Parties may stipulate in advance amount to be paid as damages.—People v. Central etc. Co., 76 Cal. 35, 18 Pac. 90.

[f] Under Civil Code, sections 3387, 3389, which provide that a contract otherwise proper may be specifically enforced, though a penalty is imposed, or the damages are liquidated for its breach, as it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, the parties may agree to stipulated damages in contracts for the purchase of land.—Aikman v. Sanborn, 52 Pac. 729; Aikman v. Murphy, 55 Pac. 1099.

FOR AUTHORITIES FROM OTHER STATES:

Liquidated damages, what agreements provide for: 30 Am. Rep. 28, note.

Whether liquidated damages or a penalty: 1 Am. Dec. 331. See, also, 13 Cyc. 89-105; 15 Cent. Dig., cols. 1826-1887, §§ 154-187.

§ 46. Construction of Stipulations.

[a] Whether sum to be paid when violation is penalty or liquidated damages must be determined from contract as a whole.—Nash v. Hermosilla, 9 Cal. 587, 25 Cal. 71.

[b] Where a building contract contains a number of stipulations, the breach of any one of which would constitute a breach of the contract, and a sum is stipulated to be paid in case of breach of the contract, it will be construed as a penalty, not as liquidated damages.—Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676.

[c] Where property sold is to be paid for partly in other specific property, the amount fixed in the agreement of sale, in lieu of which the specific property was to be delivered, should be treated as liquidated damages, where no time was fixed for delivery, and no specified property was agreed on.—Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58.

[d] Sum fixed in an agreement of sale, in lieu of which horses are to be delivered, is liquidated damages.—Cummings v. Dudley 60 Cal. 384, 44 Am. Rep. 58.

[e] Word "forfeiture" imports "penalty," and is equivalent thereto.—Muldoon v. Lynch, 66 Cal. 539, 6 Pac. 417.

[f] A provision in a contract that, if defendant failed to divert from a river a certain amount of water through a certain uncompleted ditch, which it agreed to complete within a specified time, and to continuously deliver such amount of water, it would surrender to plaintiff all rights which it had acquired through deeds of rights of way or water rights executed by plaintiff to its predecessor, was in the nature of liquidated damages, and not a penalty, within Civil Code, section 3369.—Pogue v. Kaweah Power etc. Co., 138 Cal. 664, 72 Pac. 144.

[g] Where it does not clearly appear that the penalty inserted in a contract for the sale of a business and the goodwill thereof was intended as security for the payment of actual damages in case of breach of contract, the court will regard the amount as liquidated damages.—Shafer v. Sloan (Cal. App.), 85 Pac. 162.

FOR AUTHORITIES FROM OTHER STATES:

See 6 Cyc. 21; 13 Cyc. 95, 97; 15 Cent. Dig., cols. 1826, 1877, §§ 154-178.

§ 47. Intent of Parties.

[a] Where the sum of fifteen thousand dollars was paid by the plaintiff as the consideration for a contract not to run boats on a certain line of travel, and the same amount was agreed by the defendant to be paid by him on failure to comply with its conditions, held, that the sum thus agreed to be paid was intended by the parties as liquidated damages. California Steam Nav. Co. v. Wright, 6 Cal. 258.

[b] A debtor, through plaintiff, his agent, conveyed land to defendant, partly to pay his debt and partly to be sold by defendant, to whom plaintiff made an absolute deed, taking back a bond to himself in the penalty of thirty-two thousand dollars, binding defendant to pay plaintiff sixteen thousand one hundred and sixty-eight dollars and one-half of the profits arising from the sale of the land, if made, and, if the land was not sold, to reconvey to plaintiff within a year from date. Held, that, on failure of defendant to sell or reconvey after expiration of the year, plaintiff was not entitled to recover the sixteen thousand one hundred and sixty-eight dollars as liquidated damages, since it was the intent of the parties that defendant was to sell the land for not less than sixteen thousand one hundred and sixty-eight dollars within a year, and that defendant was to divide any sum in excess of sixteen thousand one hundred and sixty-eight dollars with the debtor if sold within such time; otherwise he was to reconvey the property; but only for damages sustained by the breach.—Ricketson v. Richardson, 19 Cal. 330.

[c] Question whether a specified sum mentioned in a contract, to be paid by either party in the event of its violation, is liquidated damages or a penalty must be determined by the intention of the parties, to be ascertained from a consideration of the whole contract.—Streeter v. Rush, 25 Cal. 67.

[d] Penalty is not converted into liquidated damages by intention that it shall be paid.—Muldoon v. Lynch, 66 Cal. 540, 6 Pac. 417.

[e] A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty; and the application of this rule does not always depend upon the intention of the parties.—Wilmington Transportation Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705.

[f] A contract for the sale of a business and goodwill, containing a covenant of the

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vendors not to engage in a like business in the same city, may properly stipulate a specified sum as liquidated damages for breach of the covenant, and such stipulation is not to be construed as a penalty, but the evident intention of the parties must control, and the plaintiff is not required to prove anything more than a breach of the contract in order to recover the stipulated damages.—Potter v. Ahern, 110 Cal. 674, 43 Pac. 388.

FOR AUTHORITIES FROM OTHER STATES:

See 1 Cent. Dig., cols. 1829-1833, § 156.

§ 48. —— Express Declarations as to Nature of Provision.

[a] Agreement that on breach of a contract "damages shall be liquidated" at a certain sum must be considered as treating that sum as liquidated damages, and not as penalty.—Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388.

§ 49. —— Impossibility of Ascertaining Actual Damages.

[a] On the sale and delivery of a ship, the vendor agreed to deliver a good title and register, within a time certain under a penalty of two thousand dollars. Held, that the two thousand dollars were liquidated damages, since the amount of actual damages was difficult to ascertain.—Fisk v. Fowler, 10 Cal. 512.

[b] Where a contract is by its terms incapable of apportionment, the measure of damages fixed by the contract will apply.—McCauley v. Brooks, 16 Cal. 11.

[c] B. entered into an agreement with C., by which he sold to the latter his butcher shop, and bound himself, in the sum of four hundred dollars to him, not to go into the butchering business in the same place, without his consent, in any manner whatever. Held, that the sum of money expressed in the agreement is to be regarded as liquidated damages, and not as a penalty, since the amount of actual damage was uncertain.—Streeter v. Rush, 25 Cal. 67.

[d] Liquidated damages can only be contracted for and recovered in cases where it is impractical or extremely difficult to fix actual damages resulting from breach.—Patent Brick Co. v. Moore, 75 Cal. 209, 16 Pac. 890.

[e] There is no difficulty in fixing actual damages sustained from being deprived of use of land.—Eva v. McMahon, 77 Cal. 472, 19 Pac. 872.

[f] Measure of damages for breach of warranty of fitness of harvesting machine is not impracticable or extremely difficult to fix rendering agreement for liquidated damages valid.—Greenleaf v. Stockton C. H. & A. Wks., 78 Cal. 610, 21 Pac. 369.

[g] Stipulation for liquidated damages in contract to purchase land is void. Damages in such case are ascertainable by rule prescribed in section 3307, Civil Code.—Drew v. Pedlar, 87 Cal. 450, 22 Am. St. Rep. 257, 25 Pac. 749.

[h] A contract for the sale of grain bags, which provides that the vendor shall pay the vendee three cents for each bag which he refuses or neglects to deliver, as liquidated damages, is void, although it recites that, from the nature of the case, it will be extremely difficult to determine the damages. Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36.

[i] Whether contract is such that "from the nature of the case" it would be impracticable or extremely difficult to fix the actual damage, is a question of fact to be determined in each particular case by the court, and not by the arbitrary agreement of the parties.—Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36.

[j] The stipulation in a contract for the hiring of a lighter that, in case the lighter should be lost or damaged to the extent that it could not be put in the same good condition as when received, the hirer should pay a specified sum for the lighter is a "contract by which the amount of damages to be paid, or other compensation to be made for a breach of the obligation, is determined in anticipation thereof," in the sense of section 1670 of the Civil Code; and such a case not being one in which "it would be impracticable or extremely difficult to fix the actual damage," in the sense of section 1671 of the same code, the stipulation is void, and the owner is entitled to recover only his actual damage proximately resulting from the loss of the lighter, which must be averred and proved.—Wilmington Transportation Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705.

[k] Under Civil Code, sections 1670, 1671, a clause in a lease binding the lessee to pay one thousand dollars penalty in case of breach of his contract is void.—Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130.

[l] In applying the well-settled rule of construction for the determination of liquidated damages, as against the penalty, where the damages are uncertain and not measurable by any exact pecuniary standard, there is no difference between agreeing to pay a stipulated sum of money, and agreeing to do any other act, such as giving a piece of property for a breach of contract, with respect to which the resulting damages are uncertain and not susceptible of computation and compensation in an action therefor.—Pogue v. Kaweah Power and Water Company, 138 Cal. 664, 72 Pac. 144.

§ 50. —— Proportion of Sum Stipulated to Actual Damage.

[a] Where defendant agreed to build a brick building, and to occupy such portion of the lot as would be satisfactory to plaintiff, and give him possession in three weeks, and a lease for six months, with the privilege of a twelve months' lease, and failing to do so to pay certain damages, the damages were not liquidated, but merely a pen-

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alty to secure the performance of the contract, there being no proportionment of the sum stipulated to the actual damage.—Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676.

[b] In order that stated sum be taken as liquidated damages, it must be substantially limited to a basis of compensation.—Muldoon v. Lynch, 66 Cal. 540, 6 Pac. 417.

[c] A clause in a contract for the erection of a marble tomb, requiring its completion by the contractor within a stated time, under forfeiture of ten dollars per day for each and every day's delay beyond such time, provides for the payment of a penalty, and not liquidated damages, since it was evidently intended as a spur, there being no actual damage.—Muldoon v. Lynch, 66 Cal. 536, 6 Pac. 417.

[d] Where no actual damage is sustained from breach of contract, none can be recovered though stipulated for in contract.—Eva v. McMahon, 77 Cal. 472, 19 Pac. 872; Easton v. Cressey, 100 Cal. 75, 34 Pac. 622.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1864-1874, §§ 170-175.

§ 51. Operation and Effect of Stipulations.

[a] If a contract provides that either party shall forfeit to the other a certain amount for a failure to comply with its terms, and that such sum shall be considered as liquidated damages, the damages are limited to that amount.—Lightner v. Menzel, 35 Cal. 452.

[b] Where a contract for the alteration of a courthouse, and the making of improvements and walks around it, provides for liquidated damages in case of delay in finishing the courthouse, such damages cannot be recovered when the courthouse is finished in time, but the walks are not completed.—McGowan v. Ford, 107 Cal. 177, 40 Pac. 231.

[c] The entire amount provided as liquidated damages for a person engaging in business within a certain territory, embracing parts of several counties, is recoverable for engaging in business in the part of the county within which is the place where he formerly conducted business, though the agreement is void as to the other counties. Franz v. Bieler, 126 Cal. 176, 56 Pac. 249.

FOR AUTHORITIES FROM OTHER STATES:

11 C. C. A. 563, note. See, also, 13 Cyc. 104; 15 Cent. Dig., cols. 1877-1887, §§ 179-187.

V. EXEMPLARY DAMAGES.

RIGHT TO EXEMPLARY DAMAGES—NECESSITY OF SHOWING ACTUAL DAMAGE, § 52.
—— MALICIOUS, FRAUDULENT, OR OPPRESSIVE ACTS, § 53.
—— NEGLIGENT ACTS, § 54.
—— ACTS PUNISHABLE AS CRIMES, § 55.
—— FORM OF ACTIONS AS AFFECTING RIGHT, § 56.
PERSONS LIABLE—CARRIER FOR ACTS OF SERVANT, § 57.
—— LIABILITY AS BETWEEN JOINT DEFENDANTS, § 58.
—— PUBLIC OFFICIALS, § 59.
MATTERS IN MITIGATION, § 60.

For libel or slander. See Libel and Slander, § 44.
For trespass. See Trespass, § 22.
For wrongful conversion. See Trover and Conversion, § 23.

§ 52. Right to Exemplary Damages—Necessity of Showing Actual Damage.

[a] Exemplary damages cannot be recovered, in the absence of a showing of actual damages.—Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

Exemplary damages, rules respecting the allowance of: 50 Am. Dec. 767, note.

Exemplary damages, liability of principal or master for the act of his servant or agent: 62 Am. Dec. 379, note.

Exemplary or punitive damages, when allowable: 27 Am. Dec. 684, note.

Exemplary damages, when may be recovered: 28 Am. St. Rep. 870, note. See, also, 13 Cyc. 105-109; 15 Cent. Dig., cols. 1888-1924, §§ 188-205.

§ 53. —— Malicious, Fraudulent, or Oppressive Acts.

[a] Where no express malice is shown exemplary damages cannot be given.—Sears v. Hathaway, 12 Cal. 277.

[b] Exemplary damages cannot be given for a trespass not malicious.—Phelps v. Owens, 11 Cal. 22.

[c] Where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages.—Dorsey v. Manlove, 14 Cal. 553.

[d] Execution having issued on a void judgment, the party in whose favor it issued, not suspecting its validity, and acting under advice of counsel, caused a seizure of property to be made under it in the ordinary manner. Held that, in the absence of any apparent malice, a refusal to allow exemplary damages was proper.—Selden v. Cashman, 20 Cal. 56, 81 Am. Dec. 93.

[e] Exemplary damages should not be given, if evidence does not show malice.—Hirshberg v. Strauss, 64 Cal. 272, 28 Pac. 235.

[f] In cases of tort exemplary damages are not confined to cases in which malice ap-

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pears.—St. Ores v. McGlashen, 74 Cal. 150, 15 Pac. 452.

[g] Under section 3294, Civil Code, exemplary damages may be allowed for malicious and wanton trespass.—Mitchell v. Canal etc. Co., 75 Cal. 566, 17 Pac. 246.

[h] Circumstances related herein held to show such oppression as to justify award of exemplary damages.—Arzaga v. Villalba, 85 Cal. 192, 24 Pac. 656.

[i] A judgment for punitive damages, in an action for the malicious conversion of certain wheat, peaceably taken by defendant under a bona fide claim of title, and by the advice of reputable counsel, will be set aside, where the only evidence of malice is a statement made by defendant at the time,—that it was too rich for plaintiff to litigate with. Abbott v. 76 Land etc. Co., 103 Cal. 607, 37 Pac. 527.

[j] In section 3294 of the Civil Code, which allows the recovery of exemplary damages where the defendant has been guilty of malice, actual or presumed, the presumed malice spoken of is a disputable presumption of fact establishing prima facie the right of plaintiff to exemplary damages for a publication libelous per se, but this presumption may be overcome by other evidence that there was no malice in fact.—Childers v. San Jose Mercury Printing etc. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903.

[k] If a trespass was in fact committed, the actual damage which was caused thereby could not be diminished or increased by the character of the motives which actuated the trespassers; but, for the purpose of determining whether punitory damages should be allowed, the motive or intention with which the act was done is important.—Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

[l] Tort committed by mistake in assertion of supposed right or without actual wrong intention or such negligence as evinces malice or conscious disregard of rights of others, will not warrant giving of punitive damages. Lyles v. Perrin, 119 Cal. 266, 51 Pac. 332.

[m] In action for tort where defendant has been guilty of oppression, fraud or malice, actual or presumed, jury may award exemplary damages.—Lyles v. Perrin, 119 Cal. 266, 51 Pac. 332.

§ 54. —— Negligent Acts.

[a] Punitive damages cannot be given for mere negligence.—Moody v. McDonald, 4 Cal. 297.

[b] Gross negligence is not ground for award of exemplary damages unless defendant was guilty of oppression, fraud or malice. Yerian v. Linkletter, 80 Cal. 137, 22 Pac. 70.

§ 55. —— Acts Punishable as Crimes.

[a] Vindictive damages may be given for a personal injury, though punishable criminally. Wilson v. Middleton, 2 Cal. 54.

[b] Exemplary damages may be allowed for a malicious or wanton assault.—Wilson v. Middleton, 2 Cal. 54.

FOR AUTHORITIES FROM OTHER STATES:

See, 13 Cyc. 118; 15 Cent. Dig., cols. 1919-1921, § 202.

§ 56. —— Form of Action as Affecting Right.

[a] Exemplary damages may be awarded in an action for the conversion of personal property, as well as in an action for the recovery of the property itself.—Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656.

§ 57. Persons Liable—Carrier for Acts of Servant.

[a] Carrier is not liable to exemplary damages for negligence of servant.—Ward v. California Stage Co., 7 Cal. 119, 68 Am. Dec. 231.

FOR AUTHORITIES FROM OTHER STATES:

Exemplary damages, corporation's liability for: 59 Am. St. Rep. 589, note. See, also, 13 Cyc. 114-120; 15 Cent. Dig., cols. 1924-1930, §§ 206-214.

§ 58. —— Liability as Between Joint Defendants.

[a] In a suit against two defendants claiming vindictive damages by reason of malice, which is proved, however, only against one, the rule that damages are to be estimated according to the amount which should be paid by the most culpable does not apply.—Nightingale v. Scannell, 18 Cal. 315.

§ 59. —— Public Officials.

[a] Though there be malice on the part of the party putting an execution into the hands of an officer, yet, if the acts of the officer be honest and bona fide, he is not liable to vindictive or exemplary damages.—Nightingale v. Scannell, 18 Cal. 315.

[b] Rule giving vindictive or exemplary damages in cases of malicious trespass applies as well to officers of the law, acting under color of process, as to private persons. Nightingale v. Scannell, 18 Cal. 315.

§ 60. Matters in Mitigation.

[a] The fact that plaintiff obtained possession of the property pending the proceedings for its conversion does not affect the question of allowing exemplary damages, but only the amount.—Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656.

VI. MEASURE OF DAMAGES.

A. Injuries to the Person, §§ 61-66.
B. Injuries to Property, §§ 67-73.
C. Breach of Contract, §§ 74-87.

A. INJURIES TO THE PERSON.

MODE OF ESTIMATING DAMAGES, IN GENERAL, § 61.

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—— INJURY TO WIFE, § 62.
—— INJURY TO CHILD, § 63.
DISCRETION OF JURY AS TO AMOUNT, § 64.
EXPENSES INCURRED, § 65.
—— NECESSITY FOR ACTUAL PAYMENT, § 66.

§ 61. Mode of Estimating Damages in General.

[a] Person injured is entitled to compensation commensurate with injury and no more. Parke v. Frank, 75 Cal. 370, 17 Pac. 427.

[b] In an action to recover damages for personal injuries, caused by the negligence of the defendant, it was proper to instruct the jury that the measure of recovery was compensatory damages, the elements of which were expenses paid by plaintiff for care and nursing while disabled, and the value of the time lost while disabled, to be determined from direct evidence before the jury, and such reasonable compensation for impairment of his earning power, and for his pain and anxiety, as the jury might, in their sound discretion, determine, not exceeding, in all, the amount alleged.—Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

[c] Damages for personal injury is amount which will compensate for all injury proximately caused by negligent act.—Fries v. American etc. Co., 141 Cal. 613, 75 Pac. 164.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages, conflict of laws concerning: 91 Am. St. Rep. 714, note; 56 L. R. A. 301, note. See, also, 13 Cyc. 136-173; 15 Cent. Dig., cols. 1938-2109, §§ 222-353.

§ 62. —— Injury to Wife.

[a] In an action for damages for personal injuries to the wife, the husband must be made a party plaintiff, but the recovery cannot extend to any matters for which the husband must sue alone, as loss of service and the like.—Matthew v. Central Pac. R. Co., 63 Cal. 450.

§ 63. —— Injury to Child.

[a] Father of child, injured by a vicious animal, and thereby deformed, can recover from the owner of the animal only for such expenses as he incurred in healing the original wound, and not for any expense incurred in removing the deformity, since there would be practically no limit to the liability of defendant, if the father could sue at pleasure for serious and expensive operations for the purpose of removing every trace of the injury, and charge defendant with the entire cost. Karr v. Parks, 44 Cal. 46.

§ 64. Discretion of Jury as to Amount.

[a] In actions for personal torts, the law does not fix precise rules for the admeasurement of damages, but the matter is left to the discretion of the jury.—Aldrich v. Palmer, 24 Cal. 513; Wheaton v. North Beach & M. R. Co., 36 Cal. 590.

[b] In actions to recover for personal injuries, the judgment of the jury, and not the opinion of the court as to the amount of damages, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice.—Boyce v. California Stage Co., 25 Cal. 460.

[c] Amount of recovery for breach of contract is not to be left to discretion of jury. Parke v. Frank, 75 Cal. 369, 17 Pac. 427.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1953, 1954, §§ 230-232.

§ 65. Expenses Incurred.

[a] A person injured by the fall of an awning in process of erection in front of a store, and who sues the person erecting the same for damages, is not entitled to include in his damages the sum paid for his board during the time he was disabled.—Graeber v. Derwin, 43 Cal. 495.

[b] Father of a child, which has been injured by a vicious animal, and thereby deformed, can recover from the owner of the animal only for such expenses as he incurred in healing the original wound, and not for any expense incurred in removing the deformity, since there would be practically no limit to the liability of defendant if the father could sue at pleasure for serious and expensive operations for the purpose of removing every trace of the injury, and charge defendant with the entire cost.—Karr v. Parks, 44 Cal. 46.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 140, 141; 15 Cent. Dig., cols. 1970-1975, §§ 242-254.

§ 66. —— Necessity for Actual Payment.

[a] Expenses incurred for medicine, nurse hire, and doctor's bills may be recovered, though the bills have not been paid at the time of the trial.—Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546.

B. INJURIES TO PROPERTY.

INJURIES TO REAL PROPERTY—HOUSE OR FIXTURE, § 67.
—— TREES, § 68.
—— REMOVAL OF FENCE, § 69.
—— REMOVAL OF GOLD-BEARING EARTH, § 70.
DESTRUCTION OF PROPERTY, § 71.
DETENTION OR LOSS OF USE OF MONEY, § 72.
EFFECT OF COMMINGLING OF DAMAGED FRUIT, § 73.

§ 67. Injuries to Real Property—House or Fixtures.

[a] For trespass in removing fixtures, measure is value of fixtures in place, and not

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market value after removal.—Rhoda v. Alameda County, 58 Cal. 357.

[b] Proper damages for injuries to house from blasting is sum sufficient to restore it to its condition prior to injury.—Colton v. Onderdonk, 69 Cal. 159, 160, 10 Pac. 395.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages for the destruction of property having no market value at the place of destruction: 62 Am. St. Rep. 791, note.

Measure of damages in actions of trover when the owner of a special interest is the plaintiff: 52 Am. Dec. 678, note.

Measure of damages when lands are taken for public use: 88 Am. Dec. 113, note.

Damages, measure of for unintentional trespass, as by mining by mistake on the land of another: 54 Am. Rep. 421, note. See, also, 15 Cent. Dig., cols. 2000-2009, §§ 274-278.

§ 68. —— Trees.

[a] Measure of damage for cutting down trees is not mere value of wood, but injury to land, in view of all the circumstances, including object of trees.—Chipman v. Hibberd, 6 Cal. 162.

[b] Measure of damages for destruction of bearing fruit trees is what they are worth growing.—Montgomery v. Locke, 72 Cal. 77, 13 Pac. 401.

FOR AUTHORITIES FROM OTHER STATES:

15 L. R. A. 612, 19 L. R. A. 653, notes. See 15 Cent. Dig., cols. 2017-2020, § 283.

§ 69. —— Removal of Fence.

[a] Where one sustains damage from a wrongful removal of a fence from his grounds, if he sues for the injury to his freehold, he may recover the entire damages.—Pennybecker v. McDougal, 48 Cal. 160.

[b] In replevin for materials which, before their removal, composed a fence attached to and a part of the realty the plaintiff can recover only the value of the materials after their removal, and not the value of the fence as it stood before the removal.—Pennybecker v. McDougal, 48 Cal. 160.

§ 70. —— Removal of Gold-bearing Earth.

[a] Damages for wrongfully removing gold-bearing earth from a claim, and extracting the gold therefrom, are the value of the gold less the expense of digging the gold-bearing earth and separating it from the realty, so as to make it personal property.—Goller v. Fett, 30 Cal. 481.

§ 71. Destruction of Property.

[a] Measure of damages for destruction of ditch stated.—Mogk v. Peterson, 75 Cal. 496, 17 Pac. 446.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1986-1993, §§ 266-271.

§ 72. Detention or Loss of Use of Money.

[a] Only damages which law allows for detention of money under its process is legal interest.—Heman v. Landers, 12 Cal. 107.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 1994-1997, § 272.

§ 73. Effect of Commingling of Damaged Fruit.

[a] Where damaged fruit is commingled with the knowledge and consent of the parties, the measure of damage to each owner of an undivided share thereof is his proportion of the aggregate damage to the commingled mass.—Arnold v. Producers' Fruit Co., 128 Cal. 637, 61 Pac. 283.

C. BREACH OF CONTRACT.

IN GENERAL, § 74.
EFFECT OF PROVISIONS OF CONTRACT, § 75.
FAILURE TO PERFORM, § 76.
—— CONTRACT TO MAKE LUMBER, § 77.
—— CONTRACT TO FURNISH FREIGHT TO HAULER, § 78.
—— BUILDING CONTRACTS, § 79.
—— CONTRACT WITH RAILROAD COMPANY AS TO CONSTRUCTION OF ROAD OR STATION, § 80.
DEFECTS IN PERFORMANCE, § 81.
PREVENTION OR OBSTRUCTION OF PERFORMANCE—LOSS OF PROFITS, § 82.
—— MODE OF ASCERTAINING PROFITS, § 83
—— LOSS OF PROFITS AND EXPENSES INCURRED, § 84.
FAILURE TO PAY MONEY, § 85.
FAILURE TO DELIVER OR CONVEY PROPERTY, § 86.
FAILURE OF BAILEE TO RETURN PROPERTY, § 87.

§ 74. In General.

[a] Where from nature of contract no other mode is left, the price agreed is the measure. Baldwin v. Bennett, 4 Cal. 392, 9 Cal. 363.

[b] Measure of damage for breach of contract is actual loss sustained.—Baldwin v. Bennett, 4 Cal. 392, 411.

[c] Damages for breach of contract is that which results naturally, proximately and directly.—Parke v. Frank, 75 Cal. 370, 17 Pac. 427.

[d] Measure of damages for breach of contract is actual loss sustained, consisting of value of services rendered and damage sustained for refusal to allow performance of rest of contract.—Webb v. Trescony, 76 Cal. 623, 18 Pac. 796.

[e] The measure of damages upon an obligation to pay money is not the amount due by the terms of the obligation, with interest thereon, unless the consideration has passed

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to the obligor; but, when the consideration has not passed, and the contract is executory on both sides, and the promisee has not done, the things required of him to be done, nor made a bona fide or valid offer or tender thereof, so as to pass the consideration to the promisor, he can only recover the actual damages, if any, suffered by the repudiation of the contract by the promisor, and must plead such damages in order to recover the same.—Hellings v. Heydenfeldt, 107 Cal. 577, 40 Pac. 1026.

[f] In action by insurance company for damages against person ordering insurance for company without authority, measure of damages is actual expense of making, issuing and delivering the policy.—American etc. Ins. Co. v. Hart, 141 Cal. 682, 75 Pac. 334.

[g] Measure of damages for breach of contract under Civil Code, section 3300 determined.—Hunt Bros. Co. v. San Lorenzo Water Co., 88 Pac. 1093.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages in actions for breach of warranty of soundness: 40 Am. Dec. 303, note.

Measure of damages for a breach of an executory contract: 42 Am. Dec. 48, note.

Measure of damages where lessee is prevented from taking possession or is afterward evicted by the lessor: 100 Am. Dec. 428, note.

Measure of damages for breach of warranty of title: 24 Am. St. Rep. 266, note.

Measure of damages for breach of covenant for quiet enjoyment: 53 Am. St. Rep. 116, note. See, also, 6 Cyc. 108-115; 13 Cyc. 155-169; 15 Cent. Dig., cols. 2023-2109, §§ 285-353.

§ 75. Effect of Provisions of Contract.

[a] Where, from the nature of the contract, it is not practicable to ascertain the amount of damages sustained by a breach of it, the measure is the price agreed on.—Coffee v. Meiggs, 9 Cal. 363.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2025-2027, § 287.

§ 76. Failure to Perform.

[a] Plaintiff bought stock of a national bank under an agreement with defendant that, at the end of a year, he would take it back, and repay plaintiff the price and interest. Plaintiff gave notice, and, at the end of the year, tendered the stock. Between the notice and the tender the bank became insolvent. After the tender the comptroller of currency levied an assessment on the stock which plaintiff had to pay. Held, in an action for breach of contract, that plaintiff could recover, not only the purchase price and interest, but also the amount of the assessment.—Gay v. Dare, 103 Cal. 454, 37 Pac. 466.

[b] In an action by a landlord for damages because of the tenant's refusal to execute a lease and abandonment of premises, whereby the landlord was compelled to rent at a loss, the measure of damages was the difference in rentals.—Silva v. Bair, 141 Cal. 599, 75 Pac. 162.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2028-2059, §§ 291-305.

§ 77. —— Contract to Make Lumber.

[a] When party who contracts with another to make lumber for him, and to pay him a fixed sum therefor monthly, as the lumber is made, breaks the contract, without any fault on the other's part, the rule of damages for the breach is the difference between the cost of making the lumber and the contract price. Hale v. Trout, 35 Cal. 229.

§ 78. —— Contract to Furnish Freight to Hauler.

[a] In an action to recover damages for breach of a contract whereby defendant agreed to furnish plaintiff a certain amount of wheat for transportation, and to pay him a certain price therefor, plaintiff cannot recover more than his actual loss after deducting the amount earned from others during the time he would otherwise have been engaged in the performance of the contract with defendant.—Utter v. Chapman, 38 Cal. 659.

[b] Measure of damages for breach of contract to furnish freight to hauler is difference between what he could have made had contract not been broken and what he did make. Dunn v. Daly, 78 Cal. 644.

§ 79. —— Building Contracts.

[a] Where a contract for the construction of a dam guaranteed that it would stand for five years after its completion, and provided that payment therefor should be made in installments as the construction thereof progressed, and further provided that, if within the five years it washed away, it was to be rebuilt or the installments, or a proportional part thereof, according to the time the dam had stood, should be refunded, the rule of damages provided for by the contract has reference solely to the guaranty, and damages for failure to build at all must be measured by the ordinary rules.—Reedy v. Smith, 42 Cal. 245.

[b] Defendant, in consideration of the grant of a right of way through plaintiff's land, agreed to build for plaintiff a certain wagon road, and also to fence both sides of the way. Held, in an action for the breach of these agreements, that plaintiff was entitled to recover what it would reasonably cost to construct the road and fence.—Taylor v. North Pacific Coast R. Co., 56 Cal. 317.

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§ 80. —— Contract with Railroad Company as to Construction of Road or Station.

[a] A railroad company entered on land under an agreement with the owner that it would build its road from a point near the center of a city through such owner's land. The company built a portion of its road, including the part through the land in question, but failed to build the portion running near the center of the city, which portion, if built, would have greatly increased the value of such land. Held, that the land owner was entitled to recover from the company the amount it would cost to place his land in the same condition as before entry by the company.—Smith v. Los Angeles etc. Ry. Co., 98 Cal. 210, 33 Pac. 53; Patton v. Los Angeles etc. Ry. Co., 33 Pac. 55.

§ 81. Defects in Performance.

[a] Where a building contract which had been substantially performed provided for payment of the price before commencement of the work, defendant's measure of damages for defects in the work was the amount of detriment suffered thereby.—Carpenter v. Ibbetson, 1 Cal. App. 272, 81 Pac. 1114.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 158; 15 Cent. Dig., cols. 2066-2069, §§ 320-325.

§ 82. Prevention or Obstruction of Performance—Loss of Profits.

[a] In action for breach of contract and for hindering plaintiff from completing his part thereof the true measure of damages is the value of the labor performed by plaintiff, and the profit he could fairly have derived from the labor he was prevented from performing. Cunningham v. Dorsey, 6 Cal. 19.

[b] In an action for breach of contract in refusing to permit plaintiff to perform the same, the measure of damages is the profit plaintiff would have made on the contract had he been permitted to perform it.—Cox v. McLaughlin, 54 Cal. 605.

[c] In action for breach of contract for construction of tunnel, plaintiff's prospective profits held a proper element of damage.—McConnell v. Corona City Water Co. (Cal. Sup.), 85 Pac. 929.

FOR AUTHORITIES FROM OTHER STATES:

See 6 Cyc. 108; 13 Cyc. 159; 15 Cent. Dig., cols. 2070-2090, §§ 326-338.

§ 83. —— Mode of Ascertaining Profits.

[a] In an action to recover for breach of a contract, under which plaintiff agreed to manufacture lumber by means of certain machinery to be furnished by defendant, which machinery when furnished was inadequate, and by reason whereof plaintiff was not enabled to manufacture as much lumber as he could have done with proper machinery, the measure of damages was the contract price for the lumber which the plaintiff was so prevented from manufacturing, less the expense in manufacturing the same.—Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952.

§ 84. —— Loss of Profits and Expenses Incurred.

[a] Where a contractor agreed to perform certain work and furnish certain materials for the construction of a building, and, after furnishing a portion of the materials, the owners of the building failed to resume work upon the building, or to receive any further material from the contractor, the latter may recover not only the profits he would have made by performance, but is also entitled to recover for expenditures made in preparing to do the work.—O'Connell v. Main etc. Hotel Co., 90 Cal. 515, 27 Pac. 373.

§ 85. Failure to Pay Money.

[a] The theory of the law is not that the party recovers the particular note or chose in action, as is commonly imagined, but that he recovers damages for the nonperformance of the contract; and, in case of failure to pay money due, the true measure of damages is the amount of money owing and the interest which was agreed upon.—Guy v. Franklin, 5 Cal. 416.

FOR AUTHORITIES FROM OTHER STATES:

37 L. R. A. 233, note. See, also, 13 Cyc. 166; 15 Cent. Dig., cols. 2090-2095, §§ 339-343.

§ 86. Failure to Deliver or Convey Property.

[a] Plaintiffs conveyed certain land to defendants, and took from them an undertaking conditioned that they should by a certain time furnish plaintiffs with Texas land warrants for thirty-two hundred acres of land. In an action on the undertaking for defendants' failure to furnish the warrants, the court found that, at and after the time for their delivery warrants could have been readily obtained for forty-seven dollars and fifty cents each, locatable on six hundred and forty acres. Held, that the measure of damages was the value of the warrants (two hundred and thirty-seven dollars and fifty cents), and not the difference between the value of the land conveyed by plaintiffs to defendants, and the liens thereon, assumed by defendants as part of the purchase money. Rayner v. Jones, 90 Cal. 78, 27 Pac. 24.

[b] In an action to recover damages for the failure of the defendants to deliver land warrants to the plaintiffs at the time and place specified in a bond of the defendant, conditioned for the due delivery of the warrants, the measure of damages is the market value of the warrants at the time specified for their delivery, with legal interest from that date, less the amount due upon the purchase price. Rayner v. Jones, 90 Cal. 78, 27 Pac. 24.

§ 87. Failure of Bailee to Return Property.

[a] Where check had been lost and paid by banker upon forged indorsement, held, that

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upon a suit for the same, after a refusal by the banker to deliver the check to the owner, in the absence of rebutting evidence, the measure of damages must be the full value of the amount for which it was drawn.—Survey v. Wells, Fargo & Co., 5 Cal. 124.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

IN GENERAL, § 88.
PERSONAL INJURIES, § 89.
—— LOSS OF ARM, § 90.
—— IMPAIRMENT OF EARNING CAPACITY, § 91.
INJURIES BY TRESPASSING CATTLE, § 92.
INJURIES TO ANIMALS, § 93.
BREACH OF CONTRACT, § 94.

§ 88. In General.

[a] Where all the evidence as to the damages suffered by plaintiff was given by his witnesses, and defendant made no effort to controvert it, and plaintiff, after giving an estimate of particular items of damage, stated that he suffered twice as much damage as he claimed in the complaint, which was five hundred dollars, a judgment for three hundred and twenty-five dollars will not be reversed because the damages found were excessive, or not in accordance with the evidence.—Pereira v. Smith, 79 Cal. 232, 21 Pac. 739.

[b] Five hundred dollars is not excessive for forcible trespass accompanied by insult and fright to plaintiff's wife, causing prolonged illness.—Razzo v. Varni, 81 Cal. 289, 22 Pac. 848.

[c] Whether verdict is excessive is determined solely from consideration of evidence and whether it fairly sustains conclusion of jury.—Harrison v. Sutter St. Ry. Co., 116 Cal. 162, 47 Pac. 1019.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 121-135; 15 Cent. Dig., cols. 2111-2191, §§ 354-405.

§ 89. Personal Injuries.

[a] Eleven hundred dollars for wanton attack on aged cripple is not excessive.—St. Ores v. McGlashen, 74 Cal. 151, 15 Pac. 452.

[b] In an action for personal injuries there was evidence that plaintiff's right arm and shoulder were greatly injured; that the internal ligaments of the shoulder joint were ruptured; that she suffered great pain, and at the time of the trial, two years after the injury, still suffered great pain in the shoulder, in the back of the head and neck, and in the chest; that her memory was impaired; that she was unable to do any work of value; that but little progress had been made toward recovery; and that her injuries would probably be permanent. Held, that a verdict of fifteen thousand dollars should not be disturbed as excessive.—Morgan v. Southern Pac. Co., 85 Cal. 501, 30 Pac. 601.

[c] Two thousand five hundred dollars is not excessive for wanton assault on old and infirm man.—Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892.

[d] In an action by a passenger of a street railway company for injuries, where it appeared that plaintiff was pregnant at the time of the accident, and that a miscarriage resulted, and that her eyesight and the action of her heart were impaired, a verdict of ten thousand dollars was not excessive.—Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 42 Pac. 983.

[e] Where there was conflicting evidence as to the nature and permanence of the injuries received by plaintiff from the attack of a vicious bull, for which defendant is liable, but, on the part of plaintiff, it was shown that the coccyx was fractured, the muscles of the region atrophied, the sciatic nerve made tender and painful to pressure, and that there were other symptoms of spinal injury, upholding a finding that plaintiff's health was seriously impaired, if not positively wrecked, it may not be said that a verdict for the plaintiff for damages in the sum of five thousand five hundred dollars was excessive.—Clowdis v. Flume etc. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

[f] From evidence showing that plaintiff was horribly injured, and nearly flayed by the escaping steam from the exploded boiler, it may not be said that a verdict for damages in the sum of five thousand dollars is excessive.—Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

[g] A verdict for two thousand dollars for injuries to hearing, sight, and nervous system, held not excessive though wages of plaintiff were not cut off or diminished, and he suffered no pecuniary loss.—Clare v. Sacramento Electric Power etc. Co., 122 Cal. 504, 55 Pac. 326.

[h] A verdict for one thousand dollars for an injury resulting in a broken arm, which prevented plaintiff from working for three months, and gave her more or less trouble thereafter, is not excessive—(1900) Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, judgment affirmed on rehearing (1901) 64 Pac. 993.

[i] Where plaintiff, a boy of fourteen, was arrested by the captain of defendant's vessel, and chained to a post, and was ejected at midnight, before reaching his destination, and was obliged to walk thirty miles to reach home, a verdict of fifteen hundred dollars was not excessive.—Trabing v. California Nav. etc. Co., 133 Cal. xx, 65 Pac. 478.

[j] A passenger, injured by a carrier's negligence, was seventy-five years old, and up to the time of the injury had been active and in good health, and engaged in his own business, which was extensive. He had held positions of trust in several financial institutions. As a result of the injury he became afflicted with heart disease, by which his capacity to transact his business was seriously impaired. Held, that a verdict for $2,000 was not excessive.—Sterrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

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[k] Where plaintiff was confined with a badly injured knee and under the constant care of physicians for two months, and had not fully recovered nearly a year later, a verdict of three hundred dollars was not excessive.—Sheyer v. Lowell, 134 Cal. 357, 66 Pac. 307.

[l] Where the plaintiff was badly injured by falling eighteen feet from a platform on a pole supporting electric wires, such fall being caused by a shock of electricity, a verdict of fifteen thousand dollars will not be deemed excessive.—Tedford v. Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85.

[m] Plaintiff was injured about the head, and was unconscious for ten or twelve days after the injury, and was suffering therefrom at the time of the trial, and there was evidence to show that the injury was permanent. Held, that a verdict for seven thousand dollars was not excessive.—Dolan v. Sierra Ry. Co. of California, 135 Cal. 435, 67 Pac. 686.

[n] In an action for injuries to a passenger, a verdict for two thousand dollars held not excessive.—Wood v. Los Angeles Traction Co. (Cal. App.), 82 Pac. 547.

FOR AUTHORITIES FROM OTHER STATES:

14 L. R. A. 677, note. See, also, 13 Cyc. 126-135; 15 Cent. Dig., cols. 2112-2180, §§ 357-396.

§ 90. —— Loss of Arm.

[a] Ten thousand dollars for an injury, caused by defendant's gross negligence, and necessitating the amputation of an arm, is not excessive.—Robinson v. Western Pac. R. Co., 48 Cal. 409.

§ 91. —— Impairment of Earning Capacity.

[a] A verdict for $30,000, in an action for personal injuries occasioned by the fall of an elevator, will not be set aside as excessive where it appears that plaintiff was a man 36 years of age, in good health, and engaged in an extensive business requiring great physical activity, and that he was so affected by several bad fractures, concussion of the spine producing permanent partial paralysis, and other serious injuries, as to render him scarcely able to walk, and prevent him ever after from resuming his business, or engaging in any other active pursuit.—Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

[b] Where plaintiff, who was employed as a street sweeper, had his leg broken by a collision with defendant's buggy, and a permanent shortening of the leg resulted, rendering his less able to earn a living, a verdict for four thousand dollars is not so large that it will be set aside.—Roche v. Redington, 125 Cal. 174, 57 Pac. 890.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 132-134; 15 Cent. Dig., cols. 2123-2127, § 368; cols. 2156-2178, §§ 386-394.

§ 92. Injuries by Trespassing Cattle.

[a] Where, in an action for damage done by trespassing cattle, the evidence as to the number of the cattle, and the amount of damage, is conflicting, it cannot be said that a judgment for three hundred and twenty-five dollars is excessive, though the cattle were on the land only at times during two months, and plaintiff paid only one thousand dollars rent for the land for the whole year, and, after the trespass subleased it for fifteen hundred dollars.—Brumley v. Flint, 87 Cal. 471, 25 Pac. 683.

§ 93. Injuries to Animals.

[a] Evidence that from two hundred and fifty to three hundred cattle, worth thirty dollars per head, died by reason of diversion of water from a stream running through plaintiffs' land, supports a finding of the amount of damages at one thousand dollars.—Heilbron v. Kings River etc. Canal Co., 76 Cal. 11, 17 Pac. 933.

§ 94. Breach of Contract.

[a] In an action for breach of a contract whereby plaintiff was to harvest defendant's grain, it appeared that plaintiff had spent several days in preparing to perform, hauling horse feed and provisions for his men, with two four-horse teams and men in charge; that he was discharged the third day of harvesting; that he was using twenty-four horses, six of them hired, and his own machine, worth two thousand dollars; that after said discharge his men, teams, and machine lay idle a week before he could obtain other work for them. Held, that a verdict for four hundred dollars actual damages was sustained by the evidence.—Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625.

VIII. PLEADING, EVIDENCE, AND TRIAL.

A. Pleading, §§ 95-108.
B. Evidence, §§ 109-120.
C. Trial, §§ 121-130.
D. Computation and Amount, Double and Treble Damages and Remission, §§ 131-135.

A. PLEADING.

SUFFICIENCY OF ALLEGATION, IN GENERAL, § 95.
—— IN ACTION FOR BREACH OF CONTRACT, § 96.
NECESSITY OF AVERRING SPECIAL DAMAGES, § 97.
MATTERS OF AGGRAVATION, § 98.
STIPULATION FOR LIQUIDATED DAMAGES AND PENALTIES, § 99.
ALLEGATIONS AS TO AMOUNT OF DAMAGES, § 100.
IN ACTION TO RECOVER TREBLE DAMAGES, § 101.
DAMAGES ACCRUING AFTER COMMENCEMENT OF SUIT, § 102.
DEFENSES—INCIDENTAL BENEFITS, § 103.
ISSUES, PROOF, AND VARIANCE, § 104.

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—— SPECIAL DAMAGES NOT PLEADED, § 105.
—— PERSONAL INJURIES, § 106.
—— INJURY TO FEELINGS, § 107.
—— PLEADING AND PROOF AS TO AMOUNT OF DAMAGES, § 108.

See, also, Pleading, § 42.
Pleading damages for libel or slander. See Libel and Slander, § 29.

§ 95. Sufficiency of Allegations in General.

[a] Where a complaint contains no prayer for damages, and does not state the amount of damages, a judgment on default awarding damages is erroneous, although the complaint state facts sufficient to sustain such a judgment.—Pittsburgh Coal Min. Co. v. Greenwood, 39 Cal. 71.

[b] In an action of damages by the vendor of land for the failure of the purchaser to comply with his part of the contract, the plaintiff must allege, in his complaint, that he has sustained damages, in order to sustain a judgment for damages.—Bohall v. Diller, 41 Cal. 532.

[c] Prospective damages need not be specially pleaded.—McKeever v. Market St. R. R. Co., 59 Cal. 294, 295.

[d] Complaint setting forth several distinct injuries should aver damages caused by each. Grandona v. Lovdal, 70 Cal. 163, 11 Pac. 623.

[e] Complaint stating facts from which damages must of necessity result sufficiently avers that plaintiff was damaged.—Blasingame v. Home Ins. Co., 75 Cal. 638, 17 Pac. 925.

[f] Allegation of damages which cannot be recovered is surplusage.—Newman v. Smith, 77 Cal. 27, 18 Pac. 791.

[g] A complaint, alleging mistake in the transmission of a telegram, so that plaintiffs were prevented from buying certain goods, and asked a certain sum as special damage, without alleging any facts going to show such damage, will sustain a judgment only for nominal damages.—Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583.

[h] Complaint for trespass to real property must contain a specific and certain averment of the actual damage done to the property, even though exemplary damages may be claimed for injuries thereto under circumstances of aggravation, and if the actual damage to the property is not averred with certainty, a demurrer for uncertainty on that ground should be sustained.—Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:
See, also, 13 Cyc. 173; 15 Cent. Dig., cols. 2192-2202, §§ 406-419.

§ 96. —— In Action for Breach of Contract.

[a] Allegation of facts which, if proved, would entitle plaintiff to recover sum demanded by him for breach of contract is sufficient allegation of damages.—Bartlett v. Odd Fellows' S. B., 79 Cal. 223, 12 Am. St. Rep. 139, 21 Pac. 743.

[b] Answer alleging that, if a street railroad had been completed as provided by the contract of plaintiff's assignor, defendant would have been able to sell his property for a greater price than it was "then worth without said railroad," or "is now worth with said railroad," and that defendant could, before making the contract for construction of the road, have sold his land at a greater price than he could when the road was completed, or at any time since, does not show any damages from delay in the construction of the road.—Witmer Bros. Co. v. Weid, 108 Cal. 569, 41 Pac. 491.

§ 97. Necessity of Averring Special Damages.

[a] Special damages must be specially pleaded.—Cole v. Swanston, 1 Cal. 51; MacDougall v. Maguire, 35 Cal. 279, 95 Am. Dec. 98.

[b] Damages which do not legally result from the breach of the contract cannot be recovered, unless they are specially claimed and set forth in the pleading; thus, damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person do not legally result from a breach of a contract of his vendor to deliver the good to him, and, in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer.—Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288.

[c] Averment of special damage is only necessary where right of action depends upon special injury received.—McCarty v. Beach, 10 Cal. 461.

[d] In answer for the breach of a contract, want of any averment of special damage cannot be reached by demurrer.—McCarty v. Beach, 10 Cal. 461.

[e] Special damages which do not necessarily accrue from a ground of complaint cannot be recovered unless the facts out of which they arise are especially averred in the complaint.—Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107.

[f] In an action to recover damages for the destruction of a book containing the subscription list of a newspaper, plaintiff cannot recover, in the absence of any allegation of special damages, the full subscription price of each subscriber whose name is contained in the book. He can only recover for the value of the book.—Nunan v. City and County of San Francisco, 38 Cal. 689.

[g] Injury to feelings need not be specially pleaded.—Shatto v. Crocker, 87 Cal. 630, 25 Pac. 921.

[h] Where special damages have been sustained from the destruction of property which

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do not all flow from the same facts, or constitute the natural consequence of the act constituting the right of recovery, but depend upon the proof of different circumstances, such special damages, as well as the circumstances justifying their recovery, should be alleged.—Mallory v. Thomas, 98 Cal. 644, 33 Pac. 757.

[i] Increased injury sustained by plaintiff by reason of her diseased condition at the time of the accident, occurring from defendant's negligence, does not constitute special damage, which must be pleaded in order to be recovered.—Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 175, 176, 179; 15 Cent. Dig., cols. 2192, 2193, § 406; col. 2200, § 413.

§ 98. Matter of Aggravation.

[a] Matter showing malice in aggravation of damages need not be pleaded.—MacDougall v. Maguire, 35 Cal. 279, 95 Am. Dec. 98.

§ 99. Stipulations for Liquidated Damages and Penalties.

[a] Where contract provides for penalty, complaint must specifically allege facts constituting breach and amount of damages sustained as result thereof.—People v. Central Pac. R. R. Co., 76 Cal. 38, 40, 18 Pac. 90.

[b] The stipulation in the contract for the hiring of the lighter for the payment of a fixed sum in case of loss or irreparable damage to the lighter must be construed as a penalty within which the actual damages for the loss or injury might be assessed, and not as fixed liquidated damages; and the plaintiff, in suing upon the contract, should have alleged and proved the actual damage.—Wilmington Transporation Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 177.

§ 100. Allegations as to Amount of Damages.

[a] It is sufficient if amount of damages is stated in prayer for judgment.—Riser v. Walton, 78 Cal. 491, 21 Pac. 362.

[b] Where the complaint prayed damages for injuries occasioned to plaintiff's person and property, real and personal, but did not specify the particular amount of damages sustained as to each, a demurrer to the complaint for ambiguity and uncertainty was improperly overruled.—Foerst v. Kelso, 131 Cal. 376, 63 Pac. 681.

[c] In ordinary actions of tort, it is unnecessary to state specifically, and in amounts, the different statements or items which go to make up the sum total of the damages. It is enough to state the facts constituting the cause of action, and claim so much in gross, as damage for the wrong done.—Montgomery v. Locke, 11 Pac. 874.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 180, 181; 15 Cent. Dig., cols. 2205, 2206, §§ 422-425.

§ 101. In Action to Recover Treble Damages.

[a] When treble damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute.—Chipman v. Emeric, 5 Cal. 239.

§ 102. Damages Accruing After Commencement of Suit.

[a] Under Civil Code, section 3283, providing that damages may be awarded for detriment resulting after suit brought, a supplemental pleading is not necessary for a recovery for damages accruing after the commencement of the action.—Halts v. Drew, 117 Cal. 305, 49 Pac. 189.

§ 103. Defenses—Incidental Benefits.

[a] It is not necessary for defendant to plead incidental benefits received by plaintiff from the act complained of to entitle him to have them deducted from the damages shown to have resulted from such act.—Hicks v. Drew, 117 Cal. 305, 49 Pac. 189.

§ 104. Issues, Proof, and Variance.

[a] Where a merchant employs a manager at a stated salary, and the latter brings an action on the contract for wages, defendant may, on the trial, introduce evidence of a loss of his profits, and diminution of his business, caused by the manager's neglect, under an answer setting up a counterclaim for damages growing out of the neglect of such manager to attend to the business.—Stoddard v. Treadwell, 26 Cal. 294.

[b] In absence of allegation in complaint that plaintiff has lost possession of the land, it is improper to show the value of rents and profits of such land as a foundation for judgment against defendant for the loss of its possession.—Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618.

[c] Where there is no denial of damages alleged in complaint, judgment may award them without taking proofs as to amount.—Johnson v. Vance, 86 Cal. 114, 24 Pac. 862.

[d] Under an allegation, in a complaint to recover damages for personal injuries, that plaintiff has "necessarily expended in doctor's bills" a stated sum, evidence is not admissible to show the amount of liabilities he has incurred for such bills, but has not paid.—McLaughlin v. San Francisco etc. Ry. Co., 113 Cal. 590, 45 Pac. 839.

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[e] Evidences of uterine trouble brought upon the injured plaintiff by the accident is admissible under the general averments of bodily injury of a continued and permanent nature, and resulting damage.—Samuels v. California Street Cable Ry. Co., 124 Cal. 294, 56 Pac. 1115.

[f] A complaint which alleged that certain grading rendered a street and alley useless and impassable, made access to plaintiff's property by said street and alley impossible, and utterly destroyed the value thereof, to the damage of plaintiff, is sufficient to warrant evidence proving damages to the lot from other causes than by simply cutting off access thereto.—Eachus v. City of Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829.

[g] A physician, sued for injuries sustained by a wife in health and constitution, and for pain and mental anguish by reason of his abandoning her at the time of her confinement, is not liable in that action to damages for the death of plaintiff's child, proximately caused by such abandonment. Judgment and order (1901), 63 Pac. 1007, reversed.—Lathrope v. Flood, 135 Cal. 458, 67 Pac. 683.

[h] Where the complaint, in addition to the common-law cause of action, prayed for treble damages, under the provisions of section 3344 of the Political Code, which are penal in their nature, and must be strictly construed, the fact that the evidence was not sufficient to sustain a recovery under that section would not justify an instruction for a verdict for the defendant, where there was sufficient evidence to sustain a recovery under the common-law cause of action for the actual damage alleged.—Clark v. San Francisco etc. Ry. Co., 142 Cal. 614, 76 Pac. 507.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 183-191; 15 Cent. Dig., cols. 2208-2245, §§ 429-453.

§ 105. —— Special Damages not Pleaded.

[a] Damages sustained by the vendee of goods because he cannot fulfill a contract with a third person, on account of their non-delivery, do not legally result from the vendor's breach of contract to deliver; therefore, in an action for that portion of the goods actually delivered, the defendant cannot recoup such damages, unless they are specially set forth and claimed in his answer.—Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288.

[b] Jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.—Dabovich v. Emeric, 12 Cal. 171.

[c] Special damages must be averred in the complaint, and cannot be proven under a general allegation of damages.—Gay v. Winter, 34 Cal. 153.

[d] In an action for damages occasioned by the pollution of water running through plaintiff's land, special damages cannot be proved, unless they are alleged in the complaint.—Potter v. Froment, 47 Cal. 165.

[e] If special damages are claimed, the facts establishing such special damages must be stated with particularity, in order that the defendant may be enabled to meet the charge if it be false, and, if not so stated, cannot be given in evidence.—Montgomery v. Locke, 11 Pac. 874.

§ 106. —— Personal Injuries.

[a] In a suit for damages for personal injuries, where the complaint alleges the nature of the injuries received and their permanent character, evidence of damages through inability to attend to business, necessarily resulting from such injuries, can be introduced without such damages being specially pleaded. Treadwell v. Whittier, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498.

[b] In an action for malicious prosecution, damages for injury to plaintiff's feelings, caused by the arrest, are recoverable under a general allegation of damages.—Shatto v. Crocker, 87 Cal. 629, 25 Pac. 921.

[c] In an action for a personal injury, the loss of profits in conducting a business involving the labor of others is not a necessary consequence of the personal injury to the plaintiff; and the extent of his recovery would be the worth of his services in the conduct of the business.—Lombardi v. California St. Ry. Co., 124 Cal. 311, 57 Pac. 66.

[d] Evidence of diseases resulting from injuries received by plaintiff held admissible, although not specifically alleged.—Lauder v. Currier (Cal. App.), 84 Pac. 217.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 185-189; 15 Cent. Dig., cols. 2223-2237, §§ 441-446.

§ 107. —— Injuries to Feelings.

[a] Injuries to feelings may be proved under general allegation of damages.—Shatto v. Crocker, 83 Cal. 630, 24 Pac. 836.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 189; 15 Cent. Dig., col. 2237, § 446.

§ 108. —— Pleading and Proof as to Amount of Damages.

[a] Where the damages were laid at one thousand dollars, judgment for fifteen hundred dollars was reversed on appeal.—Palmer v. Reynolds, 3 Cal. 396.

[b] Suit was brought for damages, laid at fifteen hundred dollars. Defendant with other matter in defense averred that plaintiff was not damaged "in the sum of fifteen hundred dollars." A verdict for six hundred dollars was found in plaintiff's favor; but, on

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the ground that the answer admitted damages in any sum less than fifteen hundred, judgment was entered for fourteen hundred and ninety dollars. Held that, after plaintiff had gone into proof as to damages, and the jury had returned a verdict on the facts in evidence, this judgment was improper, since defendant might well have been taken by surprise.—Reniff v. The Cynthia, 18 Cal. 669.

B. EVIDENCE.

PRESUMPTIONS AND BURDEN OF PROOF, § 109.
ADMISSIBILITY OF EVIDENCE, IN GENERAL, § 110.
—— IN ACTION FOR LOSS OF OR DAMAGE TO PROPERTY, § 111.
—— IN ACTION FOR BREACH OF CONTRACT, § 112.
—— RIGHT TO SHOW OR REBUT INTENT, MALICE OR MOTIVE OF DEFENDANT, § 113.
—— HEALTH AND PHYSICAL CONDITION OF INJURED PARTY, § 114.
—— TESTIMONY OF PHYSICIAN, § 115.
—— PECUNIARY CONDITION OF PERSON INJURED, § 116.
—— WEALTH OF DEFENDANT, § 117.
—— IMPAIRMENT OF EARNING CAPACITY, § 118.
—— REPUTATION OF PHYSICIAN EMPLOYED BY INJURED PLAINTIFF, § 119.
WEIGHT AND SUFFICIENCY OF EVIDENCE, § 120.

§ 109. Presumptions and Burden of Proof.

[a] In questions of damages for taking gold from a mining claim, plaintiff must necessarily find great difficulty in showing the amount taken, and therefore defendants cannot complain of excessive damages, if they do not show the correct amount of gold taken out by them.—Antoine Co. v. Ridge Co., 23 Cal. 219.

[b] In an action for breach of contract to furnish freight to a steamboat, plaintiff is entitled to recover only the actual loss suffered from the breach; but to show that such loss was less than the profits that would have been made under the contract, the burden of proof is on the defendant.—Utter v. Chapman, 43 Cal. 279.

[c] In an action to recover damages for the diversion of a watercourse, plaintiff is not bound to prove affirmatively what expense should be deducted in computing the loss in the value of his crop from want of irrigation. Ellis v. Tone, 58 Cal. 289.

[d] Amount of damage caused by breach of contract must be proved as a fact.—Parke v. Frank, 75 Cal. 369, 17 Pac. 427.

[e] Where amount of damages sustained is not denied, they need not be proved.—Johnson v. Vance, 86 Cal. 114, 24 Pac. 862.

[f] General damages may be recovered in the absence of actual proof; and an instruction importing that direct evidence must be offered establishing actual damages before a verdict may be given therefor, is not a correct statement of the law.—Hearne v. De Young, 132 Cal. 357, 64 Pac. 576.

[g] Under the general provisions of section 1670 of the Civil Code making all contracts for liquidated damages void, except as expressly provided in section 1671, it must be presumed, in the absence of a showing that the case is within the exception that the contract for liquidated damages is invalid and the exception must be both pleaded and proved to overcome that presumption.—Long Beach City School Dist. v. Dodge, 135 Cal. 401, 67 Pac. 499.

[h] A vendor who, after receiving money on the contract, rescinds it for the vendee's breach, has the burden to show, as against the vendee's claim for return of the money, what damages he has sustained by the breach. Green v. Barney, 36 Pac. 1026.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 191, 192; 15 Cent. Dig., cols. 2245-2250, §§ 454-459.

§ 110. Admissibility of Evidence in General.

[a] The court is entitled to be put in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the quantum of damages is to be deduced.—Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

[b] Evidence of the expense of digging a ditch in a manner materially different from the mode provided as a test of value in the contract alleged by plaintiff is irrelevant.—Biggerstaff v. Briggs, 4 Pac. 371.

§ 111. —— In an Action for Loss of or Damage to Property.

[a] In an action to recover damages for interfering with the regularity of the flow of water into plaintiff's ditch, proof that, in consequence of the irregularity of the flow of the water into the ditch, plaintiff has lost his customers, is competent evidence.—Natoma Water etc. Co. v. McCoy, 23 Cal. 490.

[b] In an action for the negligent burning of a forest of timber, evidence of the character of the timber for milling purposes is admissible on the question of damages.—Cleland v. Thornton, 43 Cal. 437.

[c] Where defendant claimed damages on the ground that plaintiff, who had leased a dairy ranch from him, had refused to execute a lease and had abandoned the premises, evidence as to which were the most profitable months for dairying, offered to show that the premises were abandoned at the close of a profitable season, and defendant, being compelled to rent them then, suffered a detriment, was properly excluded, as not being on the measure of damages, which was the difference in rentals.—Silva v. Bair, 141 Cal. 599, 75 Pac. 162.

[d] Where plaintiff's wheat was alleged to have been destroyed by fire from defendant's

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traction engine, plaintiff held entitled to prove the market value of wheat at the time of the fire.—Quint v. Dimond, 147 Cal. 707, 82 Pac. 310.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 192-212; 15 Cent. Dig., cols. 2251-2313, §§ 460-501.

§ 112. —— In Action for Breach of Contract.

[a] In an action for failure to deliver goods according to contract, the contract was for the cargo, or all the goods of a given description in a given vessel, and there were no other like goods in the market. Held, that the admission of evidence to show what they were worth in broken parcels was error.—Tobin v. Post, 3 Cal. 373.

[b] In an action for services by plaintiff in constructing an electric railroad for defendant, and for damages by defendant's failure to perform its part of the contract, defendant set up by way of counterclaim that plaintiff had abandoned the contract before completing the road, and it appeared that the road had been sold in an uncompleted state. Held, that evidence of the price for which it was sold was inadmissible, since such evidence would not affect the amount of damages defendant would be entitled to by reason of plaintiff's failure to complete the road.—Electric Imp. Co. v. San Jose etc. R. Co., 31 Pac. 455.

§ 113. —— Right to Show or Rebut Intent, Malice, or Motive of Defendant.

[a] If circumstances of aggravation be shown, in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions.—Dorsey v. Manlove, 14 Cal. 553.

[b] A complaint alleged a breach of contract by defendants, a steamship company, to convey plaintiffs. Held, that plaintiffs could show fraud at the inception of the contract, in a predetermination of defendants not to carry it out, which was a proper subject to be considered by the jury, in connection with the tortious acts subsequently done. Jones v. The Cortes, 17 Cal. 487.

§ 114. —— Health and Physical Condition of Injured Party.

[a] Testimony that before the accident plaintiff was able to do her own housework, but since the accident she had not been able to do it, is competent to show the extent of the injury.—Healy v. Visalia etc. R. Co., 101 Cal. 585, 36 Pac. 125.

[b] In action by a married woman to which husband is not party, for trespass upon her separate property, evidence as to condition of her health and strength subsequent to date of trespass, is inadmissible, and should be excluded.—Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 197, 204; 15 Cent. Dig., cols. 2286, 2287, § 482.

§ 115. —— Testimony of Physician.

[a] Defendant should be allowed to ask plaintiff's physician, on cross-examination, what he considered the serious ailment at the time he was called to see her, and what treatment was advised.—McFadden v. Santa Ana etc. Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252.

§ 116. —— Pecuniary Condition of Person Injured.

[a] In an action for damages caused by injury to the person, the jury, in estimating them, cannot take into consideration the fact that plaintiff is a man who has to depend on his manual labor for a living. The damages in such actions are not dependent on the wealth or poverty of plaintiff.—Shea v. Potrero etc. R. Co., 44 Cal. 414.

[b] In assessing damages for injuries to an employee, caused by his employer's negligence, plaintiff's "condition in life" or pecuniary condition, as rich or poor, cannot be considered.—Malone v. Hawley, 46 Cal. 409.

[c] Where the evidence in an action for injuries to a passenger showed that the plaintiff was seventy-five years old, and up to the time of the injury had been active and in good health, and engaged in business of his own, which was somewhat extensive and diversified, and that he had held positions of trust in several financial and other corporations, which capacity to transact business was seriously impaired, an instruction as to compensation for the value of his time during the period of disability and for the impairment to his ability to make money was justified, and was properly given, though there was no evidence that he was actually earning anything at the time of the injury.—Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages, pecuniary circumstances of the parties as affecting: 67 Am. Dec. 562, note. See, also, 13 Cyc. 197; 15 Cent. Dig., cols. 2309-2311, § 498.

§ 117. —— Wealth of Defendant.

[a] Where punitive damages are claimed in the case, evidence of the wealth of the defendant is admissible for the purpose of graduating the amount which it is proper to award.—Greenberg v. Western Turf Assn., 140 Cal. 357, 73 Pac. 1050.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages, pecuniary circumstances of the parties as affecting: 67 Am. Dec. 562, note. See, also, 13 Cyc. 211; 15 Cent. Dig., cols. 2311, 2312, § 499.

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§ 118. —— Impairment of Earning Capacity.

[a] In an action for personal injuries, evidence as to the character, continuance, and extent of plaintiff's business after the injury held admissible.—Burns v. Dunham, Carrigan & Hayden Co. (Cal. Sup.), 82 Pac. 959.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 202-204; 15 Cent. Dig., cols. 2299-2304, §§ 490, 491.

§ 119. —— Reputation of Physician Employed by Injured Plaintiff.

[a] In an action for personal injuries, evidence of the professional reputation of the physician employed by plaintiff to dress his wounds is admissible.—Thorne v. California Stage Co., 6 Cal. 232.

§ 120. Weight and Sufficiency of Evidence.

[a] In an action for breach of a contract of agency, plaintiff failed to prove as a fact the amount of damages actually sustained, leaving its determination to the direction of the jury. Held sufficient ground for a new trial.—Parke v. Frank, 75 Cal. 364, 17 Pac. 427.

[b] Evidence as to the cost of constructing a new staircase held insufficient to sustain a recovery for a breach of specifications in the staircase constructed.—Carpenter v. Ibbetson, 1 Cal. App. 272, 81 Pac. 1114.

[c] In an action for a breach of contract to organize a corporation and issue stock, the estimated value of the stock if issued held not the measure of damages within Civil Code, section 3300.—Eisenmayer v. Leonardt (Cal. Sup.), 84 Pac. 43.

[d] In an action for breach of contract to organize a corporation and issue stock, a recovery for the value of the stock held not authorized under the evidence.—Eisenmayer v. Leonardt (Cal. Sup.), 84 Pac. 43.

[e] Evidence held not sufficiently certain to sustain a finding as to damages.—Johnson v. Levy (Cal. App.), 86 Pac. 810.

[f] Evidence examined and held insufficient to authorize finding of damages.—Calkins v. Sorosis Fruit Co., 88 Pac. 1094.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 213-220; 15 Cent. Dig., cols. 2313-2334, §§ 502-514.

C. TRIAL.

QUESTIONS FOR JURY, § 121.
INSTRUCTIONS, § 122.
—— EXEMPLARY DAMAGES, § 123.
—— MEASURE OF DAMAGES FOR INJURY TO PERSON, § 124.
—— MEASURE OF DAMAGES FOR INJURY TO PROPERTY, § 125.
—— MEASURE OF DAMAGES FOR BREACH OF CONTRACT, § 126.
VERDICT AND FINDINGS OF JURY, § 127.
—— UNCERTAINTY, § 128.
FINDINGS OF COURT, § 129.
DEFAULT JUDGMENT—NECESSITY FOR WRIT OF INQUIRY, § 130.

§ 121. Questions for Jury.

[a] Amount of actual damage is a question of fact.—Drake v. Palmer, 4 Cal. 11.

[b] What constitutes compensatory damages is a question of law.—Dorsey v. Manlove, 14 Cal. 553.

[c] In suit for damages for an entry upon mining claims, and for perpetual injunction, etc., held, that it was error for the court below to charge the jury that if they believed no injury or damage was done by defendants to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge the jury might have decided the case upon this want of proof of plaintiffs' damages, instead of absence of proof of their title.—Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567.

[d] Measure of exemplary damage is matter for the jury alone.—Russel v. Dennison, 45 Cal. 337.

[e] Measure of damages is matter for jury alone, unless clearly disproportionate.—Russel v. Dennison, 45 Cal. 337.

[f] Where a trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the measure and amount of damages are matters for the jury alone.—Gorman v. Southern Pac. Co., 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112.

[g] In an action for negligence causing the destruction of plaintiff's property by fire, the question of interest upon the damages allowed must be left to the discretion of the jury; and an instruction is erroneous which arbitrarily requires the jury to add interest from the date of the fire, to such sum as they might find to be the amount of the damage caused.—King v. Southern Pac. Co., 109 Cal. 96, 41 Pac. 786.

[h] Where, in an action to recover for wrongfully diverting water from plaintiff's land, the complaint asked for punitive damages, and several instructions given at plaintiff's request contain intimations looking toward punitive damages, but the case did not justify such allowance, it was error to refuse to charge expressly that such damages could not be allowed, and the error was not cured by a charge that only compensatory damages should be awarded.—Mabb v. Stewart, 133 Cal. 556, 65 Pac. 1085.

[i] An instruction that plaintiff was entitled to recover only the actual damages proven, as distinguished from mere imaginary or exemplary damages, was properly refused, as tending to mislead the jury as to the char-

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acter of proof necessary.—Trabing v. California Nav. etc. Co., 133 Cal. xx, 65 Pac. 478.

[j] Civil Code, section 3333, declares that for the breacn of an obligation not arising from contract the measure of damages is the amount which will compensate for the detriment proximately caused thereby. Held, that an instruction in an action for injuries to a servant that plaintiff should recover such damages as the jury should "feel" plaintiff entitled to was erroneous.—Fries v. American Lead Pencil Co., 141 Cal. 610, 75 Pac. 164.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 233; 15 Cent. Dig., cols. 2371-2376, §§ 533, 534.

§ 122. Instructions.

[a] In an action for personal injuries an instruction to the jury that "money is an inadequate recompense for pain," though not an appropriate expression in a charge to the jury upon the question of compensatory damage, does not constitute a reversible error where the jury are also instructed that resulting pain is an element of damage to be compensated, and that if the plaintiff was entitled to recover, "the measure of her recovery is what is called compensatory damages—that is, such sum as will compensate her for the injury she has sustained"; that "the determination of the amount is committed to the judgment and sound discretion of the jury"; and that it should be "in such measure as a jury, dispassionately considering all the circumstances of the case, will allow."—Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. 603.

[b] An instruction that, in cases of injuries for which a criminal prosecution might be brought, exemplary damages may be recovered in a civil action, is improper, as eliminating the question of mitigating circumstances.—Badostain v. Grazide, 115 Cal. 425, 47 Pac. 118.

[c] Instructing that the jury should render a verdict for such damages as appeared from all the evidence to be just is too general in an action against a principal for the malicious acts of its agent done in the course of his duty.—Trabing v. California Nav. etc. Co., 121 Cal. 137, 53 Pac. 644.

[d] An instruction purporting to limit the recovery of actual damages, in the absence of malice in fact, to the pecuniary loss of the plaintiff, is erroneous.—Hearne v. De Young, 132 Cal. 357, 64 Pac. 576.

[e] Instruction that jury may award such damages as they "feel" plaintiff is entitled to is in derogation of section 3333, Code of Civil Procedure, and erroneous.—Fries v. American etc. Co., 141 Cal. 613, 614, 75 Pac. 164.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2378-2481, §§ 537-562.

§ 123. —— Exemplary Damages.

[a] Under Civil Code, section 3294, providing that in any action of tort where defendant has been guilty of oppression or malice the jury may give exemplary damages, a charge that plaintiff could recover only actual damages was properly refused, where there was evidence of a wanton, aggravated, and malicious trespass by defendant.—Waters v. Dumas, 75 Cal. 563, 17 Pac. 685.

[b] Under Civil Code, section 3294, authorizing the recovery of punitive damages "in any action for the breach or an obligation not arising from contract, where defendant has been guilty of oppression, fraud, or malice, actual or presumed," it is error to charge that if plaintiff was injured by defendant's act, and "in doing such act defendant was grossly careless," punitive damages might be awarded, as it cannot be said that an act of gross carelessness is always an act done through oppression, fraud, or malice.—Yerian v. Linkletter, 80 Cal. 135, 22 Pac. 70.

[c] In an action in which punitive damages were asked the court instructed that "in any action for the breach of an obligation not arising upon contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Held, that, after such instruction had been given, defendant was entitled to an instruction that "a tort committed by mistake in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of punitive damages."—Lyles v. Perrin, 119 Cal. 264, 51 Pac. 332.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 240-244; 15 Cent. Dig., cols. 2386-2396, §§ 543-547.

§ 124. —— Measure of Damages for Injury to Person.

[a] In an action by a husband for loss of his wife's services, there being evidence that before the injury she had cared for their children, refusal of an instruction that the jury could not consider the loss of service or of protection which plaintiff's children suffered by reason of the injury is not error; it being misleading, and instructions having been given clearly limiting recovery to damages suffered by plaintiff.—Redfield v. Oakland Consol. St. Ry. Co., 112 Cal. 220, 43 Pac. 1117.

[b] Where the jury were instructed that they might deduct from the amount of damages for personal injuries any money given to plaintiff by defendant by way of an alleged settlement, defendant cannot complain that it was injured by such payment.—Abrahams v. Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216.

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[c] In an action for damages for personal injuries, causing plaintiff to have a miscarriage, an instruction that if the jury shall find that defendant wrongfully inflicted injuries on the person of plaintiff, and that she suffered pain in consequence thereof, and that she was at the time pregnant, and the injury caused her to have a miscarriage, and that her health has been impaired by reason thereof, or if they find that any of said alleged facts have been proved, the amount of damages to which plaintiff is entitled is such sum as shall appear reasonable and just, provided, however, that a greater amount of damages than is alleged in the complaint cannot be given, is proper.—Thomas v. Gates, 126 Cal. 1, 58 Pac. 315.

[d] In an action for damages for personal injuries causing plaintiff to have a miscarriage, an instruction by the court, after giving the rule as to the detriment proximately caused by the act of defendant, to the effect that this will include compensation for the pain resulting from the corporal hurt, if it produced pain; for mental suffering, if any, naturally resulting to plaintiff from the injury or wrong, if any; for wounded sensibility or affection, and for sense of wrong and insult, by reason of the malice or oppression of defendant, if he was guilty of malice or oppression,—states the correct rule of damages.—Thomas v. Gates, 126 Cal. 1, 58 Pac. 315.

[e] Instructions on measure of damages for personal injury held proper, in view of Civil Code, section 3333.—Hersberger v. Pacific Lumber Co. (Cal. App.), 88 Pac. 587.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 236; 15 Cent. Dig., cols. 2396-2419, §§ 548-555.

§ 125. —— Measure of Damages for Injury to Property.

[a] In an action to recover for the diversion of a watercourse, the court need not instruct as to the rule of damages, otherwise than in a general way, unless requested.—Ellis v. Tone, 58 Cal. 289.

[b] In an action for injuries to a growing crop, instructions, in the same paragraph, that the verdict should be for the value of the crop at the time it was injured, with interest, and that it should be for the difference between the values immediately before and after the injury, with interest on that difference, are so contradictory as to constitute reversible error.—Harrison v. Spring Valley Gold Co., 65 Cal. 376, 4 Pac. 381.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 236; 15 Cent. Dig., cols. 2419-2425, §§ 556-559.

§ 126. —— Measure of Damages for Breach of Contract.

[a] In an action for breach of contract to lease, where plaintiff alleges that he owned all the necessary teams, etc., for cultivating the premises, and had begun to prepare to move on them when defendant refused to perform, instructions that plaintiff was entitled to recover all that he could have made on the premises during the year; that he was entitled to the value of the crop that an average farmer would have raised, less the cost of raising and harvesting, to be determined by the evidence; that, if plaintiff had the stock and utensils, etc., to cultivate the premises, or any portion thereof, without hiring, the jury may consider that,—are not in conflict with an instruction that they are not to assess any damages resulting to plaintiff from the loss of his labor or the use of his teams.—Rice v. Whitmore, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2426-2431, §§ 560-562.

§ 127. Verdict and Findings of Jury.

[a] When verdict finds actual and exemplary damages separately, the latter should be disregarded if not allowable.—Moody v. McDonald, 4 Cal. 297.

[b] Finding of jury, based upon an admission of the parties by the pleadings or otherwise, is not less an assessment of damages than if the findings were made upon conflicting evidence.—Patterson v. Ely, 19 Cal. 28.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 248-252; 15 Cent. Dig., cols. 2422-2438, §§ 563-566.

§ 128. —— Uncertainty.

[a] A judgment for one cent damages entered upon a special verdict in favor of the plaintiff for "nominal damages," if in other respects proper, will not be set aside for uncertainty in the verdict.—Davidson v. Devine, 70 Cal. 519, 11 Pac. 664.

§ 129. Findings of Court.

[a] Where an action against a sheriff for abuse of process was tried by the court, it was not necessary for the court to segregate in its findings the amount of actual damages from the amount given as exemplary damages, in the absence of a request.—Foley v. Martin, 142 Cal. 256, 71 Pac. 165.

[b] A finding that a specified sum will compensate one for a personal injury held to mean the amount necessary to compensate him as fixed by Civil Code, section 3333.—Griffin v. Pacific Electric Ry. Co. (Cal. App.), 82 Pac. 1084.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2432-2438, §§ 563-566.

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§ 130. Default Judgment—Necessity for Writ of Inquiry.

[a] A final judgment on default may be rendered upon an unliquidated demand, the defendant being notified in the summons of the amount for which the plaintiff will take judgment; and it is not necessary to resort to a writ of inquiry.—Hartman v. Williams, 4 Cal. 254.

D. COMPUTATION AND AMOUNT, DOUBLE AND TREBLE DAMAGES, AND REMISSION.

DAMAGE ACCRUING AFTER SUIT BROUGHT, § 131.
COMPUTATION OF AMOUNT, GENERALLY, § 132.
COMPUTING INTEREST AS DAMAGES, § 133.
DOUBLE AND TREBLE DAMAGES, § 134.
REMISSION OF EXCESS, § 135.

§ 131. Damage Accruing After Suit Brought.

[a] In actions for damages the rule is, that the proof of damage may extend up to the time of verdict as to all facts which flow as a natural result from the injury for which suit is brought.—Hicks v. Herring, 17 Cal. 566.

[b] Under Civil Code, section 3283, plaintiff is entitled to damages resulting after commencement of suit.—McLennan v. Ohmen, 75 Cal. 563, 17 Pac. 687.

[c] Parties are entitled to benefit of any facts occurring after suit brought which show clearly gains prevented by breach of contract complained of.—Shoemaker v. Acker, 116 Cal. 247, 48 Pac. 62.

[d] Where damages complained of are continuous, evidence of injury resulting after commencement of action is admissible.—Hicks v. Drew, 117 Cal. 314, 49 Pac. 189.

[e] A statement by plaintiff's counsel that he desires to limit the proof to damage before the filing of the complaint is not a disclaimer of damages down to the trial, where questions by him as to such subsequent damages are thereafter excluded, because not confined to a time prior to the filing of the complaint, and without reference to the alleged disclaimer.—Hicks v. Drew, 117 Cal. 305, 49 Pac. 189.

[f] Plaintiff was entitled to recover damages accruing after suit brought upon a cause of action which was complete when the suit was begun, where the damages proved were the natural and necessary consequences of the wrong.—Bryson v. McCone, 121 Cal. 153, 53 Pac. 637.

For Authorities from Other States:

See 13 Cyc. 254; 15 Cent. Dig., cols. 2438-2441, §§ 567.

§ 132. Computation of Amount Generally.

[a] Where plaintiff's testimony showed that the loss sustained was the amount claimed in the complaint, and defendant's counsel admitted the value of the property as alleged, it was error for the jury to assess damages in a less amount.—Koebig v. Southern Pac. Co., 108 Cal. 235, 41 Pac. 469.

For Authorities from Other States:

See 15 Cent. Dig., cols. 2441-2446, §§ 568-573.

§ 133. Computing Interest as Damages.

[a] Interest may be allowed as damages in the absence of statute.—Davis v. Greely, 1 Cal. 422.

[b] Where a statute is passed changing the legal rate of interest, recovery on a claim may be had under the old rate of interest up to the time of the passage of the act, and the new rate after that time.—White v. Lyons, 42 Cal. 279.

§ 134. Double and Treble Damages.

[a] Since Political Code, section 3344, providing for treble damages to the party injured by the negligent setting out of fires, is silent as to whether the jury shall find such damages, or whether they shall find the actual damage, and the court shall enter judgment for three times such amount, it is immaterial which course is pursued, provided absolute certainty is attained, and this can be secured by preparing the form of verdict.—Galvin v. Gualala Mill Co., 33 Pac. 94.

For Authorities from Other States:

See 13 Cyc. 253; 15 Cent. Dig., cols. 2446-2448, §§ 574, 575.

§ 135. Remission of Excess.

[a] Where a jury has passed upon a question of unliquidated damages the court below has no right to direct the plaintiff to remit a part of the verdict. In case, however, the plaintiff does enter into a stipulation to remit part of the damages found by the jury he will be held to his stipulation.—George v. Law, 1 Cal. 363.

[b] If, of two distinct items of damages, one is incorrectly allowed by the jury, the other may stand, if it is correct and the plaintiff is willing to remit the improper damages.—Butler v. Collins, 12 Cal. 457.

[c] Where, in ejectment against several defendants, the judgment for damages is several, instead of joint, the damages may be remitted, and the judgment for the land stand.—Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632.

[d] If plaintiff recovers a verdict for too large a sum, he may enter a remittitur for the excess.—Muller v. Boggs, 25 Cal. 175.

[e] Plaintiff asked for an injunction against a diversion of water, claiming five hundred inches. He asked also for damages. A jury found him entitled to eight hundred inches, and to one thousand dollars damages. Held,

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that the verdict for damages could not stand, even by plaintiff remitting the three hundred inches over the amount claimed; that there must be a new trial.—Dougherty v. Haggin, 61 Cal. 305.

[f] Where a verdict is rendered in excess of the amount demanded by the complaint, the court may, before the entry of the judgment, allow plaintiff to remit the excess and to take judgment for the amount demanded. Clanton v. Coward, 67 Cal. 373, 7 Pac. 787.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 250-252; 15 Cent. Dig., cols. 2448-2454, §§ 576-579.

DAMS.

On non-navigable streams. See Waters and Watercourses, § 37.
Injuries from breaking of. See Waters and Watercourses, § 185.
Construction and maintenance of. See Waters and Watercourses, VII, B.

DANGEROUS ANIMALS.

See Animals.

DANGEROUS INSTRUMENTALITIES.

Care required in handling. See Negligence, §§ 10-12.
Liability of manufacturers and sellers of, for injuries resulting from. See Negligence, § 12.

DANGEROUS MACHINERY.

Liability of master for injuries to servant from. See Master and Servant, § 28.

DANGEROUS OCCUPATIONS.

Occupations dangerous to health. See Health, §§ 7, 8.

DANGEROUS PREMISES.

Liability of landlord and tenant for injuries from. See Landlord, §§ 85-89.

DANGEROUS WEAPON.

Assault with. See Assault and Battery, § 26.

DARREIN CONTINUANCE.

See Puis Darrein Continuance.

DATE.

Insertion of, in contract. See Contracts, § 28.
Judicial notice of dates. See Evidence, § 23.
On civil process. See Process, § 11.
Effect of codicil on date of will. See Wills, § 44.

DAYS.

Judicial notice of. See Evidence, § 23.
Computation of. See Time, §§ 4-7.

DAYS OF GRACE.

On bills, drafts, checks and instruments payable on time, on demand and at sight. See Bills and Notes, §§ 78-81.

DEAD BODIES.

Include personal rights, duties, and liabilities of relatives and representatives of one deceased, in respect of the possession and disposition, by burial or otherwise, of the body; and offenses relating to the disposal of dead bodies.

IN GENERAL, § 1.
RIGHT TO POSSESSION AND DISPOSITION, § 2.
OFFENSES AND PROSECUTION THEREFOR—DISINTERMENT, § 3.
—— VIOLATING SEPULTURE, § 4.

Coroner's inquests. See Coroners, §§ 3, 4.
Burial permits. See Health, § 11.
Power of midwife to issue death certificate. See Health, § 12.

§ 1. In General.

[a] A dead man is a mere senseless piece of senseless clay.—Harrison v. Sutter St. Ry. Co., 116 Cal. 166, 47 Pac. 1019.

FOR AUTHORITIES FROM OTHER STATES:

Rights and duties of relatives and others respecting: 82 Am. Dec. 509, note. See, also, 13 Cyc. 267-282; 15 Cent. Dig., cols. 2459-2471.

§ 2. Right to Possession and Disposition.

[a] Neither the probate court nor the personal representative of a decedent has any right to his body, nor any right to control the manner of disposing of the same, as against the wife of decedent.—O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906.

[b] The superior court has no jurisdiction to award the custody of a body of a decedent to a stranger to his blood, to the exclusion of the surviving wife, with directions to such stranger to transport the body to another place for interment.—O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906.

[c] If a decedent makes a testamentary disposition of his body, the court in probate and his personal representative have jurisdiction to execute the will in that regard; but if the will is silent the court has no power to dispose of the remains, or to fix the place of the interment, or to commit the interment to a stranger; but the right to dispose of the body for interment in such case belongs to the widow or next of kin of the decedent.—O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906.

[d] In the absence of statute, the custody of the corpse and the right of burial belong to the

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next of kin, and not to the executor or administrator.—Enos v. Snyder, 131 Cal. 68, 63 Pac. 170.

[e] The executor or administrator, though required by law to pay the funeral expenses, is not entitled as such to the custody of the body, and has no right of burial against the objection of the persons entitled by law.—Enos v. Snyder, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170.

[f] The provisions of section 294 of the Penal Code, in so far as defining the persons entitled to the custody of a dead body, and charging them with the duty of burial, if possessed of sufficient means, are regulative of rights which may be considered and protected in a civil action.—Enos v. Snyder, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170.

[g] Penal Code, section 292, declaring on whom devolves the duty of burying the body of a deceased person, is to be considered in a civil case as determining who has the right to bury the body, and to have the possession thereof for that purpose.—Enos v. Snyder, 131 Cal. 68, 63 Pac. 170.

FOR AUTHORITIES FROM OTHER STATES:

Bodies of the dead, rights in and to, and remedies for their enforcement: 75 Am. St. Rep. 424, note; 14 L. R. A. 85, note. See, also, 13 Cyc. 268; 15 Cent. Dig., cols. 2459-2461, §§ 1, 2.

§ 3. Offenses, and Prosecutions Therefor—Disinterment.

[a] The present case is decided upon the authority of People v. Baumgartner, 135 Cal. 72, to the effect that section 290 of the Penal Code requires the removal of a dead body from the grave in order to constitute the offense of disinterment thereof.—People v. Rhew, 135 Cal. 75, 66 Pac. 1081.

[b] "Disinter," as used in Penal Code, section 290, providing that every person who disinters or removes from the place of sepulture the dead body of a human being without authority of law is guilty of a felony, means to exhume, take out of the grave, or disentomb; and a person who merely dug down to a coffin to search the body for valuables, without removing the body, is not guilty of a violation of the section.—People v. Baumgartner, 135 Cal. 72, 66 Pac. 974.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 275, 276; 15 Cent. Dig., cols. 2465-2469, §§ 8-12.

§ 4. —— Violating Sepulture.

[a] An indictment for "violating sepulture" is sufficient, where the legal appellation of the offense was given, and the defendant was accused of having "disinterred and removed" the dead body of a human being without authority of law, not being a friend or relative of the deceased removing the body for reinterment.—People v. Dalton, 58 Cal. 226.

DEADLY WEAPON.

Defined. See Assault and Battery, § 27.

DEAF, DUMB AND BLIND ASYLUM.

Removal of resident physician of. See Asylums, § 3.

DEATH.

Include presumptions and proof as to death and survivorship in general; also actions for causing death.

I. EVIDENCE OF DEATH AND SURVIVORSHIP, §§ 1-3.

II. ACTIONS FOR CAUSING DEATH, §§ 4-55.

- A. Right of Action and Defenses, §§ 4-20.
- B. Pleading and Evidence, §§ 21-35.
- C. Damages, §§ 36-52.
- D. Trial, §§ 53-55.

Effect of death of party pending suit. See Abatement and Revival, V.

Effect of death of party pending appeal. See Appeal and Error, §§ 234-237.

Service of notice of appeal after death of appellee. See Appeal and Error, § 393.

Of principal as discharging surety on attachment bond. See Attachment, § 172.

Of client as terminating authority of attorney. See Attorney and Client, § 82.

Of member of law firm as terminating relation between firm and client. See Attorney and Client, § 83.

As discharging obligation of contract. See Contracts, § 234.

Coroners' inquests. See Coroners, § 3.

Effect of death pending suit on liability for costs. See Costs, § 18.

Death of witness as ground for admission of testimony given at former trial or preliminary examination. See Criminal Law, § 269.

As prerequisite to inheritance. See Descent and Distribution, § 10.

Death of divorced parent as terminating right to custody of child. See Divorce, § 155.

Death of party as abating ejectment suit. See Ejectment, § 74.

Declarations of persons since deceased as evidence. See Evidence, §§ 254, 265.

Effect of death of parties before issuance of execution. See Execution, § 32.

Necessity for death before valid administration. See Executors and Administrators, § 6.

As discharging guarantor. See Guaranty, § 24.

Of ward as terminating guardianship. See Guardian and Ward, § 27.

Burial permits. See Health, § 11.

Power of midwife to issue death certificate. See Health, § 12.

Damages for wrongful death as community property. See Husband and Wife, § 142.

Of insolvent as abating insolvency proceedings. See Insolvency, § 96.

Effect of death of beneficiary of insurance policy. See Insurance, § 170.

Effect of death of beneficiary in mutual benefit insurance policy. See Insurance, § 239.

Effect of death before rendition of judgment. See Judgment, §§ 9, 10.

Effect of death of judgment debtor on judgment lien. See Judgment, § 537.

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Effect of death on running of statute of limitations. See Limitation of Action, §§ 59-61.
As terminating relation of master and servant. See Master and Servant, § 7.
Death of partner and survivorship. See Partnership, §§ 94-99.
Of principal as revoking agency. See Principal and Agent, §§ 17-20.
Issuance of patent to government land after death of settler. See Public Lands, § 123.
Disposition of wages and effect of deceased sailors. See Seamen, § 2.
As discharging vendor's lien. See Vendor and Purchaser, § 111.
Lapse of legacy on death of legatee. See Wills, § 361.

I. EVIDENCE OF DEATH AND SURVIVORSHIP.

PRESUMPTION OF DEATH FROM ABSENCE, § 1.
PRESUMPTIONS OF SURVIVORSHIP, § 2.
ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE OF DEATH OR SURVIVORSHIP, § 3.

§ 1. Presumption of Death from Absence.

[a] In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years. Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300.

[b] To shorten the time when presumption of life ceases from absence there must be evidence of some specific peril to the life of the individual.—Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300.

[c] Law presumes that a person once shown to be alive continues to live until his death is proved or he has not been heard from for seven years.—People v. Feinlen, 58 Cal. 224, 41 Am. Rep. 258.

[d] On the issue whether a son of a testator was dead October 27, 1898, at the time of the making of the will, it was shown that the son left his home in California, and went to Washington, in 1888, in ill-health. The last letter received from him was in July, 1889. During this period he repeatedly wrote to his wife, discussing his ill-health, and promising to write again. No one ever heard from him after July, 1889. There were rumors that he had moved to Illinois, but on investigation it appeared that another person was commonly known in Illinois by the name of this testator's son. Held, to prove the son's death before the making of the will.—Ross' Estate, In re, 140 Cal. 282, 73 Pac. 976; Frear v. Ross, 140 Cal. 282, 73 Pac. 976.

[e] It is the duty of the husband absent from his wife to keep her advised of his whereabouts, and, when he fails to do so for ten years, she has the right to believe that he is dead, though she has made no attempt to find him.—Harrington's Estate, In re, 140 Cal. 244, 73 Pac. 1000; Harrington v. Union Trust Co., 140 Cal. 244, 73 Pac. 1000; rehearing denied, 140 Cal. 294, 74 Pac. 136.

[f] It was the duty of the former husband to keep his wife advised as to his whereabouts. The wife was not required to endeavor to ascertain his whereabouts; but she had the right to believe, from his silence for ten years prior to the second marriage, that he was dead.—Harrington, Estate of, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000.

FOR AUTHORITIES FROM OTHER STATES:

Presumption of death: 92 Am. Dec. 704, 104 Am. St. Rep. 199-206, notes.

Presumption and proof of death: 91 Am. Dec. 526, note.

Presumption of death from absentee not being heard of for seven years: 46 Am. Rep. 761, note. See, also, 13 Cyc. 297-305; 15 Cent. Dig., cols. 2478-2481, § 2.

§ 2. Presumptions of Survivorship.

[a] Presumption of survivorship of husband over second wife and children perishing in same calamity will prevail over presumption of revocation of former will by second marriage.—Sanders v. Simcich, 65 Cal. 50, 52, 54, 2 Pac. 741.

[b] Where husband and wife perish in common calamity, husband is presumed to survive. Hollister v. Cordero, 76 Cal. 652, 18 Pac. 855.

[c] Murder of entire family is a calamity within meaning of section 1963, Code of Civil Procedure, subdivision 40.—Hollister v. Cordero, 76 Cal. 652, 18 Pac. 855.

[d] Where a husband and wife were both murdered, and their house and bodies burned, in absence of any proof as to which survived, the husband will be presumed to be the survivor, under Code of Civil Procedure, section 1963, subdivision 40, providing that, where two persons of different sex perish in the same calamity, both being over fifteen and under sixty years, the male will be presumed to have survived.—Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855.

FOR AUTHORITIES FROM OTHER STATES:

Presumption of survivorship when death results from the same catastrophe: 41 Am. Dec. 522, note.

Presumption of survivorship: 104 Am. St. Rep. 211-213, note; 51 L. R. A. 863, note. See, also 13 Cyc. 308; 15 Cent. Dig., cols. 2491-2493, § 7.

§ 3. Admissibility and Sufficiency of Evidence of Death or Survivorship.

[a] Hearsay information of death of the ancestor of plaintiff derived from the immediate family of the deceased is sufficient, prima facie, to establish the fact.—Anderson v. Parker, 6 Cal. 197.

[b] The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel bound for a specified port, and that neither the vessel nor crew had ever been heard from, is

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not sufficient to raise a legal presumption of his death.—Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300.

[c] The testimony of a wife that she had not heard from her husband for seventeen years, during which she was absent from his last known place of residence, living under various assumed names, and never bearing that of her husband, thereby suggesting the probability that she had endeavored to conceal herself from him, is insufficient to justify the presumption of his death.—Garwood v. Hastings, 38 Cal. 216.

[d] When both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of a probate court granting letters of administration upon her estate recites that she was "the surviving wife" of her husband. In a proceeding by administrator to set aside the probate of her husband's will, it is error to refuse evidence aliunde upon the question of survivorship.—Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741.

[e] Order granting letters upon wife's estate cannot by recital conclude the fact that she survived husband perishing in same calamity.—Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741.

[f] Verdict of coroner's jury is not admissible to prove time and manner of death. It is matter of mere opinion and hearsay.—Hollister v. Cordero, 76 Cal. 653, 18 Pac. 855 .

[fg] Evidence recited herein held not to prove that wife murdered at same time as husband survived him.—Hollister v. Cordero, 76 Cal. 651, 18 Pac. 855.

[g] Where testator devised property to his two brothers, evidence of the declarations of one of the devisees that the other enlisted in the army and was believed by the family to have been killed, and that he was never married, was sufficient to support a finding that such devisee was dead, and to entitle the heirs of the declarant to the entire devise.—Woolsey v. Williams, 128 Cal. 552, 61 Pac. 670.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 309, 310; 15 Cent. Dig., cols. 2493, 2494, §§ 8, 9.

II. ACTIONS FOR CAUSING DEATH.

A. Right of Action and Defenses, §§ 4-20.

B. Pleading and Evidence, §§ 21-35.

C. Damages, §§ 36-52.

D. Trial, §§ 53-55.

A. RIGHT OF ACTION AND DEFENSES.

COMMON LAW, § 4.
SOURCE OF RIGHT OF ACTION, § 5.
STATUTE CONSTRUED, § 6.
NATURE OF ACT OR OMISSION CAUSING DEATH, § 7.
JOINDER OF CAUSES OF ACTION, § 8.
DEFENSES—NEGLIGENCE OF FELLOW-SERVANT OF DECEASED, § 9.
—— CONTRIBUTORY NEGLIGENCE, § 10.
AUTHORITY TO SUE, § 11.
ABATEMENT OF ACTION BY DEATH OF PLAINTIFF, § 12.
PERSONS ENTITLED TO SUE—PERSONAL REPRESENTATIVES, § 13.
—— HEIRS AND NEXT OF KIN, § 14.
—— MOTHER AFTER DESERTION BY FATHER, § 15.
—— POSTHUMOUS CHILD, BORN AFTER RECOVERY BY MOTHER, § 16.
—— RECOVERY BY REPRESENTATIVE AS BAR TO SUIT BY HEIR, § 17.
JOINDER OF PARTIES, § 18.
PERSONS LIABLE, § 19.
TIME TO SUE, § 20.

FOR AUTHORITIES FROM OTHER STATES:

Action to recover damages for the wrongful causing of death: 48 Am. Dec. 632, note.

Actions for causing death: 70 Am. St. Rep. 669, note. See, also, 13 Cyc. 310-387; 15 Cent. Dig., cols. 2495-2712, §§ 10-154.

§ 4. Common Law.

[a] A civil action for damages for the death of a person, per se, cannot be maintained by anyone at common law.—Kramer v. Market Street R. R. Co., 25 Cal. 434.

FOR AUTHORITIES FROM OTHER STATES:

Right to sue at common law for wrongful death: 37 Am. Rep. 716, note.

§ 5. Source of Right of Action.

[a] Right of action for death is purely statutory.—Hartigan v. Southern Pacific Co., 86 Cal. 143, 24 Pac. 851.

§ 6. Statute Construed.

[a] Application of act "requiring compensation for causing death by wrongful act, neglect, or default," is not to be extended to any matters not embraced in the strict letter of the statute.—Eustace v. Jahns, 38 Cal. 3.

[b] It is the intention of the statute to provide a fair and just compensation to relatives of deceased.—Taylor v. Western Pac. R. R. Co., 45 Cal. 336.

§ 7. Nature of Act or Omission Causing Death.

[a] Railroad company is liable for death of employee caused by falling of a bridge negligently constructed and maintained by the company as a part of its road.—Rodgers v. Central Pac. R. R. Co., 67 Cal. 607, 8 Pac. 377.

[b] An owner of land wrongfully held by another is not civilly liable for the killing of the occupant while resisting the owner's attempt to regain possession without the use of more force than was reasonably necessary.—Burnham v. Stone, 101 Cal. 164, 35 Pac. 627.

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FOR AUTHORITIES FROM OTHER STATES:

See, also, 13 Cyc. 318, 319; 15 Cent. Dig., cols. 2505-2508, § 16.

§ 8. Joinder of Causes of Action.

[a] Action for death may be brought by heirs or personal representatives, but separate actions cannot be maintained by both.—Hartigan v. Southern Pacific Co., 86 Cal. 143, 24 Pac. 851.

[b] Averment of damages for loss of society and for value of services are properly separated, and if separately pleaded do not compel plaintiff to elect on which he will rely.—Fox v. Oakland etc. Ry., 118 Cal. 68, 52 Am. St. Rep. 216, 50 Pac. 25.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., col. 2518, § 22.

§ 9. Defenses—Negligence of Fellow-servant of Deceased.

[a] If death was due to some act or omission of a fellow-servant of decedent, there can be no recovery for the death.—Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 322-327; 15 Cent. Dig., cols. 2518-2530, §§ 23-32.

§ 10. —— Contributory Negligence.

[a] In an action for wrongful death, contributory negligence is a matter of defense, to be proved affirmatively by the defendant.—Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 323; 15 Cent. Dig., cols. 2521-2524, §§ 25, 26.

§ 11. Authority to Sue.

[a] Presumption is that the bringing of an action for death by an attorney representing the plaintiff, was authorized; and, if not authorized, the authority can only be assailed upon an application for a dismissal, and no issue can be made upon that point before a jury.—Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139.

FOR AUTHORITIES FROM OTHER STATES:

54 L. R. A. 934, note. See, also, 13 Cyc. 335-337; 15 Cent. Dig., cols. 2533-2550, §§ 35-46.

§ 12. Abatement of Action by Death of Plaintiff.

[a] Death of widow takes out of case question of compensation to her for death of husband.—Taylor v. Western Pac. R. R. Co. 45 Cal. 323.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 328; 15 Cent. Dig., cols. 2530, 2531, § 33.

§ 13. Persons Entitled to Sue—Personal Representatives.

[a] Under act of 1862, providing that every action for death by wrongful act shall be brought by and in the names of the personal representatives of deceased, no action can be maintained for such death by any other persons.—Kramer v. San Francisco Market St. R. Co., 25 Cal. 434.

[b] Under Code of Civil Procedure, section 377, providing that action for death by wrongful act may be brought by the heirs of the deceased or his personal representatives, the administrator can sue only where there are heirs, as the right of action is for their benefit.—Webster v. Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276.

§ 14. —— Heirs and Next of Kin.

[a] Surviving children are entitled to a fair and just compensation for their loss, irrespective of rights of deceased widow.—Taylor v. Western Pac. R. R. Co., 45 Cal. 323.

[b] Under code, action may be brought by heirs of deceased.—Beeson v. Green Mountain etc. Co., 57 Cal. 39.

[c] The word "heirs," in Code of Civil Procedure, section 377, allowing heirs to recover for the death of an adult by wrongful act, includes all those capable of inheriting from the deceased generally, uncontrolled by limitation of statutes relating to the distribution of community property, and hence includes minor children of deceased.—Redfield v. Oakland Consol. St. Ry. Co., 110 Cal. 277, 42 Pac. 822.

§ 15. —— Mother After Desertion by Father.

[a] Code of Civil Procedure, secion 376, provides that the mother can maintain an action for death of a minor child only in case of the death of the father or his desertion of the family. Held, that where a wife procured a divorce from her husband on the ground of extreme cruelty, consisting of threatening her life and driving her and her infant child from the home, and since the divorce he had not contributed to the support of either his wife or child, such facts constituted a desertion of the family, within such section, authorizing the wife to maintain an action for the child's death.—Delatour v. Mackay, 139 Cal. 621, 73 Pac. 454.

§ 16. —— Posthumous Child, Born After Recovery by Mother.

[a] A widow recovered judgment for the wrongful killing of her husband. Held to bar a subsequent action for the same wrong, brought by a child thereafter born to her, but who, at the time of the judgment, was en ventre sa mere.—Daubert v. Western Meat Co., 139 Cal. 480, 69 Pac. 297.

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[b] Where a child is unborn, and its existence is unknown to the defendant in an action by its mother to recover for the wrongful death of her husband, the father of the child, at the time the judgment is rendered in favor of the widow or other heirs, such judgment is a bar to a subsequent action by such unborn child to recover for its father's wrongful death. Judgment (1902), 69 Pac. 297.—Daubert v. Western Meat Co., 139 Cal. 480, 73 Pac. 244.

§ 17. —— Recovery by Representative as Bar to Suit by Heir.

[a] Under Code of Civil Procedure, section 377, permitting either the heirs or personal representative of a decedent to bring an action for his wrongful death, only one action for such cause can be brought, and a recovery by the executor is a bar to an action by the heirs.—Hartigan v. Southern Pac. R. Co., 86 Cal. 142, 24 Pac. 851.

[b] Action for death is maintainable by heirs or personal representatives of deceased, but not by both.—Munro v. Pacific etc. Co., 84 Cal. 519, 18 Am. St. Rep. 248, 24 Pac. 303.

§ 18. Joinder of Parties.

[a] Under Code of Civil Procedure, section 377, allowing heirs to recover for the death of an adult by wrongful act, a husband, on the death of his wife by wrongful act, may in one action recover personally, and as guardian ad litem of their minor children, for her death.—Redfield v. Oakland Consol. St. Ry. Co., 110 Cal. 277, 42 Pac. 822.

§ 19. Persons Liable.

[a] Where the section crew of a railroad company sidetrack a hand-car with which they are working to clear the main track for an approaching train, and the section foreman, who has unlocked the switch, negligently fails to close it, and the train enters on the side track, and kills a section hand, the section foreman is personally liable in damages for his death.—Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708.

FOR AUTHORITIES FROM OTHER STATES:

15 L. R. A. 262, note. See, also, 13 Cyc. 337; 15 Cent. Dig., cols. 2554-2557, § 49.

§ 20. Time to Sue.

[a] Action for causing death by negligence must be commenced within two years after death.—Benjamin v. Eldridge, 50 Cal. 612.

FOR AUTHORITIES FROM OTHER STATES:

48 L. R. A. 639, note. See, also, 13 Cyc. 339, 340; 15 Cent. Dig., cols. 2561-2563, § 52.

B. PLEADING AND EVIDENCE.

PLEADING—COMPLAINT, § 21.
—— EXISTENCE OF BENEFICIARY, § 22.
—— ANSWER, § 23.
—— VARIANCE, § 24.
BURDEN OF PROOF—SELF-DEFENSE, § 25.
ADMISSIBILITY OF EVIDENCE, § 26.
—— CAUSE OF DEATH, § 27.
—— CONDITION OF CORPSE, § 28.
—— CHARACTER, HABITS, AND DOMESTIC RELATIONS OF DECEASED, § 29.
—— BUSINESS EDUCATION AND HABITS OF DECEASED, § 30.
—— SUFFERINGS OF DECEASED, § 31.
—— DECLARATIONS OF DECEASED AFTER ACCIDENT, § 32.
—— EXPECTANCY OF LIFE ACCORDING TO CARLISLE TABLES, § 33.
—— EARNING CAPACITY OF DECEASED, § 34.
—— POVERTY OR ILL-HEALTH OF PLAINTIFF, § 35.

§ 21. Pleading—Complaint.

[a] Where the petition shows that the mother of deceased is his sole heir, and that deceased was killed through the negligence of defendants, whereby she was damnified, it states facts sufficient to constitute a cause of action.—O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

[b] A complaint in an action for the negligent killing of plaintiff's child need not specially aver the loss of the services of the child. Morgan v. Southern Pac. Co., 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71.

[c] Under Code of Civil Procedure, section 377, providing that the heirs of a person whose death is caused by the wrongful act or neglect of another may recover damages, a complaint alleging that plaintiff, at the time of the injury to, and the death of, such person, was his wife, and is his surviving widow, states a cause of action, as the widow is an heir of the deceased husband, and, under certain conditions, may be his sole heir.—Knott v. McGilvray, 124 Cal. 128, 56 Pac. 789.

[d] Complaint for wrongful death held not demurrable for uncertainty.—Kramm v. Stockton Electric R. Co. (Cal. App.), 86 Pac. 903.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 340-346; 15 Cent. Dig., cols. 2569-2585, §§ 60-69.

§ 22. —— Existence of Beneficiary.

[a] An action for the death of a husband brought by the surviving widow is brought by an heir of the deceased, who may be the sole heir; and where the complaint does not show on its face that there were other heirs, and the answer does not plead nonjoinder of other heirs, the objection to such nonjoinder is waived.—Knott v. McGilvray, 124 Cal. 128, 56 Pac. 789.

[b] Under Code of Civil Procedure, section 377, providing that action for death by wrongful act may be brought by the heirs of deceased or his personal representatives, the existence of such heirs must be pleaded and proved, as the administrator can sue therefor only where there are heirs.—Webster v. Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276.

[c] In action for death brought by an administratrix, a complaint which does not al-

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lege the existence of any heir, or heirs, does not state a cause of action.—Kerrigan v. Market Street Railway Company, 138 Cal. 506, 71 Pac. 621.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 341-343; 15 Cent. Dig., cols. 2576-2580, §§ 64-66.

§ 23. —— Answer.

[a] In action by wife for shooting husband, denial that shooting was willful, unlawful or malicious, raises no issue.—Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 347; 15 Cent. Dig., cols. 2586, 2587, § 71.

§ 24. —— Variance.

[a] In an action under the statute authorizing the recovery of compensation for causing death by wrongful act, etc. (Stats. 1862, p. 447), the allegation of the complaint was that defendants owned, as tenants in common, the entire block in front of which the accident occurred, and the proof was that they owned such block in distinct parcels in severalty. Held, that the variance was immaterial.—Gay v. Winter, 34 Cal. 153.

[b] A variance between the allegations of the petition and the proof as to the sex of the minor children, brothers and sisters of deceased, is not material.—O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 348; 15 Cent. Dig., cols. 2589-2592, § 74.

§ 25. Burden of Proof—Self-defense.

[a] Action lies by wife for death caused by shooting of husband. Burden of proving self-defense is on defendant.—Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 348, 349; 15 Cent. Dig., cols. 2592-2595, §§ 75-78.

§ 26. Admissibility of Evidence.

[a] Evidence that deceased had intended to sue defendant is inadmissible.—Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139.

FOR AUTHORITIES FROM OTHER STATES:

13 Cyc. 350-360; 15 Cent. Dig., cols. 2595-2615, §§ 79-92.

§ 27. —— Cause of Death.

[a] Hearsay derived from family of deceased is admissible to prove cause of death.—Anderson v. Parker, 6 Cal. 197.

[b] Record of conviction of murder is admissible as evidence of the fact that the person convicted was implicated in said murder.—Harris v. More, 5 Pac. 159.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 350; 15 Cent. Dig., cols. 2598, 2599, § 80.

§ 28. —— Condition of Corpse.

[a] In action for death, evidence of condition of remains of deceased is admissible.—Leahy v. Southern Pac. R. R., 65 Cal. 151, 3 Pac. 622.

§ 29. —— Character, Habits, and Domestic Relations of Deceased.

[a] In an action to recover for the death of one killed, by defendant's negligence, evidence is admissible to show him to have been a kind and good husband and father.—Cook v. Clay St. Hill R. Co., 60 Cal. 604.

[b] In an action for wrongful death, evidence that decedent's family relations were most pleasant held to justify an inference that decedent supported his family.—Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App.), 86 Pac. 830.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 354; 15 Cent. Dig., cols. 2606-2609, §§ 86, 87.

§ 30. —— Business Education and Habits of Deceased.

[a] Business education of deceased and his habits of sobriety and competency are proper to be considered.—Taylor v. Western Pac. R. R. Co., 45 Cal. 324.

§ 31. Sufferings of Deceased.

[a] Suffering borne by deceased may be shown as part of circumstances attending injury, but it seems not as ground of damage.—Cork v. Clay Street Hill R. R. Co., 60 Cal. 605.

[b] In an action for wrongful death, evidence of complaints made by deceased of suffering and pain were admissible.—Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App.), 86 Pac. 830.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2602, § 82.

§ 32. —— Declarations of Deceased After Accident.

[a] Statements made by deceased in regard to his sufferings are admissible to indicate his bodily condition, and the extent of his injury; and the question whether they were feigned or not must be left to the jury.—Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139.

[b] In an action for the death of defendant's servant the declarations of the deceased made to third parties after the accident, constituting no part of the res gestae, are not admissible against the plaintiff.—Hedge v. Williams, 131

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Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 351, 352; 15 Cent. Dig., cols. 2599-2602, § 81.

§ 33. —— Expectancy of Life According to Carlisle Tables.

[a] Decedent's expectancy of life according to mortality tables is not a certainty, but mere probability.—Harrison v. Sutter St. Ry. Co., 116 Cal. 164, 47 Pac. 1019.

[b] Expectancy or probable lease of life may be shown by Carlisle mortality tables.—Harrison v. Sutter St. Ry. Co., 116 Cal. 163, 168, 47 Pac. 1019.

[c] In determining probable length of life of deceased, court may consider Carlisle or other mortality or expectancy tables as tending to show ordinary experience in like cases.—Harrison v. Sutter St. Ry. Co., 116 Cal. 168, 47 Pac. 1019.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 352, 353; 15 Cent. Dig., col. 2612, § 90.

§ 34. —— Earning Capacity of Deceased.

[a] In an action by minors for the death of their father through the alleged negligence of defendant, it was proper to permit the mother and guardian of plaintiffs to testify as to deceased's average monthly contribution to plaintiffs' support at the time of his death.—Powley v. Swensen, 146 Cal. 471, 80 Pac. 722.

[b] In an action for wrongful death the question of decedent's earning capacity held not determinative of the amount of the verdict.—Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App.), 86 Pac. 830.

§ 35. —— Poverty or Ill-health of Plaintiff.

[a] In an action by widow and children for death of their husband and father, it is error to allow plaintiffs to prove that the children are without means.—Mahoney v. San Francisco etc. Ry. Co., 110 Cal. 471, 42 Pac. 968.

[b] Fact that daughter of deceased, who was living with him, was of full age, does not entitle her to prove her lack of means of support, as against the defendant, against whom the action is prosecuted by her solely as one of the heirs at law of the deceased.—Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577.

[c] In an action for death by negligence, evidence of poverty of one of plaintiffs, a daughter of the deceased, who was living with him at his death, is not competent, and its admission is prejudicial error.—Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577.

[d] In an action by a child against a railroad company for negligently causing her father's death, evidence that she has no property is inadmissible, though she is an adult.—Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577.

[e] In an action for wrongful death of plaintiff's husband, evidence as to plaintiff's ill-health was admissible as tending to establish pecuniary loss.—Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App.), 86 Pac. 830.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 358; 15 Cent. Dig., cols. 2612-2615, § 91.

C. DAMAGES.

IN GENERAL, § 36.
COMPENSATION FOR INJURY TO DECEASED, § 37.
NOMINAL DAMAGES—DEATH OF BROTHER, § 38.
ELEMENTS OF COMPENSATION, § 39.
—— DEATH OF CHILD, § 40.
—— PECUNIARY LOSS TO PLAINTIFF, § 41.
—— LOSS OF PROSPECTIVE PECUNIARY BENEFITS, § 42.
—— FUNERAL EXPENSES, § 43.
—— LOSS OF SERVICES OF WIFE, § 44.
—— LOSS OF SOCIETY AND PROTECTION, § 45.
—— MENTAL SUFFERINGS OF PLAINTIFF OR BENEFICIARIES, § 46.
EXEMPLARY DAMAGES, § 47.
MEASURE AND AMOUNT OF AWARD, § 48.
—— STATUTORY RESTRICTIONS, § 49.
—— DISCRETION OF JURY, § 50.
—— INADEQUATE DAMAGES, § 51.
—— ADEQUATE AND EXCESSIVE DAMAGES, § 52.

§ 36. In General.

[a] In an action for wrongful death damages to which children are entitled are not to be arrived at by determining, first, what would have been a just compensation to the widow and children, and subtracting from this the sum to which the widow would have been entitled had she lived, but the fact that there had been a surviving widow is to be left entirely out of the case.—Taylor v. Western Pacific R. R. Co., 45 Cal. 323.

FOR AUTHORITIES FROM OTHER STATES:

17 L. R. A. 71, note.

Damages, whether recoverable for death when resulting from negligence: 37 Am. Rep. 716, notes. See, also, 13 Cyc. 362-382; 15 Cent. Dig., cols. 2623-2690, §§ 97-140.

§ 37. Compensation for Injury to Deceased.

[a] Plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative. Sorrow and mental anguish caused by the death are not elements of damage in such a case, and nothing can be recovered as a solatium for wounded feelings; and the loss of

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society can only be considered for the purpose of estimating the pecuniary loss.—Morgan v. Southern Pacific Co., 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603.

[b] Recovery in action for death is for injuries inflicted upon plaintiffs and not for injuries inflicted upon deceased.—Redfield v. Oakland Con. St. Ry. Co., 110 Cal. 277, 42 Pac. 822.

§ 38. Nominal Damages—Death of Brother.

[a] In an action for damages for the death of plaintiff's brother, only nominal damages can be recovered where it does not appear that plaintiff derived, or could reasonably expect to derive, pecuniary benefit from deceased, nor that deceased was accumulating, or was likely to accumulate, any estate, so that plaintiff, as his heir, would suffer pecuniary loss.—Burk v. Arcata etc. R. R. Co., 125 Cal. 364, 57 Pac. 1065.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 362; 15 Cent. Dig., cols. 2623-2626, § 97.

§ 39. Elements of Compensation.

[a] Under act of April 26, 1862, section 3, relative to compensation for death by wrongful act, such damages should be assessed as will be just compensation to the surviving widow and children for the death of the husband and parent.—Taylor v. Western Pac. R. Co., 45 Cal. 323.

[b] Damages must be estimated by way of compensation, and not by way of solace.—Beeson v. Green Mountain etc. Co., 57 Cal. 39.

[c] Jury should estimate amount deceased would in all reasonable probability have earned in years yet remaining to him, deduct amount reasonably required for his personal use and maintenance, and give verdict that would pecuniarily compensate his heirs.—Harrison v. Sutter St. Ry. Co., 116 Cal. 163, 47 Pac. 1019.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 368-374; 15 Cent. Dig., cols. 2632-2664, §§ 103-119.

§ 40. —— Death of Child.

[a] A parent whose children are killed by the negligence of a railroad corporation is not limited in his demand for damages to the actual pecuniary injury sustained by reason of the loss of the services of the children.—Nehrbas v. Central Pac. R. Co., 62 Cal. 320.

[b] Parent may recover such damages for negligent killing of child as are reasonable and just under all the circumstances.—Cleary v. City Ry. Co., 76 Cal. 241, 18 Pac. 269.

[c] In action by personal representative under Code of Civil Procedure, section 377, mother of deceased is entitled to compensation for pecuniary loss sustained by her on account of death of her son.—Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

[d] In an action for the death of a child, the amount of plaintiff's recovery is limited to the actual pecuniary injury sustained by her by reason of the death of her child.—Morgan v. Southern Pac. Co., 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71.

[e] Jury can award nothing in the way of penalty for death, nor for sorrow or grief of parents, but must confine verdict to probable value of child's services until his majority, less cost of his support.—Fox v. Oakland etc. Ry., 118 Cal. 67, 62 Am. St. Rep. 216, 50 Pac. 25.

[f] In considering probable character of occupation of deceased child to determine his probable earning capacity, it is proper to regard the calling of his father.—Fox v. Oakland etc. Ry., 118 Cal. 68, 62 Am. St. Rep. 216, 50 Pac. 25.

[g] In an action to recover for the death of plaintiff's son, an instruction that plaintiff was entitled to compensatory damages for the loss of her son's society was erroneous, since she is only entitled to recover for pecuniary loss occasioned by her son's death.—Wales v. Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932.

[h] In an action for negligent death of a minor daughter it was error to limit the consideration of the pecuniary loss suffered by reason of plaintiff's deprivation of the comfort and society of the deceased "for the remainder of her minority," since a parent may enjoy the comfort and society of a child after minority.—Quill v. Southern Pac. Co., 140 Cal. 265, 73 Pac. 991.

§ 41. ——, Pecuniary Loss to Plaintiff.

[a] Pecuniary loss sustained by heirs is recoverable in action for death brought by representatives.—Munro v. Pacific etc. Co., 84 Cal. 522, 18 Am. St. Rep. 248, 24 Pac. 303.

[b] In an action for death only such damages can be recovered as the statute authorizes, and, in the absence of a different rule, the only damage allowed is the probable pecuniary value of the life of the deceased to the relatives in whose behalf the action is brought.—Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139.

[c] Under Code of Civil Procedure, section 377, the amount of recovery in actions for wrongful death is limited to the value of the pecuniary interest of plaintiff in the life of the person killed; but such interest need not be measured by the evidence as a precise sum of money.—Ruppel v. United Railroads of San Francisco (Cal. App.), 82 Pac. 1073.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2645-2648, § 111.

§ 42. —— Loss of Prospective Pecuniary Benefits.

[a] Under Code of Civil Procedure, section 377, allowing heirs to recover for the death of

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an adult killed by wrongful act, in an action by minors for the death of their mother, loss of benefits of a pecuniary value, which plaintiffs would probably have received from their mother, had she lived after their arrival at majority, could be considered in determining the damages. Redfield v. Oakland Consol. St. Ry. Co., 110 Cal. 277, 42 Pac. 822.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2648-2653, § 112.

§ 43. —— Funeral Expenses.

[a] In an action under the statute for causing by wrongful act the death of a person, funeral expenses are not recoverable, except as special damages, if recoverable at all, and must be specially pleaded.—Gay v. Winter, 34 Cal. 153.

§ 44. —— Loss of Services of Wife.

[a] Husband may recover expense incurred by him for necessary labor and services substituted for ordinary services of wife.—Martin v. Southern Pacific Co., 130 Cal. 285, 52 Pac. 515.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 369, 370; 15 Cent. Dig., cols. 2654-2657, § 115.

§ 45. —— Loss of Society and Protection.

[a] In an action, under Code of Civil Procedure, section 377, by a widow to recover for the wrongful death of her husband, the jury may consider the relations existing between plaintiff and deceased at the time of his death, and the injuries sustained by her in the loss of his society.—Beeson v. Green Mountain Gold Min. Co., 57 Cal. 20.

[b] Loss of comfort, society and protection of deceased are proper elements of damage. Munro v. Pacific etc. Co., 84 Cal. 525, 18 Am. St. Rep. 248, 24 Pac. 515.

[c] Where deceased was of mature age, and had a legal right to change his residence, and was not living with his father when killed, the case is not like that of husband and wife, or parent and minor child, and it seems that the jury ought not in such case to be instructed in relation to compensation to the father for the deprivation of the comfort, society, and protection of the deceased.—Pepper v. S. P. Co., 105 Cal. 389, 38 Pac. 974.

[d] Jury may consider loss suffered by widow in being deprived of comfort, society and protection of husband, but only for purpose of fixing pecuniary value of his life. Harrison v. Sutter St. Ry. Co., 116 Cal. 169, 47 Pac. 1019.

[e] Loss of society, comfort and protection of deceased can only be considered in estimating value of services.—Fox v. Oakland etc. Ry., 118 Cal. 68, 62 Am. St. Rep. 216, 50 Pac. 25.

[f] It was proper to instruct the jury that in estimating the pecuniary loss of the plaintiffs the jury had a right to take into consideration the loss of society, comfort, and care suffered by them in the death of the husband and father.—Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

[g] In determining the measure of damages in an action by a father for the death of his minor daughter, the loss of the comfort and society of the deceased should not be limited to the minority or marriage of the daughter; but, independently of the probable value of the services of the daughter during minority or until marriage, nothing further should be allowed for "protection and support" of the parent by the daughter.—Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991.

[h] In an action for the death of a married woman her husband and children were entitled to recover as damages all pecuniary loss suffered by them from the loss of society and protection of the deceased.—Green v. Southern California Ry. Co., 67 Pac. 4.

[i] In an action for death of plaintiff's husband, plaintiff is entitled to recover for loss of decedent's society.—Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App.), 86 Pac. 830.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 371; 15 Cent. Dig., cols. 2657, 2658, § 116.

§ 46. —— Mental Suffering of Plaintiff or Beneficiaries.

[a] Damages for distress of mind and loss of society are recoverable in action for death caused by negligence.—Beeson v. Green Mountain etc. Co., 57 Cal. 20.

[b] Mental anguish is an element of damages for wrongful death of child.—Cleary v. City Ry. Co., 76 Cal. 241, 18 Pac. 269.

[c] Sorrow, grief or mental suffering of surviving mother or wife cannot be considered in estimating damages.—Munro v. Pacific etc. Co., 84 Cal. 524, 527, 18 Am. St. Rep. 248, 24 Pac. 303.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 373; 15 Cent. Dig., cols. 2660-2663, § 118.

§ 47. Exemplary Damages.

[a] Under act of April 22, 1862, providing a jury may award exemplary damages for the death of a wife by the negligence of another. Myers v. City and County of San Francisco, 42 Cal. 215.

[b] Under the act of April 26, 1862, exemplary damages may be awarded in an action for the death of an infant caused by negligence.—Myers v. City and County of San Francisco, 42 Cal. 215.

[c] Damages can only be compensatory, and not exemplary or vindictive.—Munro v. Pa-

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cific etc. Co., 84 Cal. 526, 527, 18 Am. St. Rep. 248, 24 Pac. 303.

[d] In an action for the death of plaintiff's son, the grievance to be redressed is that of plaintiff as a relative of the deceased, and not that of the deceased; and it is error in such action to instruct the jury that they may allow exemplary damages if the act causing death was wanton, cruel, and malicious.—Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139.

FOR AUTHORITIES FROM OTHER STATES:

44 C. C. A. 259, note. See, also, 13 Cyc. 363; 15 Cent. Dig., cols. 2626-2628, § 98.

§ 48. Measure and Amount of Award.

[a] Damages for wrongful death are in their nature unliquidated, to be estimated from the evidence without specific testimony as to the amount.—Harrison v. Sutter St. Ry. Co., 116 Cal. 162, 47 Pac. 1019.

[b] The measure of damages for the death of a relative is the pecuniary loss suffered by plaintiff, and not the loss of society, comfort and care, regardless of pecuniary loss. Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577.

[c] In an action for damages for the death of a person, more than nominal damages were recoverable, where it appeared that the heirs of the person killed were her parents, and there was evidence that, in addition to the wages she was receiving at the time of her death, she assisted her parents in other ways. Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163.

FOR AUTHORITIES FROM OTHER STATES:

Measure of damages for causing death of a human being: 12 Am. St. Rep. 375. See, also, 13 Cyc. 365-380; 15 Cent. Dig., cols. 2664-2686, §§ 120-131.

§ 49. —— Statutory Restrictions.

[a] Although there are statutory restrictions in other states limiting the amount of recovery in an action for death, such restrictions cannot be considered in this state; but section 377 of the Code of Civil Procedure, having been enacted after such statutes were in existence, is a direct determination of the legislature of this state that the policy adopted by other states should not exist here.—Redfield v. Oakland Con. St. Ry. Co., 110 Cal. 277, 41 Pac. 822.

[b] The legislature has not declared the money value of a life annuity in favor of the deceased to be the measure of damages in an action for death, but has determined to leave the subject of the amount of damages at large, to be determined by the jury, with the single restriction that the damage allowed should be just, under all the circumstances of the case.—Redfield v. Oakland Con. Street Ry. Co., 110 Cal. 277, 42 Pac. 822.

[c] Under Code of Civil Procedure, section 377, the restriction as to the amount of damages in an action for death held to consist only in the limitation that the same must be just.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 380; 15 Cent. Dig., cols. 2665-2667, § 122.

§ 50. —— Discretion of Jury.

[a] Discretion of jury in fixing amount of damages for death of infant should not be interfered with by court, except in cases of the most papable abuse.—Myers v. San Francisco, 42 Cal. 215.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 375; 15 Cent. Dig., cols. 2667-2670, § 123.

§ 51. —— Inadequate Damages.

[a] In an action to recover damages caused by the reckless taking of human life, a verdict for two hundred dollars is not a just and fair compensation, and justifies the court in granting the plaintiff a new trial.—Mariani v. Dougherty, 46 Cal. 26.

[b] In an action for death by wrongful act, when the only issues are defendant's negligence, and contributory negligence of the deceased, a verdict for plaintiff, assessing his damages at one dollar, will be set aside as inadequate.—Wolford v. Lyon Gravel Gold Min. Co., 63 Cal. 483.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 379; 15 Cent. Dig., col. 2670, § 124.

§ 52. —— Adequate and Excessive Damages.

[a] In an action against a city to recover for the death of an infant, a verdict for five thousand dollars is not so excessive as to justify a presumption that the jury were misled by passion, prejudice, or ignorance. Myers v. City and County of San Francisco, 42 Cal. 215.

[b] A verdict for eight thousand dollars damages is not excessive in a suit against a street railway company for negligence whereby plaintiff's husband was killed, she being an invalid with a daughter.—Cook v. Clay St. Hill R. Co., 60 Cal. 604.

[c] Where plaintiff's five children, ranging from five to sixteen years of age, were killed at a railway crossing because of the company's negligence, a verdict in an action by the father against the company, for ten thousand five hundred dollars, was not excessive, in view of Code of Civil Procedure, sections 276, 277, authorizing the jury to give the next of kin, in actions for death resulting from negligence, such damages as might seem reasonable and just under all the circum-

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stances.—Nehrbas v. Central Pac. R. Co., 62 Cal. 320.

[d] Three thousand dollars is not excessive for death of man twenty-three years old, who is sole support of widowed mother and minor children.—O'Callaghan v. Bode, 84 Cal. 497, 24 Pac. 269.

[e] Since, in an action for the death of a child, the amount of plaintiff's recovery is limited to the actual pecuniary injury sustained by her by reason of the death of her child, a verdict for twenty thousand dollars is excessive, where the child was a daughter only two years old.—Morgan v. Southern Pacific Co., 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71.

[f] In an action for damages for the death of a wife and mother, prosecuted by her husband and minor children, a recovery of fourteen thousand dollars damage will not be disturbed upon appeal as excessive, where, after a careful review of the testimony, it cannot be said that the damage awarded by the jury appears to have been given under the influence of passion or prejudice.—Redfield v. Oakland Consolidated Street Railway Co., 110 Cal. 277, 42 Pac. 822.

[g] Order setting aside, as excessive, a verdict of eight thousand dollars for death of man sixty-nine years old, earning one hundred and ten dollars per month, affirmed.—Harrison v. Sutter St. Ry. Co., 116 Cal. 163, 164, 47 Pac. 1019.

[h] Verdict of six thousand dollars for death of boy four years old held grossly excessive. Fox v. Oakland etc. Ry., 118 Cal. 67, 68, 62 Am. St. Rep. 216, 50 Pac. 25.

[i] In an action for death, a verdict for five thousand dollars held not excessive, so as to require the setting aside of the verdict, under Code of Civil Procedure, section 667.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

[j] In an action for the wrongful death of a regular practicing physician forty-four years of age, a verdict in favor of plaintiff for twelve thousand dollars, held not excessive.—Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App.), 86 Pac. 830.

D. TRIAL.

§ 53. Questions for Jury.

[a] If the plaintiff makes a case which does not charge the deceased or the person injured with negligence, the case should be permitted to go to the jury, under appropriate instructions.—Gay v. Winter, 34 Cal. 153.

[b] Contributory negligence of deceased is a question of fact.—McKeever v. Market St. R. R. Co., 59 Cal. 309.

[c] Jury should not consider that decedent's expectancy of life would be fully realized and that he would continue to the end with same earning capacity he had at time of death.—Harrison v. Sutter St. Ry. Co., 116 Cal. 164, 47 Pac. 1019.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 382, 383; 15 Cent. Dig., cols. 2690, 2691, § 141.

§ 54. Instructions.

[a] In an action by the heirs of a decedent, under Code of Civil Procedure, section 377, to recover for his death, the jury were instructed that the measure of damages is the pecuniary loss suffered by plaintiff, without any allowance for distress of mind, and the loss which they are entitled to recover is what deceased would probably have earned in his business or calling during the rest of his life, and which would have gone to the benefit of his heirs and personal representatives, taking into consideration his age, ability and disposition to labor, and his habits of life. Held, that the instruction was more favorable to defendant than was justifiable, inasmuch as the statute gives the jury the power to assess such damages "as under all the circumstances of the case may be just."—McKeever v. Market St. R. Co., 59 Cal. 294.

[b] In an action by the widow and administratrix of a deceased person for damages for the death of the intestate alleged to have been caused by the negligence of the defendant, the jury rendered a verdict for the plaintiff. Held, the question of evidence was submitted to the jury under instructions as favorable to the defendant as it could ask, and under instructions it did ask for, and, as there was evidence from which negligence might be inferred, the verdict should not be disturbed.—Cook v. Clay Street Hill R. R. Co., 60 Cal. 604.

[c] A charge that the measure of damages was the amount which deceased would probably have earned in the nine years "which it appears he had yet to live," according to mortality tables in evidence, which the jury might take "into consideration, as they are part of the proof that he might have lived that long," did not virtually tell the jury that the tables established that deceased would have lived nine years.—Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019.

[d] Instruction on measure of damages held indefinite, ambiguous and calculated to mislead.—Harrison v. Sutter St. Ry. Co., 116 Cal. 168, 47 Pac. 1019.

[e] Where an action for the death of plaintiff's son was brought to compensate plaintiff alone, and the court so instructed the jury, it was not error to refuse to instruct that the law did not contemplate that any damages awarded plaintiff should be a compensation to any other person or persons.—Murphy v. Coppiotors, 136 Cal. 317, 68 Pac. 970.

[f] An instruction, in action by heirs for death of deceased, that such damages may

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be given as, under the circumstances, may be just, and in determining the amount of such damages the jury may consider the pecuniary loss, if any, suffered by plaintiffs in the death of deceased, by being deprived of his support; also the relations proved as existing between them and deceased at time of his death, and the injury, if any, sustained by them in the loss of his society, does not authorize the inclusion of anything besides pecuniary loss.—Keast v. Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

[g] In an action against a railroad for the death of plaintiff's husband, an employee, an instruction that the jury might consider the fact that deceased was the sole support of the plaintiff was improper, though not ground for reversal.—Kerrigan v. Market St. Ry. Co., 138 Cal. 506, 71 Pac. 621.

[h] Where, in an action for the death of an employee resulting from the negligence of the employer, the heirs of the decedent were her father and mother, an instruction that "the pecuniary loss in such case" was "the value in money, if any, of the life of the deceased to her father and mother," was not erroneous as allowing the father and mother more than the actual pecuniary loss sustained.—Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 385; 15 Cent. Dig., cols. 2691-2705, §§ 142-148.

§ 55. Judgment as Bar.

[a] An action for death is statutory. The statute of this state contemplates but one action and one recovery. A judgment in favor of a widow for the death of her husband, she being the only heir then capable of maintaining an action therefor, exhausts the right given by the statute, and precludes a subsequent action for the same death by a posthumous child, whose existence in its mother's womb was unknown to the defendant at the time of the previous action, trial, and judgment. (Beatty, C. J., dissenting.) Daubert v. Western Meat Co., 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2706-2708, §§ 150, 152.

DEATH CERTIFICATES.

Power of midwife to issue. See Health, § 12.

DEATH PENALTY.

See Homicide, §§ 222-230.

Disbelief in, or conscientious scruples against, as disqualifying petit jury. See Jury, § 89.

DEATH SENTENCE.

See Homicide, §§ 222-226.

Appeal from federal circuit to supreme court as suspending death sentence. See Courts, § 159.

DEATH WARRANT.

See Homicide, § 227.

DEBATE.

Law governing conduct of. See Parliamentary Law, § 1.

DEBAUCH.

See Abduction; Rape; Seduction.

DE BENE ESSE.

Taking testimony de bene esse. See Depositions.

DE BONIS NON.

Administrators de bonis non. See Executors and Administrators, § 191.

Actions by administrators de bonis non. See Executors and Administrators, § 460.

DEBRIS.

See Mines and Minerals, § 98.

DEBT, ACTION OF.

Include actions of debt as distinguished from other forms of action; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom they may be maintained; proceedings therein; review of proceedings; and costs in such actions.

§ 1. To Recover License Tax or Penalty.

[a] Debt will not lie for keeping a gaming table without license, to recover the amount of the license.—People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331.

[b] When a statute casts upon a party an obligation to pay money to particular persons, without providing a remedy for its recovery, an action of debt will lie.—State of California v. Poulterer, 16 Cal. 514.

[c] Duty imposed by revenue act of 1857, section 49, for selling goods at public auction, may be collected by an action of debt by the state against the auctioneer, the penal remedy afforded by section 52 not being exclusive.—State v. Poulterer, 16 Cal. 514.

[d] At common law, action of debt was proper to recover penalty.—People v. Central Pac. R. R. Co., 76 Cal. 38, 18 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 402-424; 15 Cent. Dig., cols. 2714-2758.

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DEBT OF ANOTHER.

As consideration for contract. See Contracts, § 45.
Necessity that promise to pay another's debt be in writing. See Frauds, Statute of, §§ 2-9.

DEBTORS.

Right to notice of assignment of debt. See Assignments, § 37.
Rights and remedies of debtor making assignment for creditors. See Assignments for Benefit of Creditors, §§ 53-55.
What are fixtures between debtor and creditor. See Fixtures, § 21.
Right to make appropriation of payments made. See Payment, § 18.

DEBTS.

Which may constitute basis of attachment. See Attachment, §§ 4-21.
Discharged by discharge in bankruptcy. See Bankruptcy, §§ 25-27.
State debts. See California, III.
Power of state to repudiate debts. See California, § 61.
"Debt" as property protected by due process clause of constitution. See Constitutional Law, § 246.
Liability of stockholders for debts of corporations. See Corporations, §§ 226-267.
Liability of corporate officers for corporate debts. See Corporations, §§ 312-322.
Limitation of amount of corporate indebtedness. See Corporations, § 391.
Liability of heirs and distributees for debts of ancestor. See Descent and Distribution, §§ 60, 61.
Payment of, as unlawful preference of creditors. See Fraudulent Conveyances, § 53.
Charged on separate estate of wife. See Husband and Wife, § 86.
Right to enjoin collection of. See Injunction, § 49.
Discharged by discharge of insolvent. See Insolvency, §§ 120-127.
Statement of indebtedness in judgment by confession. See Judgment, § 30.
Secured by land mortgage. See Mortgages, § 46.
Power of cities to incur. See Municipal Corporations, §§ 303-308.
Discharge of, by payment. See Payment, § 23.
Power of agent to collect debts due principal. See Principal and Agent, § 50.
School debts. See Schools and School Districts, § 17.
Deduction of debts in valuing property for taxation. See Taxation, § 74.
Liability of devisees and legatees for debts of testator. See Wills, VII, G.

DECEDENTS.

See Dead Bodies; Death; Descent and Distribution; Executors and Administrators; Wills.

DECEIT.

See False Personation; False Pretenses; Fraud.

DECEIVING COURT.

As ground for disbarment. See Attorney and Client, § 30.
As contempt. See Contempt, § 14.

DECEPTION OF PUBLIC.

By unlawful use of trademark or trade name. See Trademarks and Trade Names, § 13.

DECISION CONTRARY TO LAW.

As authority. See Courts, § 77.

DECISION ON THE MERITS.

What constitutes. See Judgment, § 389.

DECISIONS.

See Judgment.

Conclusiveness of decisions of county board. See Counties, § 53.
Preparation, filing and formal requisites. See Courts, §§ 94-98.
Rule of decision. See Courts, § 75.
On appeal in criminal case. See Criminal Law, § 802.

DECISIONS REVIEWABLE.

By appeal or writ of error. See Appeal and Error, III.
By certiorari. See Certiorari, §§ 12-29.
On criminal appeal. See Criminal Law, §§ 611-624.
Decisions of justices of the peace which are appealable. See Justices of the Peace, §§ 106-110.
Decisions of justices of the peace reviewable by certiorari. See Justices of the Peace, § 140.

DECLARATION.

See Pleading.

In assumpsit. See Assumpsit, § 6.

DECLARATION OF ABANDONMENT.

Of homestead. See Homesteads, § 180.

DECLARATION OF HOMESTEAD.

See Homesteads, §§ 26-37.

DECLARATION OF MARRIAGE.

Marriage by joint declaration. See Marriage, § 10.

DECLARATIONS.

As evidence—in criminal cases. See Criminal Law. X, F.
—— In civil cases. See Evidence, VIII.
Admissibility of declarations of agent to establish authority to act for principal. See Principal and Agent, § 59.

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DECLARATIONS AGAINST INTEREST.

As evidence. See Evidence, § 261.

DECLARATIONS AS TO BOUNDARIES.

As evidence. See Evidence, § 264.

DECLARATIONS BY PERSONS SINCE DECEASED.

As evidence. See Evidence, §§ 254, 265.

DECLARATORY STATEMENT.

On location of mining claim. See Mines and Minerals, § 22.

DECOY.

See references under Entrapment.

DECREE.

See Judgment.

DECREE OF DISTRIBUTION.

See Executors and Administrators, §§ 366-375.

DEDICATION.

Include giving or devoting real property or easements therein to the use of the public, and acceptance and revocation of such dedication; nature, requisites, incidents, operation, and effect thereof; evidence relating thereto; estates, interests, or easements created; and rights, duties, and liabilities of parties making such dedications and of the public as to the property dedicated.

I. NATURE AND REQUISITES, §§ 1-59.
- A. In General, §§ 1-9.
- B. Modes and Sufficiency of Dedication, §§ 10-35.
- C. Acceptance, §§ 36-46.
- D. Revocation, §§ 47-52.
- E. Evidence and Determination, §§ 53-59.

II. OPERATION AND EFFECT, §§ 60-67.

Right to acquire title to dedicated property by adverse possession. See Adverse Possession, §§ 30-33.
Necessity that agreement creating be in writing. See Frauds, Statute of, § 16.
Of toll road. See Turnpikes and Toll Roads, § 5.
Of wharf. See Wharves, § 9.

I. NATURE AND REQUISITES.

A. In General, §§ 1-9.

B. Modes and Sufficiency of Dedication, §§ 10-35.

C. Acceptance, §§ 36-46.

D. Revocation, §§ 47-52.

E. Evidence and Determination, §§ 53-59.

A. IN GENERAL.

NATURE OF DEDICATION, § 1.
PURPOSES OR OBJECTS OF DEDICATION, § 2.
—— NECESSITY, § 3.
PROPERTY SUBJECT TO DEDICATION, § 4.
CAPACITY OR AUTHORITY TO DEDICATE, § 5.
—— OCCUPANT OF PUBLIC LAND, § 6.
NECESSITY FOR GRANTEE OR DONEE, § 7.
NECESSITY THAT GRANT BE TO PUBLIC, § 8.
LIMITATION AS TO DURATION, § 9.

§ 1. Nature of Dedication.

[a] A common-law dedication is the setting apart of land for public use, and to constitute it, there must be an intention by the owner clearly indicating by his words or acts to dedicate the land to public use, and an acceptance by the public of the dedication.—People ex rel. Howland v. Dreher, 101 Cal. 271, 35 Pac. 467.

[b] Dedication is but a phase of estoppel in pais.—Prescott v. Edwards, 117 Cal. 303, 304, 59 Am. St. Rep. 186, 49 Pac. 178.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 437-440; 15 Cent. Dig., cols. 2765-2775, §§ 1-11.

§ 2. Purposes or Objects of Dedication.

[a] Dedication of property to a corporation of limited membership, formed purely for scientific purposes, is not for a "public use," and, therefore, a dedication to such a corporation of unoccupied city land by a board of supervisors, authorized to dedicate such land for a "public use" only under Statutes of 1868, page 379, is invalid.—California Academy of Sciences v. City and County of San Francisco, 107 Cal. 334, 40 Pac. 426.

[b] Board of supervisors cannot dedicate land except for public use.—Home for Inebriates v. San Francisco, 119 Cal. 537, 51 Pac. 950.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 444-450; 15 Cent. Dig., cols. 2765-2768, §§ 1, 2.

§ 3. —— Necessity.

[a] Accepted dedication makes a street though roadway was not required as necessity.—Brown v. Stark, 83 Cal. 641, 24 Pac. 162.

§ 4. Property Subject to Dedication.

[a] A mere cul de sac may, like a thoroughfare, be dedicated to public use as a street, etc.—Stone v. Brooks, 35 Cal. 489.

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FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2768, 2769, § 8.

§ 5. Capacity or Authority to Dedicate.

[a] A finding of fact that the president and other members of a corporation, individually, but not in their corporate capacity, had given their consent to the use of land claimed by the corporation, for a bridge constructed by a city under a legislative act, and thus dedicated it to the use of the same, does not establish a dedication by the corporation.—Pacific Bridge Co. v. Kirkham, 54 Cal. 558.

[b] The acts of one of two joint owners of land, tending to show the dedication of a strip thereof to public use as a street, cannot be considered in an action brought by a grantee of such joint owners against a city to restrain it from working such strip as a public street.—Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 150.

[c] Dedication must be made by the owner of the land, and his intention to dedicate it must be made to appear in the facts or circumstances of the particular case; and it cannot be inferred from any unauthorized acts or declarations of an agent in charge of the land.—California Nav. etc. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936.

[d] Appointment by owner of an agent to carry out the reclamation of land, and to manage the same, does not imply any authority to the agent to dedicate any portion of the land to the public for wharves or landings.—California N. & I. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936.

[e] Where, in a suit to restrain defendants from obstructing a strip of land alleged to have been dedicated to public use as a road, and to have it declared a road, it appeared that one of defendants had conveyed a strip of land to be used by the grantee in reaching the alleged road, such conveyance was not binding on the other defendant. Judgment (1902) 70 Pac. 273, reversed.—Hartley v. Vermillion, 141 Cal. 399, 74 Pac. 987.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 442; 15 Cent. Dig., cols. 2769-2773, §§ 5-7.

§ 6. —— Occupant of Public Land.

[a] Knowledge by the owner that the public traveled over uninclosed waste land does not show a dedication, where the land was claimed by many to be public land, and the owner was then proceeding to obtain his patent, as, under the act of Congress, claimants were not obliged to sue until their right to a patent had been determined.—Harding v. Jasper, 14 Cal. 642.

[b] Holder of certificate of purchase of school lands may dedicate it as a public highway.—Watkins v. Lynch, 71 Cal. 25, 11 Pac. 808.

§ 7. Necessity for Grantee or Donee.

[a] Dedication of land for public or charitable use is good without donee to take; and the legislature, as well as chancery, may appoint trustees who may maintain actions in regard to the land. Held, accordingly, in an action to quiet title, where it appeared that land adjoining the school premises of the plaintiff had been dedicated for public use for school purposes by the defendant, that the dedication was valid, and that the action was properly brought by the plaintiff.—Carpenteria School Dist. v. Heath, 56 Cal. 478.

[b] Where the owner of land, in laying out a town, makes a map, marking off certain land as a public square, and sells lots with reference to such map, the fact that the town is not yet organized does not affect the validity of the dedication.—Town of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405.

§ 8. Necessity that Grant be to Public.

[a] In its strictly legal sense "dedication" is matter purely between owner and public. There is no such thing as dedication between owner and individuals. Public must be party to every dedication.—Prescott v. Edwards, 117 Cal. 301, 59 Am. St. Rep. 186, 49 Pac. 178.

[b] Dedication is matter purely between owner and public. There is no such thing as dedication between owner and individuals. Sacramento v. Clunie, 120 Cal. 32, 52 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2773-2775, § 9.

§ 9. Limitation as to Duration.

[a] It is essential to a dedication of property to public use that it is to be forever, and irrevocable. A reservation of the right to revoke defeats the dedication.—City of San Francisco v. Canavan, 42 Cal. 541.

B. MODES AND SUFFICIENCY OF DEDICATION.

GENERAL REQUISITES, § 10.
—— DEDICATION OF STREETS OR HIGHWAY, § 11.
EXPRESS OR IMPLIED DEDICATION, § 12.
INTENT TO DEDICATE, § 13.
ACTS CONSTITUTING DEDICATION, IN GENERAL, § 14.
—— CONSTRUCTION OF IMPROVEMENTS PUBLIC IN THEIR NATURE, § 15.
—— LOCATION OF BUILDINGS OR FENCES, § 16.
—— OPENING WAYS, § 17.
ABANDONMENT TO OR ACQUIESCENCE IN PUBLIC USE, § 18.
—— KNOWLEDGE AND CONSENT OF OWNER AND NATURE OF USE IN GENERAL, § 19.
—— TIME REQUISITE, § 20.
—— USE OF VACANT OR UNINCLOSED LANDS, § 21.
—— PUBLIC USE OF PRIVATE WAYS AND IMPROVEMENTS, § 22.

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EXPRESS CONVEYANCE, AGREEMENT OR DECLARATION, § 23.
—— SALES AND DESCRIPTIONS OF PROPERTY WITH REFERENCE TO STREETS, § 24.
—— SALE OF LOTS FRONTING ON WAYS AS DESIGNATED IN MAP OR PLAT, § 25.
—— SALE OF LANDS BOUNDED BY UNOPENED STREETS, § 26.
MAPS AND PLATS, IN GENERAL, § 27.
—— DESIGNATION OF USE OR PURPOSE—PARKS, § 28.
—— AVENUES AND STREETS, § 29.
—— UNDESIGNATED PARTS OF MAP OR PLAT, § 30.
—— AUTHENTICATION OF MAP AND OWNERSHIP OF PROPERTY PLATTED, § 31.
—— ADOPTION OF MAP OR PLAT BY REFERENCE THERETO, § 32.
—— SALE OF LANDS WITH REFERENCE TO MAP, PLAT, OR SURVEY, § 33.
ACTS OR DECLARATIONS TO PREVENT IMPLIED DEDICATION, § 34.
—— MAINTENANCE OF BUILDING FENCE OR GATE, § 35.

§ 10. General Requisites.

[a] A deed or writing is not necessary to prove a dedication of land to the public use. Harding v. Jasper, 14 Cal. 642.

[b] To constitute valid and complete dedication there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication.—San Francisco v. Canavan, 42 Cal. 541.

[c] It is essential to a dedication that there should be an offer to dedicate and an acceptance on the part of the public.—City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855.

§ 11. —— Dedication of Streets or Highway.

[a] A street may be dedicated by legislative grant or enactment.—Breed v. Cunningham, 2 Cal. 361.

[b] A dedication of land to the public use as a street or highway may be made by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party. San Francisco v. Scott, 4 Cal. 114.

[c] To constitute a dedication of land for the purposes of a rural highway no particular formality is necessary. The intention on the part of the owner to so dedicate evidenced by acts and declarations is the vital question.—Harding v. Jasper, 14 Cal. 642.

[d] East street, in San Francisco, between Market and Folsom streets has been duly dedicated as a public street.—People ex rel. Alvord v. Pope, 53 Cal. 437.

[e] Dedication of highway is insufficient, without assent to its use by public sufficient to show intention to dedicate property to such use.—Hope v. Barnett, 78 Cal. 14, 20 Pac. 245.

[f] To constitute a dedication of land for a street there must be a manifestation of the owner's intent to dedicate it to a public use, and an acceptance and use by the public for the purpose intended and manifested by the owner.—Spaulding v. Bradley, 79 Cal. 449, 21 Pac. 47.

[g] Possession of a proposed public street by a trespasser not in privity with the pueblo does not affect the dedication of the street if it is laid out as such on the official map of the pueblo.—Mills v. City of Los Angeles, 90 Cal. 522, 27 Pac. 354.

[h] Evidence in this case reviewed and held to show act of dedication of land to public use for street purposes.—Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[i] To constitute a dedication of land to public use as a highway no particular formality of either word or act is required. It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate or an acquiescence in the use of his land for a highway, or his declared assent to such use. The vital principle of the dedication is the intention to dedicate, and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made.—Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[j] Dedication exists only where the owner of the land has manifested some intention to make the dedication; and where the dedication of a highway is sought to be established by user, it must appear that such user was with the knowledge of the owner, and with his consent, or without objection on his part. Huffman v. Hall, 102 Cal. 26, 36 Pac. 417.

[k] Circumstances must clearly show an unequivocal intention manifested by the owner to devote his land to wayfaring uses; and the public must accept the proffered dedication in accordance with the apparent offer of the owner. Such acceptance may be signified by public user.—Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

[l] Dedication of street must be clearly evidenced by unequivocal acts.—People v. Sperry, 116 Cal. 595, 48 Pac. 723.

§ 12. Express or Implied Dedication.

[a] Dedication may be express, and completed by a single act or deed, or it may be implied from a series of acts.—Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839.

[b] Question of intent to make a common-law dedication of land for a public highway is paramount, but the dedication may be express or implied, and if the donor's acts are such as indicate an intention to appropriate the land to the public use, upon acceptance by the public the dedication becomes com-

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plete.—People v. County of Marin, 103 Cal. 223, 37 Pac. 203.

§ 13. Intent to Dedicate.

[a] Whole question, as against owner of soil, is whether there is sufficient evidence of an intention to dedicate.—People v. Reed, 81 Cal. 77, 15 Am. St. Rep. 22-n, 22 Pac. 474.

[b] Animus dedicandi must be clearly indicated by unequivocal acts.—City of Eureka v. Croghan, 81 Cal. 525, 526, 22 Pac. 693.

[c] Dedication is question of intention to be gathered from owner's acts and conduct.—Phillips v. Day, 82 Cal. 30, 22 Pac. 976.

[d] Dedication is question of intention to be determined from acts of owner.—Griffiths v. Galindo, 86 Cal. 196, 24 Pac. 1000.

[e] To constitute a sufficient dedication there must be an intention to make it.—City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840.

[f] Intention of owner to dedicate must be plainly manifest.—San Francisco v. Grote, 120 Cal. 62, 65 Am. St. Rep. 155, 52 Pac. 127.

[g] In an action by the owner of land to restrain a city from working a strip thereof as a public street, findings of fact that for about twelve years prior to the commencement of the action the strip has been open to public travel without protest from plaintiffs, and that it has been continuously used as a public way; that a few years prior to the commencement of the action the owner thereof caused a plat of his land adjacent to the strip to be made, dividing the same into lots facing on the strip, which plat, however, did not include the strip, nor refer to it in any way—are insufficient to support a conclusion of law that such strip is a public street, as there is no finding of an intention to dedicate.—Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190.

[h] The public used as a landing a part of the shore of navigable waters for a long period of years, with the consent of an agent of the owners, but it did not appear that he was authorized to dedicate the same to the use of the public further than that he was authorized to manage and reclaim for its owners a large area of swamp land, of which it was a part, and his testimony showed that it was their intention to retain control thereof. Held not to justify a finding that the landing had been dedicated to the public, conceding that such a dedication may be made.—California Nav. etc. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825.

§ 14. Acts Constituting Dedication in General.

[a] An order of the board of supervisors of a county that "all roads now traveled by teams and packmules within the limits of the county be and the same are hereby declared public highways," though not valid as transferring the title of the land to the public, still may be good evidence, in connection with other proof, to show a control on the part of the country over a road as a public highway, and a knowledge of such control on the part of the owners of the land, and thus to furnish a circumstance from which a dedication may be inferred.—Harding v. Jasper, 14 Cal. 642.

[b] Where the owner of land has dedicated a road as a public highway, and the dedication has been accepted by the public or constituted authorities of the county, the dedication is complete.—People v. County of Marin, 103 Cal. 223, 37 Pac. 203.

[c] Where the evidence shows that an avenue, in the form of a cul de sac, was opened by the owner of land, and that, from time to time, he sold parcels of land abutting on both sides of the avenue, which opened into the public street of a town, and declared to lot owners that the avenue was intended as a street for their benefit, and the avenue was used by the owners of the lots and by many other persons as a public passage for many years, to the knowledge of the original owner, and without objection from him, the court is justified in finding the dedication of the avenue as a highway, notwithstanding a denial by the original owner of the land that he had dedicated the land for highway purposes, or had any intention of doing so, and notwithstanding other conflicting evidence of acts and declarations on his part inconsistent with such intention.—Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

[d] Where offer of dedication and acceptance by public use are clearly shown, dedication becomes complete and irrevocable, and length of user is immaterial.—People v. Sperry, 116 Cal. 595, 48 Pac. 723.

[e] Statutes of 1856, page 103, incorporates the town of Eureka, describing its boundaries as commencing at a certain point north of A street, and running south to its corner, and thence southerly along A street to a certain point. A street had previously been designated as such on a map of Eureka, and the land occupied by it was owned by the state. Held, that the land occupied by A street was not dedicated as a street by the act incorporating the town.—City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439.

[f] A reservation in a deed, in form, "reserving from this grant the right of way over a strip of land thirty feet wide on the westerly line of said tract of land for canal or road purposes, both or either," does not operate of itself as a dedication to the public, and thereby conclude the owner from using such strip for the purposes mentioned in the reservation.—Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24.

[g] A county highway terminated at the western boundary of certain land, the terminal being marked by stone monuments sixty feet apart. The owner of the land employed a surveyor, who surveyed a strip sixty feet in width from the terminal of the highway to the eastern boundary of the land, and there placed a post at the northern and southern boundaries of the strip; and a map was made,

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showing the strip surveyed, with the eastern end closed, and filed for record in the county. At the time of the survey the owner of the land informed the surveyor and his children that his purpose was that a map might be made of the road, in order that, in dividing his land among his children, reference might be made to the map, to insure certainty of description, and that the county could not have the strip as a highway unless it paid for it. He told the children to farm up to the center of the road, which they did. The strip surveyed was never recorded or platted as a county road, and no highway connected the strip on the east. Held, that there was no dedication of it for use as a highway.—Smith v. Glenn, 129 Cal. xviii, 62 Pac. 180.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 451-461; 15 Cent. Dig., cols. 2782-2868, §§ 15-49.

§ 15. —— Construction of Improvements Public in Their Nature.

[a] The construction of an irrigation ditch by several persons for the benefit of their several tracts of land, though the irrigators be numerous, does not operate as a dedication to the public. Accordingly, such ditch is within the exception in section 6 of the Los Nietos irrigation law (Stats. 1877, p. 374), relating to the control of irrigation ditches by commissioners.—Cate v. Sanford, 54 Cal. 24.

§ 16. —— Location of Buildings or Fences.

[a] Strip of land in the city of Los Angeles originally forming part of a public plaza, as laid out by the authorities of the pueblo, and subsequently declared to be part of a public square by an ordinance of the city, does not cease to be a part of the square and become a public street by being excluded from an inclosure erected about the rest of the square, and used by the public for the purposes of a street.—Cohn v. Parcels, 72 Cal. 368, 14 Pac. 26.

§ 17. —— Opening Ways.

[a] One who lays out a road over his land, and permits the public to use it on payment of tolls thereby, dedicates it as a public highway.—People v. Davidson, 79 Cal. 166, 21 Pac. 538.

[b] Where the owners of a block, by mutual agreement, opened an alley, and the same was recognized as an alley for more than thirty years, such dedication is sufficient to maintain an action to abate a private nuisance in obstructing the same.—Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

[c] A public highway laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, continues to exist until it is vacated or abandoned by order of the board of supervisors of the county in which it is situated, or by operation of law, or judgment of a court of competent jurisdiction.—Plummer v. Sheldon, 94 Cal. 533, 29 Pac. 947.

[d] The act of a land owner in building a fence on each side of a strip of land, leaving it open at each end to the access of the public, the strip having been used for fifteen years prior thereto without objection, and traveled over by a large number of persons, the act of building such fence being both preceded and followed by expressed statements of the land owner showing his intention to dedicate the land as a public street, shows such a dedication.—Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[e] One who, without authority, lays out a road, and permits the public to use it on payment of tolls, thereby dedicates it as a public road; and the portion used by those who, not going so far as the toll-house, do not pay tolls, becomes a free public road, the use of which is not subject to the payment of tolls.—Blood v. Woods, 95 Cal. 78, 30 Pac. 129.

[f] Defendant, for the purpose of changing the course of a highway, opened a road through his land, fenced it on both sides, allowed it to be used by the public, and to be worked and controlled by the public authorities. Held, that the road was dedicated to the public.—McKenzie v. Gilmore, 33 Pac. 262.

§ 18. Abandonment to or Acquiescence in Public Use.

[a] Where the owner of land, without consent or objection, allowed it to be used eight years as a street, and permitted a house owned by her, but built by another, fronting on the street and extending into it, to remain there while she owned the land, there was no dedication to public use.—City and County of San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127.

[b] Where the dedication of a highway is sought to be established by user by the public, it must be shown that the user was adverse with the knowledge of the owner; and the user must be of such duration that the public interest and private right would be materially impaired if the dedication were revoked and the use by the public discontinued.—Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190.

[c] The intention of the owner of land to dedicate part thereof as a public street is essential to a dedication; and findings of mere probative facts, without the finding of a dedication or of an intent to dedicate, and which are not inconsistent with the absence of such intention, and may indicate a mere license to the public to use an open passageway for travel, without adverse user thereof by the public, are insufficient to establish the dedication of the way as a public street.—Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190.

[d] Where a corporation told purchasers of its lots in a certain town and others that it would construct a bridge and open a public highway, and then subsequently constructed the bridge and opened the road, the court is justified in finding that there was a dedication of such bridge and road.—Sussman v. County of San Luis Obispo, 126 Cal. 536, 59 Pac. 24.

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[e] Political Code, section 2618, declares that a public highway is a road, street, etc., laid out by the public, or dedicated or abandoned to the public. In a suit to declare a strip of land a public highway and to restrain the obstruction thereof, evidence considered, and held to show that the land over which the road ran had been by the owners thereof dedicated and abandoned to the public. Judgment (1902) 70 Pac. 273, reversed.—Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987.

[f] Where the public travels over a road with knowledge of those owning the land over which the road passes, without receiving any permission, but without objection, for a period beyond that required to bar a right of action by the owners, the right to the public use of the road arises by prescription or implied dedication. Judgment (1902) 70 Pac. 273, reversed.—Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987.

[g] In an action for trespass, where defendant alleged that the land entered on was a public highway, a question, "For the last ten or fifteen years, how many people have used that road or traveled it?" was properly excluded, since its answer would not have shown an intention of the owners to dedicate the road to the public.—Hibberd v. Mellville, 33 Pac. 201.

[h] Use by the public generally of a road for fifteen years, to the knowledge and with the acquiescence of the owner of the land on which it is located, does not show a dedication.—Hartley v. Vermillion, 70 Pac. 273.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 455; 15 Cent. Dig., cols. 2795-2818, §§ 20-30.

§ 19. —— Knowledge and Consent of Owner and Nature of Use in General.

[a] To establish dedication of highway by user, it must appear that such user was with knowledge and consent of owner.—Hope v. Barnett, 78 Cal. 14, 20 Pac. 245.

[b] Where the owner of a strip of land never acquiesced in or assented to the use of it by the public as a highway, and had no knowledge that the same was being used, there can be no dedication.—City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840.

[c] The fact that a strip of land has been continuously traveled and used by the general public as a highway for twenty years, with the knowledge of the owner of the fee, and without objection by him, does not justify a finding that the strip "is a public highway," since such facts are consistent with an absence of intention to dedicate, and may indicate merely a license.—Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106.

§ 20. —— Time Requisite.

[a] Where there is no abandonment or dedication of the land the user for a limited time by the public cannot fairly raise the presumption of a dedication.—San Francisco v. Scott, 4 Cal. 114.

[b] The owner of a city lot divided a portion of it into smaller lots, bounded at one end by a street, and leaving at the other an alleyway ten feet wide, upon which all the lots abutted, and conveyed said lots to different persons, including in each deed the right of way over the alley, which was a cul-de-sac eighty-seven feet long, and opening on a street. For about twenty years the alley was used by the owners of the lots and their employees, and persons visiting them. The alley was marked on the map of the city engineer, but not on the official map of the city. Held, that the evidence was not sufficient to establish a dedication, and consequently the alley was a private way, and not a public highway. Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427.

[c] Adverse user of land as a highway by the public for thirty years establishes the presumption of a dedication.—Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448.

§ 21. —— Use of Vacant or Uninclosed Lands.

[a] Land within the limits of the pueblo of Los Angeles was granted by the ayuntamiento to a private person, who was put in possession by the alcalde. Before the grant, the land was vacant, and was used by adjoining lot owners in passing to and fro, and sometimes for public celebrations and amusements. Held, that this was not sufficient evidence of a dedication to the public to overcome the presumption that the authorities acted within their powers, and conveyed a good title by the grant.—Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673.

§ 22. —— Public Use of Private Ways and Improvements.

[a] The fact that a strip of land, over which a private right of way had been granted by the owner to two other land owners, to enable them to reach a highway from their land, is used, without objection, by others, going to and from their own lands, or the places of the two grantees, does not establish a dedication to the public.—Silva v. Spangler, 43 Pac. 617.

§ 23. Express Conveyance, Agreement, or Declaration.

[a] Dedication may be made by deed.—San Francisco v. Scott, 4 Cal. 114.

[b] A deed which conveys to the present and future owners of town lots in a city certain streets and public squares in such city, "for the public use of the inhabitants of such city, to be applied to such public purposes as the future incorporated authorities of said city from time to time declare and determine," dedicates the land to public use, and contains a sufficient designation of the grantees to make it operative as a conveyance.—Mayo v. Wood, 50 Cal. 171.

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[c] That a subsequent owner petitioned the city council for an "exchange or indemnification for certain lands belonging to her, and now occupied by the public" (being the lot in question), and that the council passed a resolution directing a concession of other land to be made to her, in pursuance of which a deed was drawn up and signed by the mayor, is not an admission of dedication, when there was no proof that the deed was delivered, and it appeared that the city subsequently granted the lot to another.—Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673.

[d] Conveyances of lots adjoining the cul-de-sac by the original owner, which expressly provided for an extinction of the cul-de-sac, by agreement in writing of the owners of the adjoining allotments, show no conclusive intention to dedicate a public highway, but show the contrary.—Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 453, 454; 15 Cent. Dig., cols. 2818-2868, §§ 31-49.

§ 24. —— Sales and Descriptions of Property with Reference to Streets.

[a] Where lots are sold as fronting on or bounded by a street, such acts constitute a dedication.—Breed v. Cunningham, 2 Cal. 361; People v. Pope, 53 Cal. 437.

[b] Street may be dedicated by platting and selling lots bounded by it.—Breed v. Cunningham, 2 Cal. 361.

[c] Defendants quitclaimed to the city of San Francisco certain strips of land to be used as highways, and subsequently, said strips not having been used or opened as highways, executed a mortgage of adjoining premises, describing them as running to said streets. Said mortgages were foreclosed, and the plaintiffs, being purchasers, sought to enjoin defendants from building upon said strips of land. Held, that defendants' mortgage deed was a dedication of said strips as highways, as to the mortgagees and those claiming under them, and vested in them a right of way.—Kittle v. Pfeiffer, 22 Cal. 484.

[d] Sale of land described as bounding on certain street is an offer to dedicate the street.—Eureka v. Armstrong, 83 Cal. 624, 22 Pac. 928.

[e] After the passage of the act of March 2, 1867, the mere adoption of the town authorities of an official map of the town, which showed a street laid out through lands in the actual occupation of a private person at the date of the act, did not affect the right of the occupant to the land so designated as a street; and the fact that the grantees of the occupant, in petitioning the municipal authorities for a deed of the land, described it by reference to the map did not have the effect to dedicate the land designated as a street to public use.—Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

[f] Where owner declared to purchasers that certain strips outlined upon the ground were streets, and purchasers acted on such declaration, as to them those parcels are streets, though not as to the public.—Prescott v. Edwards, 117 Cal. 304, 59 Am. St. Rep. 186, 49 Pac. 178.

[g] Under act of Congress of 1876, extending Lyon street, bounding the Presidio military reservation, and dedicating it to the public, and Statutes of 1867-68, page 379, making the grant to the city for the benefit of persons who, if the land had not been reserved for public use, would have been entitled thereto under ordinance No. 800 of the city of San Francisco, a party receiving conveyances from the city under such ordinance must take the property charged with the dedication.—Wheeler v. Benjamin, 136 Cal. 51, 68 Pac. 313.

[h] Where the owner of a tract of land in a city, through which a street and alley are platted, conveys land on both sides of the street, describing the tracts as bounded by such street and alley, such conveyance is an offer to dedicate, and is sufficiently accepted by an ordinance accepting, and declaring to be public streets all streets and alleys which have been dedicated by the owners thereof.—City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850.

[i] Where the owner of a lot subdivided it, and left a strip of land between the subdivisions, which was a mere cul-de-sac, the fact that in his conveyances thereof were references in the description to such strip of land did not constitute a conclusive dedication of such strip to the public as a highway. Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646.

§ 25. —— Sale of Lots Fronting on Ways as Designated in Map or Plat.

[a] Where one subdivided and sold absolutely, at public sale, the middle one of three adjoining lots, making a part of the land on the sale map as an extension of a cul-de-sac to a street, with sublots fronting on such extension, it was held to be a dedication to public use, and to subject the extension and cul-de-sac to the jurisdiction of the board.—Stone v. Brooks, 35 Cal. 489.

[b] Offer to dedicate streets is shown by selling property with reference to map designating such streets.—Griffiths v. Galindo, 56 Cal. 196, 24 Pac. 1025.

[c] Where it appeared that part of the demanded premises was in the tract conveyed by R. to the maker of the plat and map, and after the death of the grantee was conveyed by the administrator of his estate to another, as described in the map, and subsequently, in selling some of them, such other designated them by the numbers thereon, and that in one sale, prior to the passage of the ordinance accepting land dedicated to the city, he referred to the lot as bounded on the street in question, the acts of both constituted a dedication of that part, and the administrator's

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deed is competent evidence of the fact.—City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

§ 26. —— Sale of Lands Bounded by Unopened Streets.

[a] A deed given by defendant to a third person, wherein the description recites that the boundary lines of the property conveyed were to run "to and along Twelfth street," which was then an open public street to the east of, but not extended westerly through, defendant's property, constitutes a dedication of, or an offer by defendant to dedicate, land for the purpose of a street.—City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, affirmed in (1890) 23 Pac. 1085.

[b] Where a street has not been opened, a conveyance of land therein, by deed describing it as part of the street, does not constitute a dedication thereof.—Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

§ 27. Maps and Plats in General.

[a] Where land owner maps it out into streets and lots and sells with reference to such map, he makes an irrevocable dedication of streets, squares, or plazas represented on it.—San Leandro v. Le Breton, 72 Cal. 174, 175, 13 Pac. 405.

[b] Mere making of map with streets is not offer of dedication until filed for record.—People v. Reed, 81 Cal. 77, 78, 15 Am. St. Rep. 22-n, 22 Pac. 474.

[c] Making and filing of map with certain streets designated thereon is only offer of dedication, and is not effectual and irrevocable until accepted.—People v. Reed, 81 Cal. 77, 15 Am. St. Rep. 22-n, 22 Pac. 474.

[d] The mere fact that an official map, adopted after the dedication of a street, has a line drawn across the mouth of the extension of such street, does not deprive the public of their right thereto.—City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928.

[e] Where a survey and map of an addition to a city, showing public streets, included a tract of land owned by one who had no connection with, and did not authorize, the survey or map, and who protested against the map, and prevented the recording of it, a finding that he dedicated, or offered to dedicate, any part of street designated thereon, and extending through his land, is against the evidence, notwithstanding the fact that in two conveyances of portions of his land he referred to the unrecorded map for a description of the lots conveyed, neither of which adjoined or referred to the street.—City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

[f] Mere marking of streets on unrecorded map and sale of lots with declaration that streets were not for public use, does not constitute dedication.—People v. Sperry, 116 Cal. 595, 48 Pac. 723.

FOR AUTHORITIES FROM OTHER STATES:

Dedication by maps and plats: 10 Am. St. Rep. 189, note. See, also, 13 Cyc. 455; 15 Cent. Dig., cols. 2828-2864, §§ 34-47.

§ 28. —— Designation of Use or Purpose—Parks.

[a] Act of legislature of March 11, 1858, ratifying and confirming an ordinance of the city and county of San Francisco, which approved a map showing the location of streets and squares in that city, operated as a selection and dedication to public use of the tracts marked as public squares on the map approved by the ordinance, and the act of Congress of July 1, 1864, relinquishing and granting to the city the title to such land for the uses and purposes specified in the ordinance, had the effect to confirm such dedication, and make it operative upon the legal title, as well as upon such title as the city held prior thereto.—People ex rel. Bryant v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 86, 29 Pac. 54.

[b] Where a land owner files a map of a number of blocks owned by him, on which one block is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, he dedicates the block to the public.—Archer v. City of Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

[c] Defendant contracted with a railway company to sell it certain land, and the railway company took joint possession of the property under the contract. It divided the land into lots and blocks, and placed them upon the market for sale, and filed a map in the recorder's office showing the subdivisions, and having a tract marked off and labeled as "Central Park." Subsequently defendant and the railroad company contracted to sell the park to one G. in consideration that he would keep it open as a public park for twenty-five years. This agreement was canceled. Subsequently the railroad company quitclaimed to defendant. Defendant had sold many lots to purchasers with reference to this map. During all this time the park was open to the public. Held, that these facts are sufficient to support a finding that the park was not dedicated and accepted by the public.—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

[d] Statutes of 1867-68, page 692, section 5, provides that "all streets, roads, alleys," etc., "marked and platted on the map of the townsite," dedicated under Revised Statutes of the United States, section 2387 et seq., "shall be deemed and considered and are hereby declared to be dedicated to public use by the filing of such town plat," etc. Land which constituted part of the plaza was defined on the map by the boundaries of a street, of which it formed a part. The other boundaries were marked by clearly defined lines. The map showed the entrance of intersecting streets into the plaza. Held, that the plaza was designated as a part of the street, whose boundaries were coincident with it, and hence

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that a deed thereto by a judge of the superior court was void.—Amador County v. Gilbert, 133 Cal. 51, 65 Pac. 130.

[e] Where land in a city is platted by the owner, the plat or map being filed in the county recorder's office, and on the map a certain tract is marked as a plaza, such action shows an intention to dedicate the tract.—City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855.

§ 29. —— Avenues and Streets.

[a] Street may be dedicated by designation upon official map of city.—Breed v. Cunningham, 2 Cal. 361.

[b] In an action for trespass, it appeared that the owner of certain land had it surveyed and platted with a street fifty feet wide running north from a highway, which street was marked on the plat "Hester Avenue." This plat was shown to purchasers, and a copy thereof posted on the premises. The lots sold to defendant were described as bounded on one side by this avenue. Prior to this sale the avenue was thrown open to public travel, and the deed to defendant was recorded before the balance of the property was sold to plaintiff. Held, that defendant had a right to remove a fence in said avenue, and that there was no need of showing that the avenue was a necessity.—Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

[c] Dedication of street is shown by filing map on which it appears, throwing it open to public and long public use of it as street.—People v. Hibernia etc. Soc., 84 Cal. 636, 637, 24 Pac. 295.

[d] In an action to quiet title to a strip of land, it appeared that plaintiff company filed for record a map of its land, platted as a cemetery, on which map the strip in question, forty feet wide, along the west side of the tract, was left blank, with an entrance indicated therefrom into the cemetery. Subsequently, in cutting the land up into cemetery lots, the company left another strip, twenty feet wide, adjoining the former strip, and the whole was known as "E Avenue," which was used by the public for three years without objection. Held, that the facts showed an intention to dedicate the strip to the public for street purposes.—Los Angeles Cemetery Assn. v. City of Los Angeles, 32 Pac. 240.

§ 30. —— Undesignated Parts of Map or Plat.

[a] The drawing of side lines through a block in a plat of land, indicating that it may be intended for a street, but not designating it by name as such, is merely an offer to dedicate.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

[b] Where a plat of land is recorded, and land appears thereon not numbered as a lot, nor corresponding in size or shape to one, but bounded by lines clearly intended to represent the lines of a street, and lots are sold as being bounded on such street, such land is dedicated for a public street, though not named as such on the plat.—City and County of San Francisco v. Burr, 36 Pac. 771.

§ 31. —— Authentication of Map and Ownership of Property Platted.

[a] A map, which was not made, by the owner of land alleged to have been dedicated for the purposes of a street, and not shown to have been made with his consent or by his authority, and to which no reference is made for description in the deed containing the alleged offer to dedicate, is of no effect on the question of dedication.—City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693.

[b] The fact that a certain street is marked as a public street on the "engineer's map." and on "Humphrey's Map of the City and County of San Francisco," is not conclusive evidence that the street has been dedicated to the public.—Whelan v. Boyd, 93 Cal. 500, 29 Pac. 69.

§ 32. —— Adoption of Map or Plat by Reference Thereto.

[a] The acceptance by a general ordinance of all offers to dedicate streets not passed in reliance upon any representation by word or act of the owner of the land in question, and not referring nor applying to that land by description, cannot estop the owner from claiming his ownership of the land which he had not offered or intended to dedicate before the passage of the ordinance, merely because he had described lots by reference to an unrecorded map of which the city had no constructive notice at the date of the ordinance.—Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

[b] Statutes of 1857, page 76, grants to the town of Eureka the lands within its limits owned by the state, including what is known as the "water front," extending from high-water mark into the bay to a point where the water is not over six feet at low tide, the trustees of the town being required to plat the water front into lots, and to sell such of them at a certain price to persons who were bona fide occupants thereof at the time the act was passed. Thereafter the trustees passed an ordinance employing a surveyor "to run off and set stakes at the corners of all the blocks lying between A and N streets and the bay." Pursuant thereto, a map was made of a part of the town, including A street, which was placed in the recorder's office. This map contained no names of streets. Thereafter an occupant of part of the water front applied for a deed, and the town conveyed to his successor, the deed including a part of A street; and in another street, which was also conveyed, a right of way to the bay was reserved for the original occupant. Held, that the municipal authorities had not dedicated as a street the part of A street conveyed by them.—City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439.

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[c] It appeared that in 1855 and 1856, under certain ordinances, a land owner had a tract subdivided into blocks and lots, with streets delineated thereon, among which was Union street, and a map was made and approved, showing such survey. In 1861 the then owner of defendant's lot made a declaration of homestead upon it, showing it to be bounded on the north by Union street. The conveyance of said lot to defendant, and a declaration of homestead and mortgage executed by him, all described the lot in a similar manner. When Union street was graded, defendant made no objection thereto. After the grading was finished the fences were adjusted to Union street as thus laid out, the street was sewered and paved, and a street railroad was placed thereon, without objection by defendant. Held, that Union street was dedicated to public use as a street, and accepted as such. Spaulding v. Wesson (Cal.), 45 Pac. 807.

§ 33. —— Sale of Lands with Reference to Map, Plat, or Survey.

[a] The platting of land, and the sale of lots with reference thereto, by the owner, do not constitute a dedication of land as a street as to the public, where such land is never opened as a street, and the owner keeps it inclosed, and uses it for more than twenty years before an attempt to accept it by the public.—People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474.

[b] Mere sale of lots according to unrecorded map is not such dedication as makes public interested party.—Wolfskill v. Los Angeles, 86 Cal. 412, 24 Pac. 1094.

[c] Sale of lots with reference to map showing streets constitutes offer to dedicate streets.—Logan v. Rose, 88 Cal. 266, 26 Pac. 106.

[d] A town authorized by act of Congress of March 2, 1867, and act of March 23, 1868 (Stats. 1867-68, p. 245), to enter lands within its limits "in trust for the several use and benefit of the occupants," and, after determining conflicting claims, to make deeds to the proper parties, caused a map of the town to be made and adopted as official which embraced and showed a certain tract in the possession of one M. to be laid off in blocks and lots, with streets extending through it, though in fact there were at the time no such divisions thereof. Thereafter it received a patent embracing the tract, and on petition of the assignees of M., who referred for description to the map, executed to them a deed of the land. Held, that the town could not be regarded as having asserted a claim to the streets, and as having deeded the land subject to the recognition of such claim by the grantees.—Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417.

[e] Reference to the unrecorded map for mere purpose of describing lots sold by owner who had not authorized the map, while expressly repudiating it for all other purposes, and preventing the recordation thereof, has no tendency to prove that he intended to dedicate to the public any part of a street defined on such map, not adjacent to the lots sold, nor referred to in the description thereof.—Eureka v. Fay, 107 Cal. 166, 40 Pac. 235.

[f] Purchaser of land is bound by maps filed by him in county recorder's office designating certain portions of land surveyed as streets.—King v. Dugan, 88 Pac. 925.

§ 34. Acts or Declarations to Prevent Implied Dedication.

[a] Declarations of agent in control, claiming compensation for use, will rebut a dedication.—San Francisco v. Scott, 4 Cal. 116.

[b] Where the intention of a land owner to dedicate part of the land for street purposes has been shown by specific acts, and it does not appear but that the entire tract, including the street has been assessed as a whole, the payment of the tax thereon by the owner cannot be held to rebut his intention of dedication so shown by his specific acts.—Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

§ 35. —— Maintenance of Building Fence or Gate.

[a] The erection and maintenance of gates or other obstructions over a road is strong evidence in support of a mere license to the public to pass over it, and in rebuttal of its dedication to public use.—Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746.

[b] Where no offer to dedicate land as a public street is made or intended by the owner, but fences are maintained, and an attempt to open it as a street is resisted, a public map made by the city, on which the land is laid down as a street, is not of itself evidence of dedication or user, nor is a private map, which has never been filed.—People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; Cook v. Sudden, 94 Cal. 443, 29 Pac. 949.

[c] Where the owner of land opens a road thereon, and the public use it uninterruptedly for some five years, the placing of a gate across it at one end, which is left open during the day and closed only at night, and which was placed there to prevent injury to those using the road, or to prevent the public from driving on the owner's wharf, is not inconsistent with an intention to dedicate the road to public use.—People v. Eel River etc. R. Co., 98 Cal. 665, 33 Pac. 728.

[d] The fact that land is inclosed is strong evidence to show that any use of it by the public was only permissive.—Huffman v. Hall, 102 Cal. 26, 36 Pac. 417.

[e] The owner of a tract of land caused it to be surveyed and platted. Part of one of the streets marked on the plat was never opened or used as a public street, and for more than twenty years the owner had a barn and shed on it. Held, that the intention to dedicate was not sufficiently indicated.—People v. Reed, 20 Pac. 708.

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[f] In an action for trespass, where defendant alleged that the land entered on was a public highway, it appeared that the line of the road for nearly its whole length had been changed from time to time by the owner of the land; that during all the time the public had been permitted to use the road it had been barred by several gates, to be opened and closed by persons passing over it; that for twelve years no work had been done or public money expended thereon by the road overseers; and it did not appear that there had been before that time. Held, that the road had not become a highway by dedication.—Hibberd v. Mellville, 33 Pac. 201.

C. ACCEPTANCE.

NECESSITY, IN GENERAL, § 36.
—— INTERVENING PRIVATE RIGHTS, § 37.
AUTHORITY TO ACCEPT, § 38.
TIME FOR ACCEPTANCE, § 39.
SUFFICIENCY—LEGISLATIVE ACTS, ORDINANCES AND RESOLUTIONS, § 40.
—— MAPS OR PLATS, AND RECOGNITION THEREOF, § 41.
—— COMPLIANCE WITH CONDITIONS, § 42.
—— USER BY PUBLIC, IN GENERAL, § 43.
—— OCCASIONAL USE, § 44.
—— IMPROVING AND REPAIRING PROPERTY DEDICATED, § 45.
—— ACCEPTANCE OR USE OF PART OF PROPERTY, § 46.

§ 36. Necessity in General.

[a] The ordinance of 1852, passed by the city council of San Francisco, setting apart one of its water lots to the public as a free dock, was not a dedication, but an offer to dedicate; and by it the city lost, and the people gained, no rights until the lots were accepted by user.—City and County of San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

[b] Mere dedication of land to public use as a street, etc., makes it a public street, subject to the jurisdiction of the board of supervisors, without any formal acceptance by them.—Stone v. Brooks, 35 Cal. 489.

[c] The recording of a map of a town is merely an offer to dedicate to the public the streets appearing on it, which offer does not become effectual as an irrevocable dedication until its acceptance by the public.—Hayward v, Manzer, 70 Cal. 476, 13 Pac. 141.

[d] No formal acceptance is necessary to complete a dedication of streets and squares represented on maps of townsite.—San Leandro v. Le Breton, 72 Cal. 175, 13 Pac. 405.

[e] Acceptance is necessary to complete dedication.—Eureka v. Armstrong, 83 Cal. 625, 22 Pac. 928; affirmed in (1890) 23 Pac. 1085.

[f] Filing and recording of map is but offer of dedication of streets and highways delineated incomplete until accepted by user or formal act.—Wolfskill v. Los Angeles, 86 Cal. 412, 24 Pac. 1094.

[g] In order to constitute a dedication for a public highway, there must be an acceptance by the public.—City of Monterey v. Malarin, 99 Cal. 290, 33 Pac. 840.

[h] Where the owner of land in a city offered to dedicate the same, but the city did nothing for twenty years to show an acceptance, when it commenced suit to establish title to the land, no dedication took place.—City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855.

[i] Conveyance of land within the corporate limits of a town, by deed describing the land as bounded by the lines of certain streets, if projected, and as being the northwest quarter of a certain block, as laid down on the official map of said town, together with five years' use of the projected streets by the public, constitutes a complete dedication of the streets to public use, without a formal acceptance.—City of Eureka v. Croghan, 19 Pac. 485.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 461-463; 15 Cent. Dig., cols. 2888-2896, §§ 64, 65.

§ 37. —— Intervening Private Rights.

[a] Where the owner of land platted a town thereon, and recorded the plat, and subsequently conveyed a tract of the land embracing part of one of the streets, there is no valid dedication, in absence of an acceptance by the public.—Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141.

§ 38. Authority to Accept.

[a] Offer to dedicate street must be accepted by public authorities.—Phillips v. Day, 82 Cal. 29, 22 Pac. 976.

[b] Common council is proper body to accept dedication of street.—Eureka v. Armstrong, 83 Cal. 625, 22 Pac. 928; affirmed in (1890) 23 Pac. 1085.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 469; 15 Cent. Dig., cols. 2896, 2897, § 66.

§ 39. Time for Acceptance.

[a] Time, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If the soil be accepted and used by the public in the manner intended by the owner the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use.—Harding v. Jasper, 14 Cal. 642.

[b] Offer of dedication must be accepted within reasonable time.—People v. Reed, 81 Cal. 80, 15 Am. St. Rep. 22-n, 22 Pac. 474.

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[c] Acceptance of offer to dedicate street within two years is reasonable time.—Eureka v. Armstrong, 83 Cal. 625, 22 Pac. 928; affirmed in (1890) 23 Pac. 1085.

[d] Acceptance must be within reasonable time after offer.—Wolfskill v. Los Angeles, 86 Cal. 412, 24 Pac. 1094.

[e] Where the owners of a tract of land made and recorded a map of the tract, by which it was subdivided and laid out in streets and lots, and marked the location of the streets upon the ground, and united in a deed to the county by which they conveyed the roads so laid out, upon the express consideration that the county should "accept, declare, duly establish, and use the same as public highways," and the terms were never accepted or complied with until after the lapse of ten years and after the offer had been effectually revoked, a dedication of the land to the public as a highway is not shown. Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770.

[f] The owner of a tract of land caused it to be surveyed and platted. Part of one of the streets marked on the plat was never opened or used as a public street, and for more than twenty years the owner had a barn and shed on it. Subsequently a city ordinance was passed directing the street commissioners to command possession of the part so occupied. Held, that there was not a sufficient acceptance to make a valid dedication.—People v. Reed, 20 Pac. 708.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 463; 15 Cent. Dig., cols. 2897-2899, § 67.

§ 40. Sufficiency—Legislative Acts, Ordinances and Resolutions.

[a] An act of the legislature, ratifying and confirming a void ordinance of a municipality providing for laying out public squares on pueblo lands within its limits, and a void order made by the municipal authorities adopting a plan, survey, and map of such public squares, reported by commissioners appointed for that purpose, operate as a selection and dedication of the squares to public use, and no other or further acceptance by the public is needed in order to make the dedication complete.—Hoadley v. City and County of San Francisco, 50 Cal. 265.

[b] Dedication of pueblo lands as public square made by San Francisco prior to 1864 was perfected by act of Congress of that year. People v. Holladay, 68 Cal. 444, 9 Pac. 655.

[c] Act of March 11, 1858, ratifying and confirming Ordinances 822 and 845 of the common council of the city of San Francisco, providing for laying out public squares on pueblo lands within its limits, and the order made by the municipal authorities adopting them, operated as a selection and dedication to the public use of such squares, and no other further acceptance by the public than was afforded by the act was needed in order to make the dedication complete.—Hoadley v. City and County of San Francisco, 70 Cal. 320, 12 Pac. 125.

[d] An ordinance by the city council declaring that certain land, alleged to have been dedicated by the owner for a street, "be, and the same is hereby, dedicated and set apart to public use as a public street," without referring to the owner or his alleged dedication, is not an acceptance thereof.—People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474.

[e] General order of council accepting all dedicated streets is sufficient acceptance though it does not name any street.—Eureka v. Armstrong, 83 Cal. 625, 22 Pac. 928, 23 Pac. 1085.

[f] Acceptance of one or more streets shown upon recorded map is not acceptance of all or any other of those delineated.—Wolfskill v. Los Angeles, 86 Cal. 412, 24 Pac. 1094.

[g] A city ordinance adopting an official map of the city in which a certain street is clearly marked out and defined through land owned by the city is sufficient evidence of the dedication of such street as a public highway, in the absence of a contrary showing, though it was not actually constructed and made ready for travel at the time.—People v. Beaudry, 91 Cal. 213, 27 Pac. 610.

§ 41. —— Maps or Plats, and Recognition Thereof.

[a] The owner of a city lot divided a portion of it into smaller lots, bounded at one end by a street, and leaving at the other an alleyway ten feet wide, upon which all the lots abutted, and conveyed said lots to different persons, including in each deed the right of way over the alley, which was a cul-de-sac eighty-seven feet long, and opening on a street. For about twenty years the alley was used by the owners of the lots and their employees, and persons visiting them. The alley was marked on the map of the city engineer, but not on the official map of the city. Held, that the evidence was not sufficient to establish an acceptance of a dedication, and consequently the alley was a private way, and not a public highway.—Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427.

§ 42. —— Compliance with Conditions.

[a] The resolution, pursuant to which plaintiff cemetery association conveyed a strip of land to defendant city, provided that the same be "granted for a public road and highway, on the condition that the fence be removed and reset on the line of the road, said work to be done at the expense of the city, and also that the street be graded at the city's expense." Defendant accepted the grant, removed the fence, and placed the street in a condition for travel, but no grading was done. Held, that defendant did not forfeit the grant because it did not grade the street when required to do so by plaintiff; but when it is apparent that defendant will not grade the street at its own expense, or at

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all, plaintiff may demand a reconveyance.—Los Angeles Cemetery Assn. v. City of Los Angeles, 95 Cal. 420, 30 Pac. 523.

§ 43. —— User by Public in General.

[a] The public use necessary to constitute an acceptance of a dedication must be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked, and the use by the public discontinued.—San Francisco v. Canavan, 42 Cal. 541.

[b] Acceptance of dedication is generally established by use by public of the land for the purpose to which it had been dedicated. Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land.—San Francisco v. Canavan, 42 Cal. 541.

[c] Use of land by public for purpose to which it was dedicated is sufficient to show an acceptance.—People v. Davidson, 79 Cal. 166, 21 Pac. 538; People v. O'Keefe, 79 Cal. 171, 21 Pac. 539; Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756.

[d] Casual public user of uninclosed land by temporary license of owner, the same after as before alleged dedication, is not acceptance.—Eureka v. Croghan, 81 Cal. 527, 22 Pac. 693.

[e] The use of land as a street by the public, for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient to perfect the dedication, without any specific action by the municipal authorities, either by resolution or by repairs or improvements.—Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[f] User by the public of a strip of land as a street for four years is sufficient to show acceptance of a previous offer to dedicate the land for street purposes.—Los Angeles Cemetery Assn. v. City of Los Angeles, 32 Pac. 240.

§ 44. —— Occasional Use.

[a] Where there was no evidence of any act of acceptance of the park by the city, the mere occasional use of a portion of the grounds for picnics and other pleasure purposes, being consistent with private ownership, which was in fact exercised over the tract, cannot establish an acceptance of the park as such by the public, against a finding of "no dedication."—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

§ 45. —— Improving and Repairing Property Dedicated.

[a] Act of supervisors in widening and grading street is sufficient acceptance of dedication.—Wolfskill v. Los Angeles, 86 Cal. 415, 24 Pac. 1094.

[b] Where a land owner petitioned county supervisors to declare a road over his land a highway, the facts that they did so, though without following the statutory requirements, and that the road was used and worked by the public for twenty-five years as a public highway, are sufficient to show an acceptance.—People v. Marin County, 103 Cal. 223, 37 Pac. 203.

§ 46. —— Acceptance or Use of Part of Property.

[a] User by public of part of width of dedicated street makes dedication complete at least to extent of such user.—Logan v. Rose, 88 Cal. 266, 26 Pac. 106.

D. REVOCATION AND ESTOPPEL.

GROUNDS, § 47.
REVOCATION BEFORE ACCEPTANCE, § 48.
—— EFFECT, § 49.
REVOCATION AFTER ACCEPTANCE, § 50.
ESTOPPEL TO CLAIM DEDICATED PROPERTY, § 51.
ESTOPPEL TO DENY DEDICATION, § 52.

§ 47. Grounds.

[a] Where a person dedicates land for a public highway, he cannot afterward reclaim the same by showing that he was induced to make such dedication by the promise of a neighbor to give him the use of other lands, and that he had ceased to use such lands.—McKenzie v. Gilmore, 33 Pac. 262.

§ 48. Revocation Before Acceptance.

[a] A statute dedicating to a city a portion of the navigable waters of the harbor for the purpose of deepening and improving them does not, per se, operate as a dedication or surrender. It contains an offer of dedication, which only becomes complete upon its acceptance by the city and the completion of the improvements. There being no acceptance, the state can withdraw the offer in whole or in part.—People v. Williams, 64 Cal. 498, 2 Pac. 393.

[b] Where the owner of land has platted a town, and has recorded the plat, a subsequent conveyance of a tract of the land embracing part of one of the streets revokes the dedication of such street, if made before the dedication has been accepted.—Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141.

[c] Owner may withdraw offer of dedication at any time before it accepted.—People v. Reed, 81 Cal. 78, 15 Am. St. Rep. 22-a, 22 Pac. 474.

[d] Dedication is revocable until accepted by donee.—Eureka v. Croghan, 81 Cal. 526, 22 Pac. 693.

[e] Offer to dedicate is revoked by sale of property before acceptance of dedication.—Phillips v. Day, 82 Cal. 29, 22 Pac. 976.

[f] Where the owner of land dedicated a part as an avenue, and it was accepted and used, not only by defendant, but by the pub-

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lic, a deed to plaintiff conveying said avenue could not operate as a revocation of the dedication.—Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

[g] Dedication of street is not revoked by failure to include it in deed in which its mention was not necessary.—People v. Hibernia etc. Soc., 84 Cal. 637, 24 Pac. 295.

[h] A deed of the entire block by the owner, describing it by metes and bounds, without reference to the alleged street delineated on the plat; and conveying it as part of the land sold, operates as a revocation of the offer to dedicate.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

[i] The drawing of side lines through a block in a plat of land, indicating that it may be intended for a street, but not designating it by name as such, is merely an offer to dedicate; and where the land so designated is not a continuation of any existing street, and has not been accepted or used by the public, and no one has acted on the offer by purchasing lots on the faith of the delineation of the land as a street, the owner may revoke the offer.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

[j] Where the dedication of a street or part of a street has not been accepted, or the property used by the public, it is purely a question of estoppel in pais whether it can be revoked or not. If no one has acted upon the offer in such a mode as to be injured by the revocation the owner may revoke the dedication, even though it be an actual dedication, and not a mere offer.—Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

[k] Offer to dedicate land may be revoked by the owner at any time before it has been accepted by the public.—People ex rel. Howland v. Dreher, 101 Cal. 271, 35 Pac. 867.

[l] Conveyance of tract of land by exterior boundaries show intention to revoke unaccepted offer of dedication.—Koshland v. Springs, 116 Cal. 696, 697, 48 Pac. 58.

[m] Offer to dedicate public highway is revoked by placing obstruction upon it.—Prescott v. Edwards, 117 Cal. 301, 59 Am. St. Rep. 186, 49 Pac. 178.

[n] The owner of a tract of land caused it to be surveyed and platted. Part of one of the streets marked on the plat was never opened or used as a public street, and for more than twenty years the owner had a barn and shed on it. Subsequently a city ordinance was passed directing the street commissioners to command possession of the part so occupied. Held that, if there had been a dedication, it was revoked before acceptance.—People v. Reed, 20 Pac. 708.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 489, 490; 15 Cent. Dig., cols. 2925-2928, § 79.

§ 49. —— Effect.

[a] The fact that, after the revocation of an offer to dedicate a street, the city attempted to accept the offer by delineating the street on the official city maps, is immaterial, since, after the revocation of the offer, the land became private property.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

§ 50. Revocation After Acceptance.

[a] Grantor cannot so sell or dispose of dedicated property as to alter or defeat dedication.—Breed v. Cunningham, 2 Cal. 361.

[b] Dedication cannot be revoked after acceptance and public user.—Brown v. Stark, 83 Cal. 642, 24 Pac. 162; People v. Sperry, 116 Cal. 595, 48 Pac. 723.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 489; 15 Cent. Dig., cols. 2922-2925, §§ 77, 78.

§ 51. Estoppel to Claim Dedicated Property.

[a] City is not estopped to claim public square was dedicated to public by unauthorized act of its officers by assessing it for taxation.—San Leandro v. Le Breton, 72 Cal. 177, 13 Pac. 405.

[b] General public are not estopped from claiming that land has been dedicated as a public street by the act or omission of the city assessor in assessing the land to the dedicator and his successors in interest.—Smith v. City of San Luis Obispo, 95 Cal. 453, 30 Pac. 591.

[c] A conveyance by a municipality included a portion of a street which was not being used as such; and the grantee and his successors took possession, and paid taxes thereon, and inclosed it with a substantial fence. Held, that the city was not equitably estopped from claiming the land as a street. City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439.

§ 52. Estoppel to Deny Dedication.

[a] As a dedication is a conclusion of fact to be drawn from the circumstances of each case, a corporation as well as an individual may be bound by its acts so as to be estopped from disputing or denying the fact of dedication, and no formal act of dedication passed by its proper officers is necessary.—Sussman v. County of San Luis Obispo, 126 Cal. 536, 59 Pac. 24.

[b] Purchaser of land filing maps in county recorder's office designating certain portions of land surveyed as streets is estopped to deny their dedication as such.—King v. Dugan, 88 Pac. 925.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2922-2925, § 77.

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E. EVIDENCE AND DETERMINATION.

PRESUMPTION AS TO DEDICATION, § 53.
PRESUMPTION AS TO ACCEPTANCE, § 54.
BURDEN OF PROOF, § 55.
ADMISSIBILITY OF EVIDENCE, § 56.
—— TO SHOW DONOR'S INTENTION, § 57.
WEIGHT AND SUFFICIENCY, § 58.
QUESTIONS FOR JURY, § 59.

§ 53. Presumption as to Dedication.

[a] Dedication will be inferred where the necessary elements are manifest—namely, an intention by the owner, clearly indicated by his words or acts, to dedicate to public use, and an acceptance by the public, as shown by its use for the purpose for which the dedication was made.—People v. Blake, 60 Cal. 497.

[b] Dedication of road as public highway is conclusion of fact to be drawn from all the circumstances of each particular case, and cannot be presumed without evidence of an unequivocal intention on the part of the owner to make the dedication.—Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746.

[c] In absence of any statute the common-law rule as to the presumption of a dedication of land as a public highway by adverse user applies in this state.—Schwardtle v. Placer Co., 108 Cal. 589, 41 Pac. 448.

[d] Where claim of public rests upon long-continued, adverse use, that use for the period of time for the acquisition of title to land by adverse possession establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive presumption of knowledge and acquiescence, and, at the same time, negatives the idea of a mere license.—Schwerdtle v. Placer Co., 108 Cal. 589, 41 Pac. 448.

[e] Dedication is presumed from long-continued use as road or highway.—Hartley v. Vermillion, 141 Cal. 349, 74 Pac. 987.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 475; 15 Cent. Dig., cols. 2928, 2929, § 80.

§ 54. Presumption as to Acceptance.

[a] Where a land owner files a map of a number of blocks owned by him, on which one block is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, actual acceptance is not requisite to complete the dedication, since acceptance will be presumed from the benefit arising from the dedication. Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; distinguishing People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474.

[b] An acceptance of an offer to dedicate will be presumed or implied in many cases; yet a finding of fact that there never was an acceptance will rarely be set aside by an appellate court, where the claim of acceptance is based upon presumption or implication alone.—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

Dedication of lands to a public use, acceptance, when inferable: 58 Am. Rep. 146, note. See, also, 13 Cyc. 475, 476; 15 Cent. Dig., cols. 2929, 2930, § 81.

§ 55. Burden of Proof.

[a] Burden of proof is on public authorities to show that land in possession of another has been dedicated as a street, to justify removal of buildings.—Tate v. Sacramento, 50 Cal. 242.

[b] Burden of proving dedication of public street is on person claiming it.—Oglesby v. Santa Barbara, 119 Cal. 116, 51 Pac. 181.

§ 56. Admissibility of Evidence.

[a] Where land was used in San Francisco as a cemetery, and was so marked upon the Van Ness map, and where the legislature subsequently authorized the removal of the dead bodies and the dedication of the land to such public use as the board might deem proper, and the board undertook to dedicate it as a park, held, that the map was not evidence tending to prove a dedication as a public park.—San Francisco v. Canavan, 42 Cal. 541.

[b] In an action against Sonoma county to recover land claimed by the county to have been dedicated to public use, the plaintiffs offered to prove that C. had been employed by the board of supervisors to look after the fences and keep them in repair, and was so engaged at the commencement of the action, and that, in performing this service, he was acting as the servant of the county, employed for that purpose. Held, that the evidence was admissible, as tending to establish the possession of the county.—Barry v. Sonoma County, 43 Cal. 217.

[c] Map made and recorded at request of former owner is admissible against his grantee on question of dedication.—Napa v. Howland, 87 Cal. 87, 25 Pac. 247.

[d] Map showing existence of public alley and street assessment for its improvement are admissible in evidence on the question of dedication, as tending to show general knowledge of the existence of the alley.—Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

[e] Evidence of an agreement between a railroad company and its grantor that part of the land conveyed should be used as a public highway is not inadmissible as contradictory of the instrument of conveyance, where it is not offered for such purpose, but to show the intention of the company to dedicate the road to the public.—People v. Eel River etc. R. Co., 98 Cal. 665, 33 Pac. 726.

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[f] Offer to dedicate may be shown by deeds of owners referring for description to map made by agent.—Koshland v. Spring, 116 Cal. 696, 48 Pac. 58.

[g] In an action to restrain defendant from entering upon plaintiff's land to open a highway by virtue of a clause in plaintiff's deed reserving a certain strip for a right of way for ditch and road purposes, evidence that the grantor of plaintiff's grantor had made a reservation similar to that in plaintiff's deed in the sale of land to witness, and evidence of what he had told witness concerning it, is incompetent to show dedication, where such witness bought his land a year before plaintiff's grantor made his purchase. Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24.

[h] While it is competent to prove the use made of the road, and the extent of the use or travel over the road, for the purpose of showing a dedication or adverse user of the road under a claim of right, it is not competent to prove such user by the declarations of third parties.—Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 472-474; 15 Cent. Dig., cols. 2130-2135, §§ 83, 84.

§ 57. —— To Show Donor's Intention.

[a] Court properly refused to allow the owner of the land to state whether she intended to dedicate any street when she sold the lots.—Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

§ 58. Weight and Sufficiency.

[a] Stronger proof of dedication is required in cases of roads in country than in cases of streets or lands in a town or city.—Harding v. Jasper, 14 Cal. 642.

[b] Dedication is a conclusion of fact to be drawn by the jury from the circumstances of each case. And the quantum and kind of evidence of the intention to dedicate depends somewhat on the peculiar circumstances of the country.—Harding v. Jasper, 14 Cal. 642.

[c] Stronger evidence is required to establish dedication of neighborhood or timber road than of a thoroughfare, and in case of a county road than of a street in a town or city. Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746.

[d] Finding herein that there had been no dedication was supported by the evidence.—Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47.

[e] Proof of dedication must be such as to clearly show owner's intent.—Latham v. Los Angeles, 87 Cal. 519, 25 Pac. 673.

[f] Where one holds land by a deed absolute, and sells part thereof with reference to a recorded plat with streets marked upon it, parol evidence that he took the land subject to a trust, but not showing the nature thereof, is insufficient to rebut the presumption that he had authority to thus dedicate the streets to the public.—Logan v. Rose, 88 Cal. 263, 26 Pac. 106.

[g] Where the complaint alleges and the court finds the alley dedicated extends along the entire rear or south line of plaintiff's lot, and there is a substantial conflict in the evidence as to whether the alley extended only from the street to the rear of the lot, or extended across the entire rear of the lot, and there is evidence sufficient to show that the alley in rear of the lot was fenced on the south side of the lot by the original owner of the land, and had been used as a passageway by the persons living along it, the finding will not be disturbed, although the testimony in the case is more than usually indefinite and unsatisfactory as to dates.—Currier v. Howes, 103 Cal. 431, 37 Pac. 521.

[h] Testimony of owner of land as to his intention not to dedicate it to public use is relevant, but not conclusive, evidence upon the subject of his actual purpose.—Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

[i] Evidence considered and held sufficient to support findings that street was not dedicated to the public.—People v. Sperry, 116 Cal. 594, 595, 48 Pac. 723.

[j] Sale including dedicated streets before their acceptance is evidence of intent to revoke offer of dedication.—Sacramento v. Clunie, 120 Cal. 31, 32, 52 Pac. 44.

[k] The dedication of a public street is a question of intent, and the acts of the owner of property are sufficient to prove a dedication only when they are evincive of such intent or are such as to estop him from denying that such was his intent.—City of Eureka v. McKay, 123 Cal. 666, 56 Pac. 439.

[l] Evidence showing that since the opening by adjoining owners of a strip used as a passageway, it was cultivated by the owners almost every year, that fruit and other trees were placed thereon by them, that taxes were paid by them to the city upon the land, that on an assessment map of another street the strip was shown to be private land, and not a street, and was assessed to the owners thereof, and that the strip had never been improved, graded, or accepted as a street by the public authorities, is wholly insufficient to support a finding that the strip was dedicated or abandoned to the public as a street. Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 476-484; 15 Cent. Dig., cols. 2935-2940, §§ 85-87.

§ 59. Questions for Jury.

[a] Dedication is question of fact to be drawn from circumstances of each particular case.—People v. Reed, 81 Cal. 77, 15 Am. St. Rep. 22-n, 22 Pac. 474.

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[b] Dedication is ultimate fact dependent upon establishment of other facts, and is to be found from the evidence presented to the court.—Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839.

[c] Dedication is a question of fact to be determined by a jury, or by the court sitting as such.—People ex rel. Howland v. Dreher, 101 Cal. 271, 35 Pac. 867.

[d] Whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case.—Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

[e] Whether owner has made offer of dedication of other streets than those by which lots are bounded is question of fact.—Koshland v. Springs, 116 Cal. 697, 698, 48 Pac. 58.

[f] The dedication in pais of a public park, or of land to any public use, can never be a matter of law. The owner's intention is the all-important element in creating a dedication, and is a question of fact; and a finding of "no dedication" cannot be disturbed where the evidence is conflicting, though the preponderance of the evidence may be in favor of the dedication.—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

[g] The record of a map, with the designation of streets and parks thereon, and the sale of lots by such map, whatever effect it may have upon the individual rights of the lot owners, cannot conclusively establish the dedication of a park designated thereon to public use; but, treating it as an offer of dedication thereof, a finding of "no dedication" will be sustained, where no public acceptance of the offer is established, and the evidence tends to show a revocation of the offer.—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 485; 15 Cent. Dig., cols. 2940-2943, §§ 88, 90.

II. OPERATION AND EFFECT.

IN GENERAL, § 60.
CONSTRUCTION OF DEDICATION AS TO USE, § 61.
PERSONS ENTITLED TO BENEFIT OF DEDICATION, § 62.
EXTENT OF DEDICATION, § 63.
TITLE ACQUIRED, § 64.
USE OF PROPERTY, § 65.
—— CHANGE OF USE, § 66.
ABANDONMENT OR NONUSER, § 67.

§ 60. In General.

[a] Land purchased by a county, on which is erected a hospital, as provided by Political Code, section 4046, subdivision 9, authorizing counties to build hospitals and "other public buildings," is dedicated to a public use, though, under the succeeding subdivision, the land may be sold; and, while owned by the county, the statute of limitations does not run in favor of one taking possession of it. Yolo County v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 459-461, 486-494, 500-503; 15 Cent. Dig., cols. 2943-2986, §§ 89-121.

§ 61. Construction of Dedication as to Use.

[a] In ejectment by a city for land claimed to have been dedicated as a levee and street, a finding that land was dedicated as "a public levee" is supported by evidence of dedication as a "public landing"; the word "levee," as applied to land such as that in question along a navigable stream, having the same meaning as "landing."—City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2959-2961, § 100.

§ 62. Persons Entitled to Benefit of Dedication.

[a] State has no proprietary interest in the streets of a city dedicated to the public use, and, when it grants a private corporation an easement over the same not common to the public, it merely grants, in its sovereign capacity, a franchise, and not a proprietary interest therein.—City and County of San Francisco v. Spring Valley Waterworks, 48 Cal. 493.

[b] A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of a city.—Smith v. City of San Luis Obispo, 95 Cal. 463, 34 Pac. 591.

[c] A street when dedicated becomes the property of the whole state, which by its legislature can deal with or dispose of it at its pleasure, and may revoke it in part or in whole.—City and County of San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482.

[d] Private corporation known as "Home for Inebriates" without any elements of public agency had no right to lot dedicated by San Francisco for a home for inebriates.—Home for Inebriates v. San Francisco, 119 Cal. 536, 51 Pac. 950.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2977, 2978, § 113.

§ 63. Extent of Dedication.

[a] Offer to dedicate street is construed to extend to whole block, as it is not presumed that owner intended to make cul de sac.—Eureka v. Armstrong, 83 Cal. 625, 22 Pac. 928; affirmed in (1890) 23 Pac. 1085.

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FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 488, 489; 15 Cent. Dig., cols. 2944-2947, §§ 91-95.

§ 64. Title Acquired.

[a] Dedication by a city of one of its water lots to the public, to be used as a free dock, is merely the grant of an easement; and the fee of the soil and the right of entry and possession remain in the city, and the public takes no estate.—City and County of San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

[b] Where a city lays out and dedicates public squares on the pueblo lands within its limits, and the dedication is ratified by an act of the legislature, and Congress afterward relinquishes to the city the title of the United States to the lands, for the uses and purposes mentioned in the ratifying act, the act of Congress confirms the dedication, and makes it operative on the legal title, as well as on such title as the city held prior to the act of Congress.—Hoadley v. City and County of San Francisco, 50 Cal. 265.

[c] Van Ness ordinance granted only such title to possessors as the city was permitted by Congress and the state to convey; and it did not operate as a contract of the city with the possessors of land reserved as a public square, and so create an obligation beyond legislative impairment. Compensation was not required to be made to adverse possessors of part of such square; nor could title be acquired thereto by adverse possession.—Holladay v. San Francisco, 124 Cal. 352, 57 Pac. 146.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 486, 487; 15 Cent. Dig., cols. 2948-2956, §§ 96, 97.

§ 65. Use of Property.

[a] Dedication of street to public use authorizes any ordinary use for street purposes such as street-cars.—Finch v. Riverside etc. Co., 87 Cal. 398.

[b] The dedication of a country highway along the shore of navigable waters does not carry with it the right to use it as a public landing place to discharge and receive freight and passengers.—California Nav. etc. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825.

§ 66. —— Change of Use.

[a] Legislature may, after dedication, change conditions upon which it was made from time to time.—Harter v. San Jose, 141 Cal. 663, 75 Pac. 344.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2959-2961, § 100.

§ 67. Abandonment or Nonuser.

[a] Recognition by legislature of prior official map not containing dedicated street is not a rejection or discontinuance of it.—People v. Hibernia etc. Soc., 84 Cal. 637, 638, 24 Pac. 295.

[b] Where a land owner files a map of a number of blocks owned by him, on which one block is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, failure of the public to use the dedicated land for the purpose intended does not impair the dedication, nor authorize the prior owner to resume possession.—Archer v. City of Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

[c] Grantees of lots may lose or surrender the easement created for them, and the public can also abandon or discontinue a highway after its dedication has become complete.—City and County of San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482.

[d] A city cannot abandon a street which has been dedicated to, and accepted by, the public, by adopting a map on which the street is not shown.—City of Eureka v. Gates, 137 Cal. 89, 69 Pac. 850.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 495-497; 15 Cent. Dig., cols. 2961-2968, §§ 103-106.

DEDUCTION OF BENEFITS.

From injuries caused by construction or maintenance of drains. See Drains, § 34.

From damages caused in exercise of power of eminent domain. See Eminent Domain, § 74.

DEEDS.

Include instruments in writing under seal in general, and, more particularly, conveyances of real property; nature, requisites, validity, incidents, construction, operation, and effect of such instruments; evidence relating thereto; delivery, acceptance, and recording or registration thereof; and estates or interests created, exceptions or reservations therefrom, and conditions or restrictions imposed thereon.

I. REQUISITES AND VALIDITY, §§ 1-67.
- A. Nature and Essentials of Conveyance in General, §§ 1-18.
- B. Form and Contents of Instruments, §§ 19-36.
- C. Execution, §§ 37-43.
- D. Delivery, §§ 44-52.
- E. Validity, §§ 53-67.

II. RECORDING AND REGISTRATION, §§ 68-72.

III. CONSTRUCTION AND OPERATION, §§ 73-150.
- A. General Rules of Construction, §§ 73-98.
- B. Property Conveyed, §§ 99-118.
- C. Estates and Interests Created, §§ 119-127.

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D. Exceptions and Reservations, §§ 128-131.

E. Conditions and Restrictions, §§ 132-148.

F. Loss or Relinquishment of Rights, §§ 149-150.

IV. PLEADING AND EVIDENCE, §§ 151-164.

Acknowledgment of deeds. See Acknowledgment.
Instruments constituting color of title sufficient to sustain title by adverse possession. See Adverse Possession, §§ 82-92.
Alteration of deeds. See Alteration of Instruments.
Assignments in writing. See Assignments.
Equitable actions to cancel deeds and grounds for such cancellation. See Cancellation of Instruments.
Grants of land for cemeteries. See Cemeteries, § 5.
Of cemeteries. See Cemeteries, § 7.
By corporations. See Corporations, §§ 368-372.
To corporations. See Corporations, § 364.
Effect of deed of land on title to crops. See Crops, § 8.
Dedication by deed. See Dedication, §§ 23-26.
By heirs and distributees. See Descent and Distribution, §§ 52, 53.
Creation of easement by deed. See Easements, § 13.
Delivery in escrow. See Escrows.
Estoppel by deed. See Estoppel, II.
Instruments operating as estoppel. See Estoppel, § 11.
As evidence. See Evidence, §§ 294-297, 324-330.
Records of, as evidence. See Evidence, § 309.
Admissibility of parol or extrinsic evidence to vary terms of. See Evidence, § 374.
As best evidence. See Evidence, §§ 170-172.
Exchange of property. See Exchange of Property.
Deeds to purchaser at execution sale. See Execution, §§ 165-177.
To purchasers at probate sales. See Executors and Administrators, § 452.
Deeding land previously conveyed as fraud. See Fraud, § 5.
Criminal prosecution for selling same land twice. See Fraud, § 59.
By debtors, in fraud of rights of creditors. See Fraudulent Conveyances.
Between guardian and ward. See Guardian and Ward, § 54.
To purchaser at guardian's sale. See Guardian and Ward, § 77.
Of homestead as abandonment of homestead right. See Homesteads, § 182.
Conveyance of homestead. See Homesteads, § 77.
Property deeded to wife as separate property. See Husband and Wife, § 61.
Of community property. See Husband and Wife, § 149.
Of married women's separate property. See Husband and Wife, §§ 94-98.
By husband and wife. See Husband and Wife, § 35.
Between husband and wife. See Husband and Wife, III.
Grants of Indian lands. See Indians, §§ 3, 4.
Of infants. See Infants, § 12.
Validity of deed executed in violation of injunction. See Injunction, § 141.
Capacity of insane persons to convey land. See Insane Persons, § 28.
Of joint property. See Joint Tenancy, § 6.
Priority between judgments and deeds. See Judgments, § 531.
To purchaser at judicial sale. See Judicial Sales, § 10.
Of timber. See Logs and Logging, § 1.
Mortgage deeds. See Mortgages.
To purchaser of land sold under power in mortgage. See Mortgages, § 171.
Of riparian rights. See Navigable Waters, § 28.
Between parent and child. See Parent and Child, § 8.
Partition by deed. See Partition, § 5.
Reformation of deeds in equity. See Reformation of Instruments.
Necessity and sufficiency of seal. See Seals.
Necessity and sufficiency of signature. See Signatures.
Tax deeds. See Taxation, §§ 181-195.
By tenants in common. See Tenancy in Common, § 25.
Conveyance in performance of contract to convey land. See Vendor and Purchaser, § 54 et seq.
Of water rights. See Waters and Watercourses, VI.
Revocation of will by deeding property included in it. See Wills, § 77.

I. REQUISITES AND VALIDITY.

A. Nature and Essentials of Conveyance in General, §§ 1-18.

B. Form and Contents of Instruments, §§ 19-36.

C. Executions, §§ 37-43.

D. Delivery, §§ 44-52.

E. Validity, §§ 53-67.

A. NATURE AND ESSENTIALS OF CONVEYANCE IN GENERAL.

NATURE OF CONVEYANCE, § 1.
PROPERTY SUBJECT TO CONVEYANCE, § 2.
CONVEYANCE DEFINED, § 3.
CONVEYANCE DISTINQUISHED FROM OTHER TRANSACTIONS—DEED OF EXECUTORY CONTRACT, § 4.
—— DISTINCTION BETWEEN SEALED AND UNSEALED INSTRUMENTS, § 5.
TIME OF TAKING EFFECT, § 6.
TITLE OR INTEREST OF GRANTOR—NECESSITY OF TITLE IN GRANTOR, § 7.
—— CONVEYANCE BY HEIR BEFORE DEATH OF ANCESTOR, § 8.
PARTIES, § 9.
—— NECESSITY FOR GRANTEES IN ESSE, § 10.
—— CAPACITY, § 11.
CONSIDERATION, § 12.
—— NECESSITY, § 13.
—— SUFFICIENCY AND ADEQUACY, IN GENERAL, § 14.
PARTICULAR MODES OF CONVEYANCE, § 15.
—— RELEASE, § 16.
—— ASSIGNMENT OF DEED, § 17.
—— QUITCLAIM, § 18.

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§ 1. Nature of Conveyance.

[a] A deed is not merely evidence of a gift or other grant, but is the gift or grant itself, and ipso facto operates to transfer the title of the property described to the grantee.—Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, judgment affirmed 66 Pac. 860.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cent. Dig., cols. 11-15, §§ 1-5.

§ 2. Property Subject to Conveyance.

[a] Thing granted must have actual or potential existence.—Mitchell v. Amador Canal etc. Co., 75 Cal. 488, 17 Pac. 246.

[b] The patentees of certain land, with their husbands, conveyed it, reserving a certain number of square miles, to be afterward located and selected by the grantors. The husband of one of the patentees gave a power of attorney to convey any portion of the lands, and under such power a conveyance was made, under which plaintiff in ejectment claimed title. No selection was made by the grantors nor by the husband, who gave the power of attorney. Held insufficient to show title or right to possession in plaintiff, as the power of attorney did not authorize the location and selection of the portion reserved to the grantors, and the conveyance of a tract of land which had not been located and selected, and which was greater in extent than that reserved, could not operate as a selection of any portion of the tract.—Butler v. Gosling, 130 Cal. 422, 62 Pac. 596.

FOR AUTHORITIES FROM OTHER STATES:

Transfer of property in another jurisdiction: 12 Am. Dec. 470, note. See, also, 13 Cyc. 528, 529; 16 Cent. Dig., cols. 20-21, §§ 10-12.

§ 3. Conveyance Defined.

[a] "Conveyance" defined.—In re McConnell, 74 Cal. 218, 15 Pac. 746.

§ 4. Conveyances Distinguished from Other Transactions—Deed or Executory Contract.

[a] An instrument setting forth that A "has this day sold" a piece of land to B for a sum of money then paid, and a further consideration agreed to be paid; and further providing that, on payment of said further agreed consideration, the said A "binds himself, his heirs, etc., to make a general warranty deed of said land free and clear from all persons claiming through or under him," held, to be an executory contract for a deed, and not a present conveyance.—Ellis v. Jeans, Cal. 409.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 521; 16 Cent. Dig., cols. 15-19, § 6.

§ 5. —— Distinction Between Sealed and Unsealed Instruments.

[a] The difference between instruments sealed and unsealed is, at this day, a mere unmeaning and arbitrary distinction made by technical law, unsustained by reason.—Ortman v. Dixon, 13 Cal. 33.

§ 6. Time of Taking Effect.

[a] A conveyance of a freehold to commence in futuro is void.—Hawes v. Stebbins, 49 Cal. 369.

FOR AUTHORITIES FROM OTHER STATES:

Deeds to take effect after grantor's death: 49 Am. St. Rep. 219, note. See, also, 16 Cent. Dig., cols, 15, § 5; cols. 23-25, § 16.

§ 7. Title or Interest of Grantor—Necessity of Title in Grantor.

[a] Bare right of possession, without claim or color of title, cannot be transferred by deed, nor otherwise than by the former possessor yielding up or abandoning the possession and permitting a new possession to be taken by another.—Daubenbiss v. White, 31 Pac. 360.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 527, 528; 16 Cent. Dig., cols. 21-25, §§ 13-18.

§ 8. —— Conveyance by Heir Before Death of Ancestor.

[a] Conveyance by heir-apparent made before death of ancestor does not convey legal title.—Ryder, Estate of, 119 Cal. 370, 74 Pac. 993.

§ 9. Parties.

[a] Grantee is prerequisite to valid deed.—Wilson v. White, 84 Cal. 242, 24 Pac. 114.

[b] Deed held to have passed no title because not naming grantee capable of taking. Rixford v. Ziegler, 88 Pac. 1092.

FOR AUTHORITIES FROM OTHER STATES:

Deeds to persons not in being: 84 Am. St. Rep. 236, note. See, also, 13 Cyc. 527, 528; 16 Cent. Dig., cols. 25, 26, §§ 19-22.

§ 10. —— Necessity for Grantees in Esse.

[a] Deed is void for want of competent parties where, at the time of the sale, there was no person, natural or artificial, in esse capable of taking it.—Phelan v. San Francisco, 6 Cal. 531.

[b] A deed to a dead man and his heirs is a nullity, for "heirs" is not a word of purchase, but limits and defines what estate passes to the grantee.—Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

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[c] A deed to J. C. B., when there is no such person in existence, does not transfer title of the property to any one.—Barr v. Schroeder, 32 Cal. 609.

§ 11. —— Capacity.

[a] It is essential to validity of deed that there should be legal capacity in the grantor to convey and in the grantee to receive; and, if either be wanting, the instrument is invalid.—Suñol v. Hepburn, 1 Cal. 254.

[b] To set aside a deed on the ground of insanity of the grantor, it is sufficient to prove that he was incapacitated from a rational care of his property by reason of mental delusion at the time of its execution. Crowther v. Rowlandson, 27 Cal. 376.

[c] Imposition or undue influence will be inferred when consideration of deed from one in great weakness of mind is grossly inadequate.—Moore v. Moore, 56 Cal. 89.

[d] A party under an insane delusion may execute an instrument if done with understanding, and not as result of insanity.—Kidder v. Stevens, 60 Cal. 414.

[e] Deed of gift of one's entire property made while in condition of great mental weakness without understanding nature and effect of his act will be set aside.—Richards v. Donner, 72 Cal. 210, 13 Pac. 584.

[f] Where the court finds that the grantor of a deed was, at the time, of unsound mind, and incapable of making a deed, and that the deed was without consideration, a judgment for cancellation will be sustained, though the court also found that there was no unfair advantage taken, or undue influence used.—Maggini v. Pezzoni, 76 Cal. 631, 18 Pac. 687.

[g] Facts examined and held to sustain judgment canceling deeds on ground of mental incapacity and undue influence.—Moore v. Moore, 81 Cal. 195, 22 Pac. 589.

[h] A person of perfect mental capacity, acting freely and voluntarily, who is sick with mortal illness, is as competent to make a voluntary conveyance of his property as when in perfect health, even though such conveyance might seem unreasonable, unjust, and unnatural.—Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

[i] After executing the conveyance, the grantor engaged in business for eleven years before he was committed to an asylum. During such period he was rash in some of his speculations, erratic in conduct, and irascible in temper. Held not sufficient to establish the insanity of the grantor at the time of the conveyance.—Falk v. Wittram, 120 Cal. 479, 52 Pac. 707.

FOR AUTHORITIES FROM OTHER STATES:

19 L. R. A. 489, 44 L. R. A. 48, 489, notes. See, also, 13 Cyc. 527.

§ 12. Consideration.

[a] Deed imports consideration.—McDonald v. McCoy, 121 Cal. 70, 53 Pac. 421.

FOR AUTHORITIES FROM OTHER STATES:

Consideration necessary to sustain covenant to stand seised: 8 Am. Dec. 366, note.

Consideration of deed, gift or purchase: 65 Am. St. Rep. 798, note.

Voluntary deeds, what are and effect of: 14 Am. St. Rep. 739, note. See, also, 13 Cyc. 529-536; 16 Cent. Dig., cols. 26-42, §§ 23-38.

§ 13. —— Necessity.

[a] Nothing passes under a deed without consideration, the grantor having previously executed and delivered a deed of the property to another.—Stephenson v. Deuel, 125 Cal. 656, 28 Am. St. Rep. 151-n, 58 Pac. 258.

[b] Under the express provisions of Civil Code, section 1040, a voluntary transfer of property is valid, though there is no consideration.—Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 529; 16 Cent. Dig., cols. 26-29, §§ 23-25.

§ 14. —— Sufficiency and Adequacy in General.

[a] Term "valuable consideration," as used in the twenty-sixth section of the conveyancing act, means a pecuniary consideration, or its equivalent, as distinguished from a good consideration, and has no reference to the adequacy of the price to the value of the property conveyed.—Clark v. Troy, 20 Cal. 219.

[b] P, while a visitor in the house of D's mother, received a severe paralytic stroke, and, while suffering from it, and believing that he was in imminent danger of death, deeded his property to D on the representation of W, an intimate friend of D's family, that the deed would be the same as a will, and more convenient. After his recovery, P requested a reconveyance, tendering a sum to cover expenses, and D refused. There was no valuable consideration. Held, that P was entitled to the property.—Richards v. Donner, 72 Cal. 207, 13 Pac. 584.

[c] Finding that the grantees named in a deed paid no consideration for the transfer of the premises is not sustained by the evidence if it appears that they paid for it by becoming sureties on a note for more than one thousand dollars. This is a valuable consideration, which is paid by executing the note, whether the grantees paid the money or not.—Grigsby v. Shwarz, 82 Cal. 278, 22 Pac. 1041.

[d] A promise by a grantee of land to pay off a mortgage upon the land, made by the

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grantor to a third party, is a valuable consideration for the conveyance.—Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

[e] Love and affection is a sufficient consideration for a deed from a husband to his wife.—Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

[f] Love and affection is a good consideration for a conveyance of land by a husband to his wife, and will support the conveyance.—Springer v. Springer, 132 Cal. xviii, 64 Pac. 470.

[g] A deed conveying land to a city, reciting that the grantors and their assigns reserve "free access or right of way to or from any lots adjoining either line of" a certain street "to and over any wharf which may be upon said street," is supported by a valuable consideration.—Aden v. City of Vallejo, 139 Cal. 165, 72 Pac. 905.

[h] In the absence of any imputation of fraud, the amount of the consideration for a deed is immaterial.—Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471.

[i] A deed executed in consideration of the grantee's promise to furnish support, etc., to the grantor for life, held based on a sufficient consideration.—Norris v. Lilly, 147 Cal. 754, 82 Pac. 425.

[j] Facts held to show consideration for a deed.—Clint v. Eureka Crude Oil Co. (Cal App.), 86 Pac. 817.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 533; 16 Cent. Dig., cols. 29-41, §§ 26-37.

§ 15. Particular Modes of Conveyance.

[a] In United States conveyances by feoffment, fine, or common recovery are not in use, and no greater effect is given to a grant or a conveyance, by bargain and sale, or lease and release, unaccompanied with covenants of warranty, than at the common law under the statute of uses.—Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 522-525; 16 Cent. Dig., cols 42-51, §§ 39-49.

§ 16. —— Release.

[a] Unless there be a prior estate and possession in a releasee, a release cannot take effect.—Branham v. City of San Jose, 24 Cal. 585.

[b] The words in a deed, "grant, bargain, sell, and convey," operate, not merely to release, but to transfer, any interest which the grantor had in the granted premises, at the date of the deed.—Muller v. Boggs, 25 Cal. 175.

[c] Covenant to give up all right and title to second story of a building and stairway operates as a conveyance.—Thompson v. McKay, 41 Cal. 221.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 525; 16 Cent. Dig., cols. 46, 47, §§ 43, 44.

§ 17. —— Assignment of Deed.

[a] Assignment of a deed does not convey title.—Dupont v. Wetherman, 10 Cal. 354, 70 Am. Dec. 725.

§ 18. —— Quitclaim.

[a] Conveyance or right, title and interest of grantor only amounts to a quitclaim.—Gee v. Moore, 14 Cal. 472.

[b] The operative words of release in a simple quitclaim deed are "remise, release, and quitclaim." Where the words "bargain, sell, and quitclaim" are employed they operate not merely to release, but to transfer any interest which the grantor possesses at the execution of the deed.—Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

[c] Words "release and forever quitclaim" are sufficient to constitute a quitclaim deed. Wholey v. Cavanaugh, 88 Cal. 135, 25 Pac. 1112.

[d] Effect of quitclaim as conveyance is not destroyed by insertion of covenant of further assurance.—Wholey v. Cavanaugh, 88 Cal. 135, 25 Pac. 1112.

FOR AUTHORITIES FROM OTHER STATES:

Quitclaim deeds, what are and their effect: 105 Am. St. Rep. 854-863, note. See, also, 13 Cyc. 525; 16 Cent. Dig., cols. 50, 51, § 49.

B. FORM AND CONTENTS OF INSTRUMENTS.

NECESSITY THAT INSTRUMENT BE IN WRITING, § 19.
SUFFICIENCY OF WRITING, IN GENERAL, § 20.
—— OPERATIVE WORDS OF CONVEYANCE, § 21.
—— RECITAL OF CONSIDERATION, § 22.
—— CORRECTION OF DEED BY SUBSEQUENT INSTRUMENT, § 23.
FORM AND PARTS OF INSTRUMENT, § 24.
DESIGNATION AND DESCRIPTION OF PARTIES—BY FICTITIOUS NAMES, § 25.
—— GRANTORS, § 26.
—— GRANTEES, § 27.
DESCRIPTION OF PROPERTY—SUFFICIENCY, IN GENERAL, § 28.
—— "BLOCK" DEFINED, § 29.
—— GENERAL AND SPECIFIC DESCRIPTION OF SAME TRACT, § 30.
—— OMISSION OF RANGE, TOWNSHIP, COUNTY OR STATE, § 31.
—— CONVEYANCE OF PART OF TRACT, § 32.
DESIGNATION OF PROPERTY BY NAME OF TRACT, § 33.
—— REFERENCE TO MAPS OR TRACTS, § 34.
—— REFERENCE TO OTHER INSTRUMENTS OR RECORDS, § 35.
—— ERRONEOUS DESCRIPTION, § 36.

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all, plaintiff may demand a reconveyance.—Los Angeles Cemetery Assn. v. City of Los Angeles, 95 Cal. 420, 30 Pac. 523.

§ 43. —— User by Public in General.

[a] The public use necessary to constitute an acceptance of a dedication must be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked, and the use by the public discontinued.—San Francisco v. Canavan, 42 Cal. 541.

[b] Acceptance of dedication is generally established by use by public of the land for the purpose to which it had been dedicated. Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land.—San Francisco v. Canavan, 42 Cal. 541.

[c] Use of land by public for purpose to which it was dedicated is sufficient to show an acceptance.—People v. Davidson, 79 Cal. 166, 21 Pac. 538; People v. O'Keefe, 79 Cal. 171, 21 Pac. 539; Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756.

[d] Casual public user of uninclosed land by temporary license of owner, the same after as before alleged dedication, is not acceptance.—Eureka v. Croghan, 81 Cal. 527, 22 Pac. 693.

[e] The use of land as a street by the public, for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient to perfect the dedication, without any specific action by the municipal authorities, either by resolution or by repairs or improvements.—Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[f] User by the public of a strip of land as a street for four years is sufficient to show acceptance of a previous offer to dedicate the land for street purposes.—Los Angeles Cemetery Assn. v. City of Los Angeles, 32 Pac. 240.

§ 44. —— Occasional Use.

[a] Where there was no evidence of any act of acceptance of the park by the city, the mere occasional use of a portion of the grounds for picnics and other pleasure purposes, being consistent with private ownership, which was in fact exercised over the tract, cannot establish an acceptance of the park as such by the public, against a finding of "no dedication."—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

§ 45. —— Improving and Repairing Property Dedicated.

[a] Act of supervisors in widening and grading street is sufficient acceptance of dedication.—Wolfskill v. Los Angeles, 86 Cal. 415, 24 Pac. 1094.

[b] Where a land owner petitioned county supervisors to declare a road over his land a highway, the facts that they did so, though without following the statutory requirements, and that the road was used and worked by the public for twenty-five years as a public highway, are sufficient to show an acceptance.—People v. Marin County, 103 Cal. 223, 37 Pac. 203.

§ 46. —— Acceptance or Use of Part of Property.

[a] User by public of part of width of dedicated street makes dedication complete at least to extent of such user.—Logan v. Rose, 88 Cal. 266, 26 Pac. 106.

D. REVOCATION AND ESTOPPEL.

GROUNDS, § 47.
REVOCATION BEFORE ACCEPTANCE, § 48.
—— EFFECT, § 49.
REVOCATION AFTER ACCEPTANCE, § 50.
ESTOPPEL TO CLAIM DEDICATED PROPERTY, § 51.
ESTOPPEL TO DENY DEDICATION, § 52.

§ 47. Grounds.

[a] Where a person dedicates land for a public highway, he cannot afterward reclaim the same by showing that he was induced to make such dedication by the promise of a neighbor to give him the use of other lands, and that he had ceased to use such lands.—McKenzie v. Gilmore, 33 Pac. 262.

§ 48. Revocation Before Acceptance.

[a] A statute dedicating to a city a portion of the navigable waters of the harbor for the purpose of deepening and improving them does not, per se, operate as a dedication or surrender. It contains an offer of dedication, which only becomes complete upon its acceptance by the city and the completion of the improvements. There being no acceptance, the state can withdraw the offer in whole or in part.—People v. Williams, 64 Cal. 498, 2 Pac. 393.

[b] Where the owner of land has platted a town, and has recorded the plat, a subsequent conveyance of a tract of the land embracing part of one of the streets revokes the dedication of such street, if made before the dedication has been accepted.—Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141.

[c] Owner may withdraw offer of dedication at any time before it accepted.—People v. Reed, 81 Cal. 78, 15 Am. St. Rep. 22-n, 22 Pac. 474.

[d] Dedication is revocable until accepted by donee.—Eureka v. Croghan, 81 Cal. 526, 22 Pac. 693.

[e] Offer to dedicate is revoked by sale of property before acceptance of dedication.—Phillips v. Day, 82 Cal. 29, 22 Pac. 976.

[f] Where the owner of land dedicated a part as an avenue, and it was accepted and used, not only by defendant, but by the pub-

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lic, a deed to plaintiff conveying said avenue could not operate as a revocation of the dedication.—Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

[g] Dedication of street is not revoked by failure to include it in deed in which its mention was not necessary.—People v. Hibernia etc. Soc., 84 Cal. 637, 24 Pac. 295.

[h] A deed of the entire block by the owner, describing it by metes and bounds, without reference to the alleged street delineated on the plat; and conveying it as part of the land sold, operates as a revocation of the offer to dedicate.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

[i] The drawing of side lines through a block in a plat of land, indicating that it may be intended for a street, but not designating it by name as such, is merely an offer to dedicate; and where the land so designated is not a continuation of any existing street, and has not been accepted or used by the public, and no one has acted on the offer by purchasing lots on the faith of the delineation of the land as a street, the owner may revoke the offer.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

[j] Where the dedication of a street or part of a street has not been accepted, or the property used by the public, it is purely a question of estoppel in pais whether it can be revoked or not. If no one has acted upon the offer in such a mode as to be injured by the revocation the owner may revoke the dedication, even though it be an actual dedication, and not a mere offer.—Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

[k] Offer to dedicate land may be revoked by the owner at any time before it has been accepted by the public.—People ex rel. Howland v. Dreher, 101 Cal. 271, 35 Pac. 867.

[l] Conveyance of tract of land by exterior boundaries show intention to revoke unaccepted offer of dedication.—Koshland v. Springs, 116 Cal. 696, 697, 48 Pac. 58.

[m] Offer to dedicate public highway is revoked by placing obstruction upon it.—Prescott v. Edwards, 117 Cal. 301, 59 Am. St. Rep. 186, 49 Pac. 178.

[n] The owner of a tract of land caused it to be surveyed and platted. Part of one of the streets marked on the plat was never opened or used as a public street, and for more than twenty years the owner had a barn and shed on it. Subsequently a city ordinance was passed directing the street commissioners to command possession of the part so occupied. Held that, if there had been a dedication, it was revoked before acceptance.—People v. Reed, 20 Pac. 708.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 489, 490; 15 Cent. Dig., cols. 2925-2928, § 79.

§ 49. —— Effect.

[a] The fact that, after the revocation of an offer to dedicate a street, the city attempted to accept the offer by delineating the street on the official city maps, is immaterial, since, after the revocation of the offer, the land became private property.—Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961.

§ 50. Revocation After Acceptance.

[a] Grantor cannot so sell or dispose of dedicated property as to alter or defeat dedication.—Breed v. Cunningham, 2 Cal. 361.

[b] Dedication cannot be revoked after acceptance and public user.—Brown v. Stark, 83 Cal. 642, 24 Pac. 162; People v. Sperry, 116 Cal. 595, 48 Pac. 723.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 489; 15 Cent. Dig., cols. 2922-2925, §§ 77, 78.

§ 51. Estoppel to Claim Dedicated Property.

[a] City is not estopped to claim public square was dedicated to public by unauthorized act of its officers by assessing it for taxation.—San Leandro v. Le Breton, 72 Cal. 177, 13 Pac. 405.

[b] General public are not estopped from claiming that land has been dedicated as a public street by the act or omission of the city assessor in assessing the land to the dedicator and his successors in interest.—Smith v. City of San Luis Obispo, 95 Cal. 453, 30 Pac. 591.

[c] A conveyance by a municipality included a portion of a street which was not being used as such; and the grantee and his successors took possession, and paid taxes thereon, and inclosed it with a substantial fence. Held, that the city was not equitably estopped from claiming the land as a street. City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439.

§ 52. Estoppel to Deny Dedication.

[a] As a dedication is a conclusion of fact to be drawn from the circumstances of each case, a corporation as well as an individual may be bound by its acts so as to be estopped from disputing or denying the fact of dedication, and no formal act of dedication passed by its proper officers is necessary.—Sussman v. County of San Luis Obispo, 126 Cal. 536, 59 Pac. 24.

[b] Purchaser of land filing maps in county recorder's office designating certain portions of land surveyed as streets is estopped to deny their dedication as such.—King v. Dugan, 88 Pac. 925.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cent. Dig., cols. 2922-2925, § 77.

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E. EVIDENCE AND DETERMINATION.

PRESUMPTION AS TO DEDICATION, § 53.
PRESUMPTION AS TO ACCEPTANCE, § 54.
BURDEN OF PROOF, § 55.
ADMISSIBILITY OF EVIDENCE, § 56.
—— TO SHOW DONOR'S INTENTION, § 57.
WEIGHT AND SUFFICIENCY, § 58.
QUESTIONS FOR JURY, § 59.

§ 53. Presumption as to Dedication.

[a] Dedication will be inferred where the necessary elements are manifest—namely, an intention by the owner, clearly indicated by his words or acts, to dedicate to public use, and an acceptance by the public, as shown by its use for the purpose for which the dedication was made.—People v. Blake, 60 Cal. 497.

[b] Dedication of road as public highway is conclusion of fact to be drawn from all the circumstances of each particular case, and cannot be presumed without evidence of an unequivocal intention on the part of the owner to make the dedication.—Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746.

[c] In absence of any statute the common-law rule as to the presumption of a dedication of land as a public highway by adverse user applies in this state.—Schwardtle v. Placer Co., 108 Cal. 589, 41 Pac. 448.

[d] Where claim of public rests upon long-continued, adverse use, that use for the period of time for the acquisition of title to land by adverse possession establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive presumption of knowledge and acquiescence, and, at the same time, negatives the idea of a mere license.—Schwerdtle v. Placer Co., 108 Cal. 589, 41 Pac. 448.

[e] Dedication is presumed from long-continued use as road or highway.—Hartley v. Vermillion, 141 Cal. 349, 74 Pac. 987.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 475; 15 Cent. Dig., cols. 2928, 2929, § 80.

§ 54. Presumption as to Acceptance.

[a] Where a land owner files a map of a number of blocks owned by him, on which one block is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, actual acceptance is not requisite to complete the dedication, since acceptance will be presumed from the benefit arising from the dedication. Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; distinguishing People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474.

[b] An acceptance of an offer to dedicate will be presumed or implied in many cases; yet a finding of fact that there never was an acceptance will rarely be set aside by an appellate court, where the claim of acceptance is based upon presumption or implication alone.—City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

Dedication of lands to a public use, acceptance, when inferable: 58 Am. Rep. 146, note. See, also, 13 Cyc. 475, 476; 15 Cent. Dig., cols. 2929, 2930, § 81.

§ 55. Burden of Proof.

[a] Burden of proof is on public authorities to show that land in possession of another has been dedicated as a street, to justify removal of buildings.—Tate v. Sacramento, 50 Cal. 242.

[b] Burden of proving dedication of public street is on person claiming it.—Oglesby v. Santa Barbara, 119 Cal. 116, 51 Pac. 181.

§ 56. Admissibility of Evidence.

[a] Where land was used in San Francisco as a cemetery, and was so marked upon the Van Ness map, and where the legislature subsequently authorized the removal of the dead bodies and the dedication of the land to such public use as the board might deem proper, and the board undertook to dedicate it as a park, held, that the map was not evidence tending to prove a dedication as a public park.—San Francisco v. Canavan, 42 Cal. 541.

[b] In an action against Sonoma county to recover land claimed by the county to have been dedicated to public use, the plaintiffs offered to prove that C. had been employed by the board of supervisors to look after the fences and keep them in repair, and was so engaged at the commencement of the action, and that, in performing this service, he was acting as the servant of the county, employed for that purpose. Held, that the evidence was admissible, as tending to establish the possession of the county.—Barry v. Sonoma County, 43 Cal. 217.

[c] Map made and recorded at request of former owner is admissible against his grantee on question of dedication.—Napa v. Howland, 87 Cal. 87, 25 Pac. 247.

[d] Map showing existence of public alley and street assessment for its improvement are admissible in evidence on the question of dedication, as tending to show general knowledge of the existence of the alley.—Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

[e] Evidence of an agreement between a railroad company and its grantor that part of the land conveyed should be used as a public highway is not inadmissible as contradictory of the instrument of conveyance, where it is not offered for such purpose, but to show the intention of the company to dedicate the road to the public.—People v. Eel River etc. R. Co., 98 Cal. 665, 33 Pac. 725.

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§ 33. —— Designation of Property by Name of Tract.

[a] In the description of the land conveyed by deed, designation of the tract by a particular name or number is sufficient; and, if it can be rendered certain by extrinsic evidence, this is as good a description as one by metes and bounds.—Stanley v. Green, 12 Cal. 148.

[b] A deed conveying a certain quantity of land, lying between certain rivers, "containing, more or less, one square mile of land, in the place known as Rincon de los Cameros, commencing at the wagon road, and ending at the point of the hill on the east," is not void for uncertainty of the description, where the term "Rincon de los Cameros" designates a strip of land embraced between the two streams, which formed two sides of a triangle, and the road, which sufficiently indicated the third side.—Stanley v. Green, 12 Cal. 148.

[c] Where the description was that "certain tract or parcel of land situated in said county of Napa, consisting of a pre-emption claim of one hundred and sixty acres, and commonly known as the 'Soda Springs,' and embracing the said springs, and the improvements thereunto belonging, and being about five miles from Napa City, in a northerly direction, together with all and singular the tenements," etc., held, to be prima facie sufficient.—Whitney v. Buckman, 13 Cal. 536.

[d] A deed reciting the grantor as the owner of a certain rancho, and describing the land as "the land between the creek of the P. N. and the creek of the A., without embracing my said rancho, as shown by the plat accompanying," is not invalid for defective description of the premises. Havens v. Dale, 18 Cal. 359.

[e] Description by name is sufficient if boundaries so known are well defined.—Banks v. Mareno, 39 Cal. 239.

[f] A description in a deed as follows: "All my right, title, and interest in and to a parcel of land situate in the town of San Francisco, being block No. 9, the same on which I now reside. The part thus donated commences at the northeast corner of said block running twenty-five varas west from said corner; thence back one hundred varas,"—is a sufficient description.—De Levillain v. Evans, 39 Cal. 120.

[g] A tract of land having a well-known name may be described thereby in a deed. Haley v. Amestoy, 44 Cal. 132.

[h] A quitclaim deed of "all my right, title, and interest in Sacramento city, upper California, consisting of town lots and buildings thereupon," passes the grantor's interest in his lots at Sacramento.—Frey v. Clifford, 44 Cal. 335.

[i] Description of land by name is, or may be, sufficient if boundaries are known and well defined.—Burnett v. Kullark, 76 Cal. 536, 18 Pac. 401.

[j] When property has a descriptive name it may be conveyed by that name, and defects in other parts of description may be disregarded.—Murray v. Tulare Irr. Co., 120 Cal. 315, 49 Pac. 563, 52 Pac. 586.

[k] Conveyance of "Watson ditch" sufficiently describes property, there being but one ditch in the county generally known and spoken of as "Watson ditch."—Murray v. Tulare Irr. Co., 120 Cal. 315, 49 Pac. 563, 52 Pac. 586.

§ 34. —— Reference to Maps or Plats.

[a] A deed describing the premises conveyed as a lot of land one hundred yards square, bounded on three sides by certain streets on the plat of a city, and on the other by certain unsurveyed land, is not void for insufficient description.—Garwood v. Hastings, 38 Cal. 216.

[b] Where a deed described town lands as "lot 62, containing 50 52/100 acres," numbered and marked on the official map or plan made by a named person of outside lands of the town, it was not void, for uncertainty, as a matter of law.—Thompson v. Thompson, 52 Cal. 154.

[c] Where a deed refers to a map as "the official map" for a more specific description of the property conveyed, the map which is the official map at the date of the deed must be taken as the map referred to by the grantor, and such map must be considered as constituting a portion of the deed. Penry v. Richards, 52 Cal. 672.

[d] If town has declared by ordinance what map is the official map of the same, deeds of property which refer to the official map, and are made after such declaration, refer to such map.—Penry v. Richards, 52 Cal. 496.

[e] A map of a tract of land having lines drawn upon it marking the boundaries and the natural objects upon its surface delineated, which is referred to in a deed containing a description of the premises therein conveyed, is to be regarded as giving the true description of the land conveyed as much as if it was expressly recited and marked down in the deed itself.—Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; Vance v. Fore, 24 Cal. 435.

[f] Where deed refers to map or other instrument, latter is regarded as part of deed. Cadwalader v. Nash, 73 Cal. 45, 14 Pac. 385.

[g] Deed describing property by reference to map must clearly identify map referred to. Cadwalader v. Nash, 73 Cal. 45, 14 Pac. 385.

[h] Deed is void for uncertainty when reference to it is equally applicable to two different maps.—Cadwalader v. Nash, 73 Cal. 47, 48, 14 Pac. 385.

[i] Where deed refers to map officially filed, map need not be recorded with it.—Napa v. Easterby, 76 Cal. 227, 18 Pac. 253.

[j] It is only where map can be used in aid of description that it is considered part

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of deed.—Cleveland v. Choate, 77 Cal. 78, 18 Pac. 875.

[k] In a suit to quiet title, a deed was offered in evidence in which the land was "bounded and particularly described as follows, to wit: On the N., 240 feet on Mill street; on the E., 110 feet on a 30-foot alley; on the S., 240 feet on an alley; on the W., 110 feet by a 30-foot alley; and being all of lots Nos. 1, 2, 3, and 4, all of block No. 8, as per plat of Johnson & Murry's addition to the town of P.; being all of said block No. 8 in said addition to P., Tulare county, Cal." Counsel offering to follow it with a plat of the addition referred to, held, that an objection to the deed, because it described nothing, was properly overruled.—Redd v. Murry, 95 Cal. 48, 24 Pac. 841.

[l] Where a deed conveyed land as a numbered block, as marked on the plat of the grantor's addition to a town, such plat, although on its face furnishing no data for locating the particular block in question, is sufficiently definite, if, with the aid of parol evidence, the land can be identified from it. Redd v. Murry, 95 Cal. 48, 30 Pac. 132.

[m] There is no objection in a deed to the phrase, "the south one-fourth," or "the south ten acres," of a government subdivision.—McCartney v. Dennison, 101 Cal. 252, 35 Pac. 766.

[n] When a tract of land has been subdivided into blocks or lots, and a map thereof made on which the blocks or lots are designated by numbers, a description of the blocks or lots in a deed by the numbers so designated is sufficient, provided the map can be produced and identified.—McCullough v. Olds, 108 Cal. 529, 41 Pac. 420.

[o] A description of the property conveyed by a deed as "lots numbers 3 and 4, containing ten acres each, in Reiner's subdivision of lot 1103, ... said subdivision recorded in book 1, page 184, records of San Diego county," when taken in connection with the map referred to, is sufficient.—McCullough v. Olds, 108 Cal. 529, 41 Pac. 420.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 548; 16 Cent. Dig., cols. 100-103, §§ 81-83.

§ 35. —— Reference to Other Instruments or Records.

[a] Although the parties to a deed may describe the property therein conveyed by a reference therein to another deed or map which contains a description, yet the deed and the instrument referred to, when taken together, must be as certain in respect to the description as a description contained in the deed itself.—Caldwell v. Centter, 30 Cal. 539, 89 Am. Dec. 131.

[b] If a conveyance of a large number of lots in a city states about the number of lots sold, and refers to another deed, given to the grantor, for a particular description of the lots, giving the date of such other deed and the names of the parties thereto, it is a sufficient identification of the deed referred to to incorporate the particular description therein contained into the deed given; and the description in the deed given is not vitiated by the fact that the deed referred to is also falsely stated to be recorded in the county where the property lies.—Saunders v. Schmaelzle, 49 Cal. 59.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 548; 16 Cent. Dig., cols. 103-105, § 84.

§ 36. —— Erroneous Description.

[a] If, by rejecting that part of the description which is false, enough remains to locate the land, the deed is effective.—Irving v. Cunningham, 66 Cal. 15, 14 Pac. 766.

[b] It is not error to refuse to nonsuit plaintiff because his deed by mistake recites that the land is in the southeast one-fourth, instead of the southwest one-quarter, of the quarter section named, where the land intended can be identified by monuments.—Helm v. Wilson, 76 Cal. 476, 18 Pac. 604.

[c] Where, in a deed, the land is fully and correctly described, except the number of the township is given as "45" instead of "4," and the land can be identified by the rest of the description, such mistake will not vitiate the conveyance.—Borchard v. Eastwood, 133 Cal. xix, 65 Pac. 1047.

C. EXECUTION.

SUFFICIENCY, IN GENERAL, § 37.
SIGNATURE OR SUBSCRIPTION OF GRANTOR, § 38.
RATIFICATION OF UNAUTHORIZED OR DEFECTIVE DEED, § 39.
CURATIVE STATUTES, § 40.
EXECUTION IN BLANK, § 41.
SEAL—NECESSITY, § 41½.
—— SUFFICIENCY, § 42.
ATTESTATION—COMPETENCY OF WITNESS, § 43.

§ 37. Sufficiency in General.

[a] A deed executed by only a few, and not all of the grantors named in it, is good as to those who did execute and deliver it, and sufficient to convey their interest in the property.—Colton v. Seavey, 22 Cal. 496; Tustin v. Faught, 23 Cal. 237.

[b] The Mexican law of 1844 and 1845 did not invalidate a deed because not executed in the presence of and witnessed by a notary public.—Merle v. Mathews, 26 Cal. 455.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 553, 554; 16 Cent. Dig., cols. 111-122, §§ 88-98.

§ 38. Signature or Subscription of Grantor.

[a] Where the signature of a grantor is affixed to the deed by another in the pres-

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ence, and at the request, of the grantor, the deed is as binding as if he had personally affixed his signature.—Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84.

[b] The fact that a grantor signs a deed by a wrong name does not render the conveyance invalid, if he is designated by his true name in the body of the deed, and in the certificate of proof of execution.—Middleton v. Findla, 25 Cal. 7.

[c] Where there are two grantors and one of them acts as attorney in fact of the other he must subscribe his name twice, once as attorney in fact for the other, and once for himself. One signature and a second seal is not equal to a second subscription.—Meagher v. Thompson, 49 Cal. 189.

[d] Where a grantor, who is unable to use his hand, requests another to assist him with his signature, and such person, by guiding his hand, makes the signature, it is sufficiently signed.—Harris v. Harris, 59 Cal. 620.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 554, 555; 16 Cent. Dig., cols. 113-117, §§ 89-94.

§ 39. Ratification of Unauthorized or Defective Deed.

[a] There cannot be any confirmation of a void deed.—Branham v. City of San Jose, 24 Cal. 585.

§ 40. Curative Statute.

[a] A deed executed by the president and the secretary of a corporation did not have the corporate seal attached, and contained no recital showing any authority from the directors to convey. Held, that the flaw in the deed relates directly to the authority of the officers to act, and is not a defect which can be cured by Civil Code, section 1207, which provides that any instrument affecting real property, recorded prior to January 30, 1873, shall be deemed to impart "notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or in the absence of any such certificate."—McCloskey v. Ladd, 28 Pac. 216.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 554; 16 Cent. Dig., cols. 120-122, § 98.

§ 41. Execution in Blank.

[a] A deed in due form, signed and acknowledged by the grantor, does not become his deed until the name of a grantee is inserted therein.—Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266-n.

[b] Agent of grantor cannot insert name of grantee in absence of grantor unless authorized in writing.—Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266-n.

[c] Deed executed in blank and filled without authority and never acknowledged is void.—Vaca Valley etc. R. R. v. Mansfield, 84 Cal. 566, 24 Pac. 145.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 553; 16 Cent. Dig., cols. 118, 119, § 96.

§ 41½. Seal—Necessity.

[a] Prior to code, conveyance without seal conveyed only an equity, and not legal title. McCarron v. O'Connell, 7 Cal. 152.

[b] No seal to a deed of conveyance was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the property sold, the date of the transfer, and the price paid, was sufficient to pass the title. Stanley v. Green, 12 Cal. 148.

[c] An equitable right to a conveyance of real estate existing under a parol contract and part performance passes to the purchaser by a bill of sale not under sale.—Owen v. Frink, 24 Cal. 171.

§ 42. —— Sufficiency.

[a] A contemporaneous writing, though not under seal, showing that a party has adopted a seal instrument as his own, is as good as setting the party's hand and seal to a deed.—Ingoldsby v. Juan, 12 Cal. 564.

[b] Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument it will not be such, even though the characters (L. S.) are added to the signature.—McDonald v. Bear River etc. Co., 13 Cal. 220.

§ 43. —— Attestation—Competency of Witnesses.

[a] The notary who certifies to the acknowledgment of a deed by a married woman is a competent witness to its execution and acknowledgment, as against the grantor therein.—Jansen v. Cahill, 22 Cal. 563, 83 Am. Dec. 84.

D. DELIVERY.

NECESSITY, § 44.
SUFFICIENCY, § 45.
—— COGRANTEES, § 46.
—— QUESTIONS FOR JURY, § 47.
—— RATIFICATION OF UNDELIVERED DEED, § 48.
NECESSITY THAT GRANTOR PART WITH ALL CONTROL OVER DEED, § 49.
RECORD OR DELIVERY FOR RECORD, § 50.
DEPOSIT FOR DELIVERY AFTER GRANTOR'S DEATH, § 51.
ACCEPTANCE, § 52.

§ 44. Necessity.

[a] No title will pass by deed which is not delivered by the grantor or some one duly au-

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thorized by him.—Fitch v. Bunch, 30 Cal. 208.

[b] Without the delivery of a deed it is void.—Barr v. Schroeder, 32 Cal. 609.

[c] A deed takes effect from its delivery, and if delivery is wanting, it is void ab initio.—Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106.

[d] A written instrument in the form of a conveyance of land does not take effect as a deed until it is delivered with the intent that it shall so operate.—Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46.

[e] Deed only takes effect upon delivery; hence deed not delivered has no validity. Ward v. Dougherty, 75 Cal. 242, 7 Am. St. Rep. 151, 17 Pac. 193.

[f] Delivery is the force that vitalizes an instrument; and a deed can take no effect until delivery, which is dependent upon the assent of the grantor.—Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323.

[g] A notary's record, showing the acknowledgment before him of a deed by a husband to his wife, is inadmissible to prove conveyance of title from the husband, in the absence of proof that the deed had been delivered.—Lewis v. Burns, 122 Cal. 358, 55 Pac. 132.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 560; 16 Cent. Dig., cols. 137-140, § 116.

§ 45. Sufficiency.

[a] Redelivery of deed to fraudulent vendor will not revest title, though intended to cancel the deed.—Davis v. Mitchell, 34 Cal. 81.

[b] The elements of delivery are, that the writing must be meant by the maker to take immediate effect; and be presumably, or in fact, accepted by the other party.—Harris v. Harris, 59 Cal. 620.

[c] Deed from father to son recorded at request of grantor, and produced on trial by grantee, is sufficiently delivered.—Wedel v. Herman, 59 Cal. 507.

[d] A finding that certain deed under which the plaintiffs claim were never delivered, held, supported by the evidence.—Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734.

[e] Where grantee obtains possession of deed surreptitiously there is no delivery. Haskell v. Doty, 78 Cal. 426, 21 Pac. 10.

[f] Evidence that deed executed in grantee's house was left on his table and he took it and put it away is sufficient proof of delivery.—McLennan v. McDonnell, 78 Cal. 276, 20 Pac. 566.

[g] Intent of grantor is main thing to be discovered in determining delivery.—Huse v. Den, 85 Cal. 399, 20 Am. St. Rep. 232, 24 Pac. 790.

[h] Where a grantee named in a deed secures possession thereof clandestinely, or in any manner without a fulfillment of the agreed conditions, or consent of the grantor to a delivery, there is no delivery of the deed, and no title passes to the grantee.—Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323.

[i] Defendant agreed with A. to sell him certain land, part cash, and balance secured by mortgage. Defendant went with A. to a notary's office, where deed was executed. While the mortgage was being prepared, A. said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, from whom he negotiated a loan. A. then returned to defendant, paid him the money, and executed the mortgage, which defendant at once recorded. Prior to this time plaintiff had the deed and A.'s mortgage to her recorded. Held, that defendant's mortgage was entitled to priority, as there had been no delivery of the deed to A. at the time he negotiated the loan from plaintiff.—Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323.

[j] When defendant, then an unmarried woman, was living with her father, and keeping house for him, he executed a deed to her conveying the home place. She testified that he handed her the deed, telling her it would secure a home for her if anything should happen to him; that she placed it with other papers, both of her father's and her own, and afterward it could not be found. After her father's death it was found by a third person in a place containing papers of both father and daughter. Held, that such evidence warranted a finding that the deed had been delivered.—Reed v. Smith, 125 Cal. 491, 58 Pac. 139.

[k] Where a wife executed two deeds to her husband, and on his representation that they would not have any validity until recorded, and on his promise that he would not have them recorded unless he survived her, placed them in his possession, there was no delivery of the deeds, as there was no intent that they should become operative as such. Kenney v. Parks, 137 Cal. 527, 70 Pac. 556.

[l] Placing deed where it may be subsequently taken away by grantor does not affect prior delivery.—Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 703.

[m] Sufficient delivery is accomplished when there is complete delivery in fact. Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 803.

[n] Valid delivery is accomplished when acts and conduct of grantor manifest present intent to dispose of title conveyed.—Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 803.

[o] No particular form of delivery is necessary. Any act or thing manifesting intent to dispose of title is sufficient.—Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 803.

[p] In an action to establish a lost deed, evidence that the grantor obtained plaintiff's daughter to read it to her, and then took the

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deed from the daughter's hand, and requested plaintiff to hold out her hand, when the grantor placed the deed in plaintiff's hand, and said: "This house and lot is yours and everything there is on the place. Now go and put it in the bureau drawe"—which plaintiff did, was sufficient to show a valid delivery.—Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

[q] When wife authorizes husband to deliver deed after exacting promise from grantee, delivery is complete though husband fails to exact the promise.—Alexander v. Welcker, 141 Cal. 303, 74 Pac. 845.

[r] What constitutes sufficient delivery of deed determined.—Central Trust Co. v. Stoddard (Cal. App.), 88 Pac. 806.

FOR AUTHORITIES FROM OTHER STATES:

Delivery of deeds: 16 Am. Dec. 35, note.

Delivery of deeds, what is: 53 Am. St. Rep. 537, note.

Delivery of deeds, what amounts to: 58 Am. Rep. 269, note. See, also, 13 Cyc. 561-569; 16 Cent. Dig., cols. 140-178, §§ 117-141.

§ 46. —— Cograntees.

[a] Delivery of a deed to one of two joint purchasers is a delivery to both.—Eshleman v. Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579; Eshleman v. Malter, 102 Cal. 199, 36 Pac. 579; Henrietta Vineyard Co. v. Eshleman, 102 Cal. 199, 36 Pac. 579.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 565; 16 Cent. Dig., cols. 156, 157, § 126.

§ 47. —— Questions for Jury.

[a] Delivery of conveyance is a question of fact to be determined by the jury, and depends more upon the intention of the parties, than upon the mode of fulfilling the intention.—Hastings v. Vaughn, 5 Cal. 315.

[b] Where a deed executed and recorded on the same day is introduced on the issue of its delivery, it is for the jury to say whether the grantee knew of the deed, and assented thereto.—Bensley v. Atwill, 12 Cal. 231.

[c] The delivery of a deed is a question of fact, depending more upon the intention of the parties than upon the mode of fulfilling the intention. The intention both of the grantor and of the grantee that the deed shall operate as a delivered instrument is essential to a delivery thereof.—Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897.

[d] Delivery is always a question of fact determinable from surrounding circumstances.—Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 803; Central Trust Co. v. Stoddard (Cal. App.), 88 Pac. 806.

§ 48. —— Ratification of Undelivered Deed.

[a] A deed that was void for want of delivery cannot be validated by a subsequent deed given for that purpose.—Barr v. Schroeder, 32 Cal. 609.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 565; 16 Cent. Dig., cols. 158, 159, §§ 128, 129.

§ 49. Necessity that Grantor Part with All Control Over Deed.

[a] Where the grantor deposits a deed with a third person to be by him delivered to the grantee on the order of grantor's agent, and, before the agent gives the order, the grantor directs such third person not to deliver it, his authority to deliver ceases, and a delivery is inoperative.—Fitch v. Bunch, 30 Cal. 208.

[b] What constitutes delivery is chiefly a question of fact, but a delivery is not complete until the grantor has so dealt with the instrument as to lose all control over it; and whether he has done so depends upon the intent to be deduced from all the surrounding circumstances.—Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46.

[c] To constitute delivery of a deed, the grantor must devest himself of all power and dominion over it.—Denis v. Velati, 96 Cal. 223, 31 Pac. 1.

[d] The essential requisite to a valid delivery is that when placed in the hands of the third party it has passed beyond the control of the grantor for all time.—Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

[e] In a suit to quiet title it was found that the trustee of a townsite platted on public lands of the United States executed deeds to persons whose names appeared on the official map as being entitled thereto, who had not previously obtained conveyances, and, among others to defendant's predecessor; and that the trustee left "all of said deeds so executed" with one T. Held, that this was sufficient to show delivery, since, if not to be regarded as express finding thereof, delivery was not inferred therefrom.—Callahan v. James, 71 Pac. 104.

§ 50. Record, or Delivery for Record.

[a] The recording of a deed is not a delivery by the grantor to the grantee, unless the deed comes from the hand of the grantor, or some one claiming through or under him. Barr v. Schroeder, 32 Cal. 609.

§ 51. Deposit for Delivery After Grantor's Death.

[a] Where the grantor executes a deed of his land, and delivers it to another, with instructions only to hold without recording until his death, and then to deliver it to the grantee, the grantor cannot recall the deed, nor alter its provisions, and he has no interest in the land, except a life estate.—Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

[b] The delivery to a third person of a deed made to the child of the grantor with

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instructions to such third person to hold it without recording until the death of the grantor, who thereby parted with all control over it, is valid.—Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300.

[c] A grantor's deposit of a deed with a bank cashier, to be filed for record if the grantor died during the life of the grantee, and otherwise to be returned, is not a sufficient delivery to vest title in the grantee. Judgment (1898) 54 Pac. 251, reversed on rehearing.—Kenney v. Parks, 125 Cal. 146, 28 Am. St. Rep. 106, 57 Pac. 772.

[d] The delivery of a deed in escrow, to be delivered to the grantee on the grantor's death, vests the title in the grantee, subject to life estate of the grantor.—Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705.

[e] A deed delivered in escrow to be delivered after the grantor's death, but with the condition that the grantor might be entitled to the same on payment of certain advances, held ineffectual to pass title to the grantee.—Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304.

[f] A deed cannot be executed as a testamentary disposition to be delivered after the grantor's death.—Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 569; 16 Cent. Dig., cols. 174-178, §§ 140, 141.

§ 52. Acceptance.

[a] It is scarcely to be presumed that one man will execute to another a deed without the assent of that other.—Bensley v. Atwill, 12 Cal. 231.

[b] In such case, it is for the jury to say whether the grantee had knowledge of the execution of the deed, or had given his assent thereto.—Bensley v. Atwill, 12 Cal. 231.

[c] To constitute delivery of deed there must be acceptance by the grantee.—Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106.

[d] Delivery of deed to stranger for benefit of grantee is deemed to be a constructive delivery to the latter only when his assent thereto or facts which authorize a presumption of such assent are shown.—Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46.

[e] Assent of grantee to deed expressing a money consideration will not be presumed, as against third person acquiring a lien before acceptance of deed in fact.—Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473; 8 Pac. 46.

[f] Acceptance of deed will not relate to delivery to third person as against intervening judgment lien.—Hibberd v. Smith, 67 Cal. 558, 561, 4 Pac. 473, 8 Pac. 46.

[g] A husband, pending a suit for divorce, agreed to convey to his wife a life estate in certain property if a decree was granted, but conveyed her a fee instead, and she accepted the deed, and retained it until her death, with full opportunity to know its contents. Held, that the agreement being executory in its nature, and subject to change, under Civil Code, section 1698, it would be assumed that he intended to convey a fee, and that she was satisfied therewith.—Hochstein v. Berghauser, 123 Cal. 681 56 Pac. 574.

[h] Acceptance is sufficiently manifest from delivery and retention of deed.—Kenniff v. Caulfield, 140 Cal. 41, 73 Pac. 803.

[i] Grantee is not required to make any explicit declaration of acceptance.—Kenniff v. Caulfield, 140 Cal. 41, 73 Pac. 803.

[j] One accepting deed in silence is deemed to have agreed to whatever conditions accompanied delivery.—Becker v. Schwerdtle, 141 Cal. 391, 392, 74 Pac. 1029.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 570, 571; 16 Cent. Dig., cols. 178-183, §§ 142-144.

E. VALIDITY.

MISTAKE, § 53.
—— AS TO IDENTITY OF PROPERTY CONVEYED, § 54.
MISREPRESENTATION AND FRAUD, § 55.
—— RELIANCE ON REPRESENTATIONS AND EQUAL MEANS OF KNOWLEDGE, § 56.
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—— INADEQUACY OF CONSIDERATION, § 58.
—— INDUCING HASTY TRANSFER OF PROPERTY, § 59.
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—— DEED TO PERSONS IN LOCO PARENTIS, § 62.
—— DEED TO SPIRITUAL ADVISER, § 63.
EFFECT OF INVALIDITY, § 64.
RATIFICATION OF VOIDABLE DEED, § 65.
CANCELLATION FOR INVALIDITY, § 66.
—— ACTIONS, § 67.

§ 53. Mistake.

[a] A court of equity will set aside a deed made under a mistake as to the rights of the parties.—(Cal. 1872) Hearst v. Pujol, 44 Cal. 230.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 576-578; 16 Cent. Dig., cols. 198-207, §§ 156-164.

§ 54. —— As to Identity of Property Conveyed.

[a] Where the grantor supposed she was selling a different tract of land, but the grantees thought they were purchasing the tract actually conveyed, there was a mutual mistake as to the subject matter of the contract, and the minds of the parties never having met, there was no contract of sale, and the deed was made under a mutual mistake of both parties. Under such circum-

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stances, the court might order a rescission of the sale altogether, but could not compel grantees to retain and pay for a tract of land they have never contracted for. In such case grantor should tender the whole amount of purchase money, and ask for an entire rescission of the contract.—Barfield v. Price, 40 Cal. 535.

§ 55. Misrepresentation and Fraud.

[a] Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterwards fraudulently attached in a suit brought by the real though not ostensible purchaser, against the husband alone, equity will compel a cancellation of the deed so obtained.—Still v. Saunders, 8 Cal. 281.

[b] Deed procured by fraud conveys legal title.—Hewlett v. Pilcher, 85 Cal. 544, 24 Pac. 781.

[c] When a wife conveys land to her husband, without consideration, for the purpose of a suit, for her benefit, to oust a tenant—she being advised that such conveyance is necessary for the suit—and he afterward, without consideration, conveys the land to a third person, who has notice of the trust, a repudiation of the implied promise to reconvey by such third person, and an attempt to hold the property as though conveyed absolutely, constitute constructive fraud, and entitle the wife to a reconveyance.—Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

[d] A deed untainted by fraud is not impeachable for fraud committed afterward in the obtaining of another deed between the same parties for different premises.—Gutierrez v. Brinkerhoff, 1 Pac. 482.

[e] A complaint to cancel a deed alleged that defendant, without plaintiff's consent, abstracted the deed from a safe where it had been deposited by the plaintiff in escrow pending the completion of a proposed sale to defendant of land therein described; that defendant after thus obtaining the deed caused it to be recorded; that no money was ever paid for the land; and defendant refused to pay the consideration or reconvey to plaintiff. Held, that the complaint showed a good cause of action.—Rising v. Gibbs, 30 Pac. 589.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 578-584; 16 Cent. Dig., cols. 208-247, §§ 165-182.

§ 56. —— Reliance on Representations and Equal Means of Knowledge.

[a] Where a board of commissioners, holding a tract of land in trust for sale, establish a rule for their own government to the effect that where land is occupied they will sell only to the actual occupant thereof, and for no sum less than one dollar and twenty-five cents an acre, and a party, knowing of such rule, and occupying seventy-two acres of the land, makes application to them in writing for a conveyance of a tract which he describes by metes and bounds and courses and distances, and states as containing about seventy-two acres, and the board execute a deed to him of the land described in the petition upon his payment of the sum which they ask for it, but the deed in fact conveys one hundred and fifty-four acres, a part of which is occupied by a third party, and the price paid is the same as for seventy-two acres, a court of equity will not compel the grantee to reconvey all but the seventy-two acres occupied by him to the board, where the latter had the means of ascertaining all the facts in the case.—Funded Debt Commrs. of City of San Jose v. Younger, 29 Cal. 172.

§ 57. —— Representations as to Future Events or Actions.

[a] If by means of a parol promise to reconvey a party obtains an absolute deed, without consideration, from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although, at the time it was made, there was no intention not to perform.—Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Brison v. Brison, 75 Cal. 525, 17 Pac. 689.

§ 58. —— Inadequacy of Consideration.

[a] There is no conclusion of fraud, springing from want of consideration, in a deed which will enable a stranger to attack it, though it is a circumstance, among others, from which fraud may be inferred.—Gillan v. Metcalf, 7 Cal. 137.

§ 59. —— Inducing Hasty Transfer of Property.

[a] In a suit to set aside a deed as obtained by fraud, it was shown that the grantor, an old man of weak mind, was falsely advised by his attending physician, the grantee's father in law, that he was about to die, and that, in order not to delay certain transactions in connection with the land, he had better convey his interest therein to the grantee; but the instrument was to contain a clause by which it should not go into effect unless he died of that illness. The deed was drawn without any such clause, however, and the grantee got possession thereof without the consent of the grantor, had it placed on record, and thereafter claimed title under it. Held, that the evidence warranted a judgment setting aside the deed.—Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352.

§ 60. —— Duress—Suit or Threat of Suit.

[a] A transfer of property, sought to be rescinded, and for which a valuable consideration was falsely recited, was executed by plaintiff to defendant, her husband, to induce him to withdraw a divorce suit instituted by him for the purpose of forcing plaintiff, who was suffering from nervous prostration, to

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surrender part of her property. The transfer was executed in the presence of defendant and his attorney, and plaintiff had no independent advice to the effect thereof. Held, that the transfer was executed under undue influence, within Civil Code, section 1575, and should be rescinded.—Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 584, 585; 16 Cent. Dig., cols. 247-250, §§ 183-189.

§ 61. Undue Influence and Confidential Relations—Deed to Relatives in General.

[a] Where the grantor, at the time of executing a deed to her brother, was in full possession of her faculties, understood what she was doing, made the deed voluntarily and without persuasion or coercion, and because of her uninfluenced desire to do so, the deed will not be deemed constructively fraudulent as to other brothers and sisters because the grantor was in a weak physical condition, and the deed transferred all of her property to the brother then living with her, to the injury of the others, who resided at a distance.—Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

[b] A deed, made by an elderly woman voluntarily, and without undue influence, conveying to her nephew and his wife all her realty with the exception of a life estate, in consideration of an agreement on their part to make their home with her, repair and improve her house, and care for her during life, will not be set aside, where it appears that the deed was understandingly made, and that the grantees had expended several hundred dollars in coming from their home in a distant state, and several hundred more in repairing the house, and were ready to perform further when interrupted by the grantor.—Creswell v. Welchman, 95 Cal. 359, 30 Pac. 553.

[c] Defendant executed a deed and power of attorney to his sister, and thereafter executed to her another deed, accompanied by an agreement for a reconveyance, if defendant should repay to plaintiff all taxes, assessments, and advances made by her. Defendant stated he had deeded his property to plaintiff, and that she was going to support him, and the sister of plaintiff testified that plaintiff told her that she intended to take care of the defendant, and look after his property. It also appeared that plaintiff had stated on the witness stand in a partition suit that she held the interest in trust for defendant. There was no evidence of consideration save the expectation of future support, and it was shown that for some time prior to the execution of the deeds, defendant's capacity to take care of himself and his property had been more or less impaired. Held, that owing to the relationship of the parties, and the fact that defendant had parted with his property on an understanding unenforceable, under Civil Code, section 1624, subdivision 1, declaring that an agreement not to be performed within a year shall be invalid unless in writing, the conveyance should be regarded as having been secured by fraud and undue influence. Odell v. Moss, 130 Cal. 352, 62 Pac. 555.

FOR AUTHORITIES FROM OTHER STATES:

Undue influence of spiritualistic mediums, presumption of: 1 Am. St. Rep. 88, note. See, also, 13 Cyc. 585-590; 16 Cent. Dig., cols. 250-277, §§ 190-199.

§ 62. —— Deed to Persons in Loco Parentis.

[a] Where plaintiff, a girl of nineteen, who has resided with her grandparents as their ward since she was nine, conveyed to her grandmother all of her property, on the representations of her grandmother that the property really belonged to her grandfather, and that she (the grandmother) would devise it to plaintiff, the conveyance will be set aside for fraud and undue influence.—Brown v. Burbank, 64 Cal. 99, 27 Pac. 940.

§ 63. —— Deed to Spiritual Adviser.

[a] In a suit to annul a trust deed, made by a woman but a few days before her death, for the benfit of her spiritual adviser, on the ground of undue influence, a finding that the grantor had no independent advice on making the deed is sustained by the evidence that the scrivener was employed and introduced to her by the cestui que trust at a hospital where no one else was present; that her last will was destroyed, and the deed made, at the suggestion of the cestui que trust, who was present, with the exception of a few minutes, while directions for the deed were given.—Ross v. Conway, 92 Cal. 632, 28 Pac. 785.

[b] A trust deed by one in weak mind and a dying condition, made principally for the benefit of one in whom the grantor had for many years imposed great confidence as her spiritual adviser, and for which there was no consideration, will be canceled, on the ground of undue influence.—Ross v. Conway, 92 Cal. 632, 28 Pac. 785.

§ 64. —— Effect of Invalidity.

[a] A bona fide purchaser for valuable consideration from the vendee in a deed obtained by a fraud will hold the property conveyed, for a deed obtained by fraud is only voidable.—Deputy v. Stapleford, 19 Cal. 302.

§ 65. Ratification of Voidable Deed.

[a] Defendant by fraud and undue influence procured a deed from his brother, who was then incompetent to transact business, giving a note as part consideration, and afterward, without payment, had possession of the note. The brother assigned the note to his wife, who obtained a judgment for recovery thereof. Her husband also executed a deed to her of the land covered by the deed

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to defendant, and she sued to recover the land from defendant. Held, that she was not estopped by the judgment in her action to recover the note, since she was entitled to possession of the note, until she received the relief due to her, and her recovery of the note was not a ratification of the deed.—More v. More, 133 Cal. 489, 65 Pac. 1044.

[b] Where a person sick in the hospital makes a deed to it for a certain sum paid and an agreement for further care, and recovers, and for several weeks is able to transact business, and up to the day of his death is satisfied with the transaction, it amounts to a ratification hereof.—Barry v. St. Joseph's Hospital & Sanitarium of the Sisters of Mercy, 48 Pac. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 591, 592; 16 Cent. Dig., cols. 281, 282, §§ 206-208.

§ 66. Cancellation for Invalidity.

[a] Offer to return consideration held necessary for cancellation of a deed for fraud. Clint v. Eureka Crude Oil Co. (Cal. App.), 86 Pac. 817.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 592-594; 16 Cent. Dig., cols. 283-290, §§ 210-213.

§ 67. —— Actions.

[a] A complaint in an action by a foster child of deceased to set aside certain deeds by deceased to his wife, as obtained by fraud and undue influence, and to recover an interest in the property, was not demurrable for failure to allege that deceased died intestate, there being no presumption that the deceased left a will devising the property to persons other than plaintiff. Judgment (1902) 70 Pac. 1024, reversed.—Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820.

[b] A bill to set aside certain conveyances on the ground of undue influence and mental incapacity was not demurrable on the ground that it was impossible to ascertain therefrom on which ground plaintiff would rely to establish her cause of action. Judgment (1902) 70 Pac. 1024, reversed.—Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820.

[c] A wife was advised that it was necessary to transfer the legal title to certain land to another, in order that a suit to oust a tenant might be maintained, and accordingly transferred it, without consideration, to her husband, for that purpose. He thereupon conveyed it, without consideration, to a third person, for the purpose for which the first conveyance was made. Afterward this third person repudiated the trust, and claimed to hold the land absolutely. Held, in an action by the wife to have her title established and the deeds declared void, that a decree declaring her the owner was substantially correct and without prejudicial error, though the decree might have ordered a cancellation or reconveyance.—Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

[d] In an action to set aside a conveyance because obtained by fraud and undue influence, the objection of the testimony as to the habits and condition of the grantor at periods from seventeen to twelve years prior to the date of the transaction goes to the weight of the evidence rather than to its admissibility.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

[e] The failure of a grantor to promptly rescind a conveyance because procured by fraud and undue influence is not a bar to a suit by the heir of the grantor to set aside the conveyance.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

II. RECORDING AND REGISTRATION.

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FOR AUTHORITIES FROM OTHER STATES:

Registration, effect of as notice: 9 Am. Dec. 254, note.

Effect of the defective recording: 96 Am. St. Rep. 397, note. See, also, 13 Cyc. 594-599; 16 Cent. Dig., cols. 290-308, §§ 214-228.

§ 68. Constitutional and Statutory Provisions.

[a] The twenty-sixth section of the act of April 30, 1850, requires conveyances made before its passage to be recorded.—Graff v. Middleton, 43 Cal. 341.

[b] The statute of enrollments (27 Hen. VIII, c. 16) has never been in force in California.—Chandler v. Chandler, 55 Cal. 267.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 597; 16 Cent. Dig., cols. 290-292, §§ 214-216.

§ 69. Necessity as Between Parties to Instrument.

[a] All title which vendor has at time passes to the vendee, as against volunteers or donees, even though the deed under which the vendor holds be unrecorded.—Snodgrass v. Rickets, 13 Cal. 359.

[b] As between the parties, a deed is valid, though not recorded.—(Cal. 1864) Landers v. Bolton, 26 Cal. 393.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 594, 595; 16 Cent. Dig., cols. 293-297, § 217.

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§ 70. Instruments Entitled to Record.

[a] Mortgages and conveyances which are not under seal are not entitled to be recorded. Racouillat v. Sansevain, 32 Cal. 376.

[b] Deeds made prior to recording act may be recorded, though not acknowledged or proved.—Anderson v. Fisk, 36 Cal. 637.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 596; 16 Cent. Dig., cols. 297-299, §§ 218-221.

§ 71. Place—Creation of New County.

[a] Where, at the time of the execution of a deed, the land conveyed was situated in a county which had been subsequently divided, the deed is properly recorded in the county it is in at the time of the recording.—Green v. Green, 103 Cal. 108, 37 Pac. 188.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 598; 16 Cent. Dig., cols. 299-302, §§ 222-224.

§ 72. Sufficiency.

[a] An omission in the record of "[L. S.]" does not vitiate it, if the deed purports to be sealed, and the certificate of the notary shows that it was sealed.—Smith v. Dall, 13 Cal. 510.

FOR AUTHORITIES FROM OTHER STATES:

Deeds, irregularities in recording, effect of: 30 Am. Dec. 463, note.

Registration of conveyances, defects in, effect of: 91 Am. Dec. 106.

Effect of the defective recording of: 96 Am. St. Rep. 397-406, note. See, also, 13 Cyc. 599; 16 Cent. Dig., cols. 304, 305, § 226.

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TIME OF TAKING EFFECT, § 98.

§ 73. In General.

[a] In construing a deed covenants cannot be resorted to, to extend premises granted or to aid a defective description in the habendum.—Mesick v. Sunderland, 6 Cal. 313.

[b] Mere matter of convenience or taste cannot be allowed to overrule express language of a deed.—Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

[c] That construction which satisfies the calls of a deed is to be preferred.—Lake etc. Co. v. San Gabriel etc. Co., 58 Cal. 51.

[d] Ambiguity in deed held to be latent not patent.—Spreckles v. Ord, 72 Cal. 88, 13 Pac. 160.

[e] Grant of right to develop water construed.—Roberts v. Krafts, 141 Cal. 26, 74 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

Election of grantee under a deed which may inure in different ways: 50 Am. Dec. 548, note.

Transfer of property in another jurisdiction: 12 Am. Dec. 470, note. See, also, 13 Cyc. 600-724; 16 Cent. Dig., cols. 309-745, §§ 229-555.

§ 74. Construction Giving Effect.

[a] To arrive at intention situation of parties and subject matter at time of contracting should be considered; whole deed should be taken together, and, if possible effect should be given to all its parts, although the immediate object of inquiry be the meaning of an isolated clause.—Brannan v. Mesick, 10 Cal. 95.

[b] Courts give effect to every part of the description of land in a deed or patent if

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possible, but if this cannot be done, they reject that which is repugnant to the general intent of the instrument.—More v. Massini, 37 Cal. 432.

[c] Grants must be made effective if possible.—Cullen v. Spriggs, 83 Cal. 62, 23 Pac. 222.

[d] It is impossible to lay down an invariable and universal rule of construction of deeds. The tendency of modern decisions is to uphold conveyances and give effect to the intention of the parties, regardless of technical rules of construction.—Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

§ 75. General Terms Limited by Particular Terms.

[a] Particular recital followed by general words will qualify them.—Hayes v. Wetherbee, 60 Cal. 396.

[b] Distinct limitation in grant is not controlled by other words less distinct.—Watson v. Sutro, 86 Cal. 522, 24 Pac. 172, 25 Pac. 64.

[c] A conveyance is to be construed in view of all the facts, and general language in the first part of the instrument is limited and qualified by subsequent terms designed solely to define what interest is possessed and granted.—Vance, In re, 100 Cal. 425, 34 Pac. 1087.

§ 76. Intention of Parties.

[a] If, when the intention is ascertained, it is found that the words will fairly bear a construction which makes them express this intention, then the words will be so construed, and the contract, with this interpretation, enforced as to the contract of the parties.—Brannan v. Mesick, 10 Cal. 95.

[b] The court, to give the proper construction to the description of land conveyed by deed, will place itself in the position of the contracting parties, and their intent will be ascertained as in other contracts; and, if such intent is not apparent from the deed, it may be sought by resort to the general rules of construction.—Kimball v. Semple, 25 Cal. 440.

[c] Intentions of parties, when ascertained, must govern, and the entire description contained in the deed should be resorted to for their discovery.—Piercy v. Crandall, 34 Cal. 334.

[d] Of two descriptions in the same deed, the one applying to land owned by the grantor should be taken as true, rather than the one applying to land of which he had not a good title.—Piper v. True, 36 Cal. 606.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 601, 602, 626, note; 16 Cent. Dig., cols. 311-314, §§ 231, 232.

§ 77. Construction by Parties.

[a] In the construction of a deed, it is competent for the court to inquire into the intent of the parties, and, in determining such intent, to look at their acts under the deed. Mulford v. Le France, 26 Cal. 88.

[b] The conduct of the parties subsequent to the making of a deed is competent, and often very material, evidence in determining, in case of an ambiguity, what was determined to be conveyed.—Vejar v. Mound City Land etc. Assn., 97 Cal. 659, 32 Pac. 713.

[c] If the deed is open to construction as to the extent of the grant, the most reliable circumstances in aid of such construction is the practical construction given it by the acts of the parties during the years immediately following its execution.—Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107.

FOR AUTHORITIES FROM OTHER STATES:

Description, construction of by subsequent acts of the parties: 35 Am. Dec. 373, note. See, also, 13 Cyc. 608; 16 Cent. Dig., cols. 314, 315, § 233.

§ 78. Strict Construction Against Grantor.

[a] Grants are to be construed most strongly against grantor.—Sullivan v. Davis, 4 Cal. 291.

]b] Deeds are always to be construed most strongly against grantor when there is any uncertainty or ambiguity in their terms. Dodge v. Walley, 22 Cal. 224; Piper v. True, 36 Cal. 606.

[c] The description of boundaries in a deed is to be taken most strongly against the grantor.—(Cal. 1864) Vance v. Fore, 25 Cal. 435.

[d] If a deed will admit of two constructions, it should be construed most strongly against the grantor.—(Cal. 1871) Salmon v. Wilson, 41 Cal. 595.

[e] If there be conflicting descriptions in a deed, that which is most strongly against the grantor will be adopted.—Hager v. Spect, 52 Cal. 579.

[f] A grant is to be interpreted in favor of the grantee.—Freeman v. Bellegarde, 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289.

§ 79. —— Grants by Public Bodies.

[a] Grants of land by public bodies to private parties are to be interpreted in favor of the grantor.—Hostetter v. Los Angeles Terminal Ry. Co., 108 Cal. 38, 4 Pac. 330.

§ 80. Extrinsic Circumstances.

[a] In the construction of a grant, the court will take into consideration the circumstances attending the transaction, and the particular situation of the parties, the state of the country, and of the thing granted, at the time, in order to ascertain the intent of the parties.—Stanley v. Green, 12 Cal. 148; Sprague v. Edwards, 48 Cal. 239; Grennan v. McGregor, 78 Cal. 258, 20 Pac. 559.

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[b] In construing a deed, the court must place itself as near as possible in the place occupied by the parties when the instrument was executed, then, taking it by its four corners, read it.—Walsh v. Hill, 38 Cal. 481.

[c] In construing doubtful clauses it is important to ascertain all attendant circumstances to arrive at intention of parties.—Altchul v. S. F. C. P. H. A., 43 Cal. 171.

[d] In construing a deed all its parts must be consulted, and it must be read in the light of surrounding circumstances and the intention the parties arrived at in this way.—Pico v. Coleman, 47 Cal. 65.

[e] Intention of the parties as to the lands intended to be conveyed should be gathered from the deed itself rather than by resorting to extrinsic evidence; if the lands are capable of being identified by a construction of the deeds themselves evidence aliunde will not be resorted to.—Pulliam v. Bennett, 55 Cal. 368.

[f] In construing a doubtful description in a grant the court must assume, as nearly as possible, the position of the contracting parties, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of those circumstances.—Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

[g] In construing deed court must consider position of parties and circumstances of transaction.—Thompson v. Motor Road Co., 82 Cal. 501.

[h] Circumstances of parties and their knowledge of state of title should be considered in arriving at their intent.—Watson v. Sutro, 86 Cal. 522, 24 Pac. 172, 25 Pac. 64.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 607; 16 Cent. Dig., cols. 318-320, § 239.

§ 81. Adherence to Grammatical Sense.

[a] A grammatical construction should never be allowed to interfere with the intention of an instrument.—Hancock v. Watson, 18 Cal. 137.

§ 82. Insertion of Right for Wrong Word.

[a] Where, from a deed, it is apparent that a wrong word has been inserted by clerical error, it will be read, in an action at law, as though the right word was in its place.—Sprague v. Edwards, 48 Cal. 239.

§ 83. Interpretation by Subsequent Events.

[a] The rule that events transpiring subsequent to the execution of a deed are not to be considered in its construing applies to unknown facts, not to an expected confirmation of a survey.—Piper v. True, 36 Cal. 606.

§ 84. Construction of Particular Words or Terms.

[a] Whenever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, a court will construe it according to the intention of the grantor.—Central Pac. R. C. v. Beal, 47 Cal. 151.

FOR AUTHORITIES FROM OTHER STATES:

Construction of the words "more or less" and "from" or "to": 28 Am. St. Rep. 631, note. See, also, 13 Cyc. 604-607; 16 Cent. Dig., cols. 321-332, §§ 241-246, 249-254.

§ 85. —— "Purchase" Defined.

[a] The word "purchase" includes every mode of acquiring an estate, except by inheritance.—Greer v. Blanchar, 40 Cal. 194.

§ 86. —— "Proviso" Defined.

[a] A "proviso" in deeds and laws is a limitation or exception to the grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided. It always implies a condition, unless subsequent words change it into a covenant.—Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

§ 87. —— "Grant" Defined.

[a] The word "grant," as used in deeds, has a well-known signification, but the parties may limit or qualify its meaning, and, if they choose to do so, the court should not hesitate to carry out their expressed intention. Faivre v. Daley, 93 Cal. 664, 29 Cal. 256.

§ 88. —— "Heirs" Defined.

[a] Word "heirs" in conveyance is not a word of purchase, carrying title to the heirs, but only qualifying the title of the grantee.—Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

[b] Word "heir" is not limited to one who takes by descent from an immediate ancestor.—Castro v. Tennent, 44 Cal. 253.

[c] A limitation in a deed of part of a remainder to the "heirs" of deceased children is to be construed as meaning persons who would succeed to their estate in case of intestacy, and as including the surviving husband of a deceased daughter.—Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.

§ 89. —— Questions for Court or Jury.

[a] The legal sufficiency of the execution of certain conveyances, offered in evidence and proved by notarial certificates of acknowledgment, is a question solely for the court.—Starr v. Barrett, 15 Cal. 361.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 610, 626; 16 Cent. Dig., cols. 323-325, § 255; cols. 359, 360, § 293.

§ 90. Recitals.

[a] If a second deed recites that it is given to confirm a former one in which mistakes

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had occurred, and the first deed was void, rendering confirmation impossible, the recitals in the second deed may be regarded as surplus, and it will be sufficient in law to pass the title. Barr v. Schroeder, 32 Cal. 609.

[b] Recital that conveyance was made in pursuance of a void judgment may be disregarded, if deed can otherwise pass title.—Ryan v. Tomlinson, 39 Cal. 639.

FOR AUTHORITIES FROM OTHER STATES:

68 L. R. A. 925, note. See, also, 13 Cyc. 611-614; 16 Cent. Dig. cols. 325-333, §§ 256-260.

§ 91. —— Recitals as Evidence.

[a] The words, "has executed unto," when used in an instrument of writing, import both a making and delivery.—Bagley v. McMickle's Admr., 9 Cal. 430.

[b] The recital in a deed of a valuable consideration paid by the grantee for the property thereby conveyed is not evidence of the payment of a valuable consideration, as against strangers, or against one claiming under the grantor by a conveyance prior to the deed in which the recitals are made, or against one claiming adversely to the grantor, but such recital is evidence of the payment of a valuable consideration only against those claiming under the grantor by conveyance subsequent to the same.—Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172.

[c] A deed reciting that the grantor has sold to the grantee certain premises implies a price paid as a consideration for the transfer.—Merle v. Mathews, 26 Cal. 455.

[d] A recital in a deed that the grantor is a corporation does not prove such corporate existence, as against one claiming the property through another source of title.—Sonoma County Water Co. v. Lynch, 50 Cal. 503.

§ 92. Construing Instruments Together.

[a] An owner of land gave a power of attorney, authorizing his agent to convey certain lots, confirming by the instruments any sale he might make. The agent, after receiving the power, conveyed the premises by his own deed, without reference to the owner; and subsequently, while the power was in force, he indorsed on the deed a writing specifying that the premises were intended to be sold under the power of attorney, that he executed the deed only as the attorney for the owner, and as such attorney he bound the owner, which indorsement he signed as attorney for the owner. Held that, to ascertain the intent of the parties, all such instruments should be construed together. Gerdes v. Moody, 41 Cal. 335.

[b] Where the owner of realty conveys portions of it to several grantees by deeds executed on the same day, and the descriptions in the deeds are apparently conflicting as to the premises conveyed, they may be construed together as being parts of the same transaction. Pulliam v. Bennett, 55 Cal. 368.

[c] Where a deed of land is made, and by a contemporaneous instrument the grantee is to perform certain conditions, the two instruments are parts of the same transaction, and are to be considered together.—Janes v. Throckmorton, 57 Cal. 368, 380

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 614-616; 16 Cent. Dig., cols. 333-338, §§ 261-265.

§ 93. Merger of Previous Agreements.

[a] All previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined.—Peabody v. Phelps, 9 Cal. 213.

[b] Where the owner agrees to sell land to another and to convey a good title, and afterwards makes a deed which is accepted by the vendee as a performance of the contract, the vendee's rights depend on the deed, and not on the previous contract; the latter being merged in and extinguished by the former.—Bryan v. Swain, 56 Cal. 616.

FOR AUTHORITIES FROM OTHER STATES:

Merger of contract of sale in deed: 16 Am. St. Rep. 622, note. See, also, 13 Cyc. 616; 16 Cent. Dig., cols. 338-345, § 266.

§ 94. Repugnant or Conflicting Parts or Clauses.

[a] If a deed contains conflicting descriptions, that description is to be adopted which is the least likely to be affected with mistakes. Vance v. Fore, 24 Cal. 435.

[b] In construing a deed containing conflicting clauses, all its parts must be consulted, in arriving at the intention of the parties, to ascertain what land is conveyed.—Pico v. Coleman, 47 Cal. 65.

[c] A grant, bargain, and sale deed of certain land contained the following clause: "This conveyance is intended to reconvey and release only such title as the parties of the first part obtained to such premises by virtue of a deed from the parties of the second part to the parties of the first part." Held, that such clause should not be construed to be repugnant to the grant, and therefore void, as the manifest intention of the parties would thereby be defeated.—Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

[d] Premises of deed herein were not in irreconcilable conflict with subsequent clauses, but were limited by reserving a contingent estate in the grantor with a restriction for its benefit.—Pavkovich v. Southern Pac. Ry. Co., 87 Pac. 1097.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 618-621, 666; 16 Cent. Dig., cols. 345-350, §§ 267-273.

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§ 95. —— Control of Subsequent by Earlier Clauses.

[a] Later words in a deed, which contradict the premises, are to be rejected if they cannot be reconciled with the obvious intent of the instrument.—Havens v. Dale, 18 Cal. 359.

[b] If two parts of a grant are irreconcilable, the first prevails.—Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491.

[c] The principle declared in section 1070 of the Civil Code that if several parts of a grant are irreconcilable, the former part prevails, has no application where the grant has but one part, which is essentially the grant for a use.—Pellissier v. Croker, 103 Cal. 516, 35 Pac. 465.

§ 96. —— Repugnancy Between Habendum and Prior Parts.

[a] Where the purpose of a grant can be clearly ascertained from the premises of a deed, and the premises contain proper words of limitation, and the habendum is repugnant to the grant, the habendum will be controlled by the manifest intent and terms of the grant.—(Cal. 1860) Eldredge v. See Yup Co., 17 Cal. 44.

[b] Where, from the whole deed, it appears that the grantor intended by the habendum clause to restrain, limit, or enlarge the estate named in the granting clause, the habendum prevails over the granting clause.—Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049.

§ 97. Construction as to Parties.

[a] A conveyance of land to B. & Co. passes the title to B. alone, and a deed of the premises signed by B. will give a valid title.—Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57.

[b] A husband's deed to his wife provided that the property should, on her death, go to their children then living, equally, "and, in the case of the death of any such children, then to their heir or heirs." Held, that the words "heir or heirs" did not refer to children, but included all the heirs of such children as the law appointed to succeed to their estates.—Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.

FOR AUTHORITIES FROM OTHER STATES:

Parties, persons not named as, when bound: 25 Am. Dec. 226, note. See, also, 13 Cyc. 621-626; 16 Cent. Dig., cols. 315, 316, § 235; cols. 351-360, §§ 274-293.

§ 98. Time of Taking Effect.

[a] When the authorities of a town make a grant of a pueblo lot, and afterwards execute a deed, the deed takes effect by relation as of the date of the grant.—Thompson v. Spencer, 50 Cal. 532.

[b] The fact that a deed to a corporation was dated four days before its articles were filed did not invalidate the conveyance, where the delivery and acceptance occurred after the incorporation.—San Diego Gas Co. v. Frane, 137 Cal. 441, 70 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

Deeds to take effect after the death of the grantors: 63 Am. Dec. 243, note. See, also, 16 Cent. Dig., cols. 361-373, §§ 294-308.

B. PROPERTY CONVEYED.

INCONSISTENT DESCRIPTIONS, § 99.
PROPERTY INCLUDED IN DESCRIPTIONS, IN GENERAL, § 100.
LIMITATION FOLLOWING OTHER DESCRIPTION, § 101.
—— REFERENCE TO OTHER INSTRUMENTS OR RECORDS, IN GENERAL, § 102.
REFERENCE TO SURVEYS, MAPS, AND PLATS AND RECORDS THEREOF, § 103.
ERRONEOUS DESCRIPTION, § 104.
QUANTITY OF INTEREST CONVEYED, § 105.
PARTICULAR WORDS OR TERMS, § 106.
APPURTENANCES, INCIDENTS AND RIGHTS PASSING WITH DEED, § 107.
—— REAL ESTATE, § 108.
—— ARTIFICIAL WATERWAYS, § 109.
—— WATER RIGHTS, § 110.
—— RIGHTS OF WAY, § 111.
—— GOLD AND SILVER, § 112.
—— FIXTURES, § 113.
—— ACCRETIONS, § 114.
—— RENTS, ISSUES AND PROFITS, § 115.
—— RIGHT TO OPERATE, § 116.
AFTER-ACQUIRED TITLE, § 117.
—— INSTRUMENTS PASSING, § 118.

§ 99. Inconsistent Descriptions.

[a] When, in a deed, there are two descriptions of the premises conveyed, and there is a clear repugnance between these descriptions, the court will look into the surrounding facts, and give effect to the description which is the most definite and certain, and which will carry out the evident intention of the parties.—(Cal. 1875) Wade v. Deray, 50 Cal. 376.

§ 100. Property Included in Description in General.

[a] A deed conveying all that portion of certain land lying south of two designated trees on the north boundary line passes only that portion of the realty lying south of a line running through the trees, and not that south of the line running through the trees and extending through the whole tract.—Chapman v. Excelsior Canal Co., 17 Cal. 231.

[b] The description of land conveyed by a deed "as all the land appertaining to a certain rancho granted to the grantor by the Mexican government, which has not been before the date of this instrument sold and conveyed" by the grantor, includes land in the rancho which had been conveyed by the grantor, and afterwards reconveyed to him.—Muller v. Boggs, 25 Cal. 175.

[c] A description in a deed as follows: "All my right, title, and interest in and to a parcel of land situate in the town of San Francisco,

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being block No. 9, the same on which I now reside. The part thus donated commences at the northeast corner of said block, running 25 varas west from said corner; thence back 100 varas,"—conveys a strip off of the easterly side of the block twenty-five varas wide and one hundred varas deep.—De Levillain v. Evans, 39 Cal. 120.

[d] Where a deed from C. and wife described the premises as "all the undivided half of the right, title, and interest of the said parties of the first part of, in, and to that certain tract," etc., "the interest therein conveyed being the same acquired by the parties of the first part as heirs of Jose Joaquin Bernal and his wife, Josefa Sanchez de Bernal, deceased," held, that there was no repugnancy in the descriptive clause, and that the deed conveyed the separate interest which the wife of one of the grantors owned as the heir of Bernal and wife, and not his interest by purchase.—Castro v. Tennent, 44 Cal. 253.

[e] Where the description in a deed is all "the lands owned by the grantor" in a certain county, with certain exceptions, it is sufficient to convey all his lands in such county not included within the exceptions.—Borchard v. Eastwood, 133 Cal. xix, 65 Pac. 1047.

[f] Plaintiff conveyed one-half of her interest in an estate, the deed reciting an intention to convey such interest in the portion of the estate as should finally be distributed and allotted to plaintiff. In an accompanying contract the grantee agreed to use his best endeavors to secure a proper monthly allowance to be made to plaintiff out of the estate for her support during the administration thereof. Held, that such allowance was not within the description of the deed.—De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637.

FOR AUTHORITIES FROM OTHER STATES:

Construction of deeds when lands are bounded by streets or highways: 23 Am. Rep. 233, note. See, also, 13 Cyc. 628-639; 16 Cent. Dig., cols. 382-431, §§ 316-335.

§ 101. Limitations Following Other Description.

[a] Particular will not restrict general descriptions in a deed, if the former follow in the sense of reiteration or affirmation.—Piper v. True, 36 Cal. 606.

[b] A deed granting "all that beach and water property" lying within certain described boundaries, and "known" on a map referred to in the deed "as blocks Nos. 1 to 32, inclusive," includes a block, numbered 33, within the boundaries defined.—Friedman v. Nelson, 53 Cal. 589.

§ 102. —— Reference to Other Instruments or Records in General.

[a] Where one deed refers to another for description of the granted premises, reference may be had to the description in the latter.—(Cal. 1864) Vance v. Fore, 24 Cal. 436.

[b] M. deeded to F. certain lots, and described them as the lots "described in and conveyed by" a former deed from S. to M. The former deed described the lot, but did not convey it, as S. had then no title; but M. had, after the former deed was given, acquired title from B. Held, that by the words, "described in and conveyed by," the grantor meant to convey to F. the lands which he then owned, and which the former deed described and purported to convey.—Central Pac. R. Co. v. Beal, 47 Cal. 151.

§ 103. Reference to Surveys, Maps, and Plats and Records Thereof.

[a] Where, in a conveyance, a reference is made to a map of the premises conveyed, the map and the deed are to be construed together. Seaward v. Malotte, 15 Cal. 304; Vance v. Fore, 24 Cal. 435; Powers v. Jackson, 50 Cal. 429; Penry v. Richards, 52 Cal. 496; Chapman v. Polack, 70 Cal. 487, 11 Pac. 764.

[b] Where land intended to be conveyed is described by reference to certain degrees of latitude, and also a certain map therein specifically described, the degrees of latitude and other imaginary lines will be discarded, as less certain and reliable than the map.—Mayo v. Mazeaux, 38 Cal. 442.

[c] The owner of land held under a Mexican grant made conveyance of a portion, and in the deed described one boundary of the land conveyed as running parallel with the southern line of the ranch, "according to the survey of the same made by the United States surveyor general of said state." At the time the deed was delivered no survey had been made and approved by the surveyor general, but an experimental survey had been made by the deputy of the surveyor general, who had the field-notes in his possession. The grantees in the deed, however, had no knowledge of this experimental survey. Held, that the description in the deed should be held to refer to the final survey of the ranch, to be thereafter determined by the federal authorities.—Fratt v. Toomes, 48 Cal. 28.

[d] When a tract of land comprising a subdivision according to the United States survey is conveyed by deed, and described in the deed only by the name of the township or subdivision of the township, the line of survey made by the United States, and the monuments then placed, are considered as referred to on the face of the deed.—Powers v. Jackson, 50 Cal. 429.

[e] If a party purchases a numbered block of land according to the official map of a city, and his purchase is so described in the deed, a further description of the block by metes and bounds, or courses and distances, is subordinate to the description of the block by its number upon the map, and must give way to the number in case of conflict.—Masterson v. Munro, 105 Cal. 431, 45 Am. St. Rep. 57, 38 Pac. 1106.

[f] A deed of lots in a certain tract, as per map thereof, does not carry any part of what

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was at the date of the map a highway, on which the tract and lots abutted, though in the meantime the highway had been vacated, and the land conveyed to the grantor of the lots; he not having owned the fee in any part of the highway before its vacation.—Sanchez v. Grace Methodist Episcopal Church, 114 Cal. 295, 46 Pac. 2.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 632, 633; 16 Cent. Dig., cols. 402-410, §§ 323, 324.

§ 104. Erroneous Description.

[a] Where one part of the description in a deed is false and impossible, but, by rejecting that, a perfect description remains, the false part should be rejected, and the deed held good. Reed v. Spicer, 27 Cal. 57.

[b] Where, in an action of ejectment, the plaintiff claimed under a deed which described the land by name, as "all the undivided two-thirds of all the lands known by the name of 'Rancho de San Vicente,' situate in the county of Los Angeles and state of California," and added a particular description, which was erroneous, held, that the deed was intended to convey two-thirds of the whole rancho, however erroneous the particular description might be. Haley v. Amestoy, 44 Cal. 132.

[c] If the granting clause in a deed conveys all the interest of the grantor, and a clause is also inserted, stating that the interest conveyed is only that acquired by the grantor, B., and the grantor has not acquired any interest from B., but owns an interest acquired from another person, the interest of the grantor passes by the deed. This is upon the principle that a deed is to be so construed as, if possible, to give effect to it as a conveyance, and if it contains a clause which is repugnant to the general intention of the deed this clause is void.—Wilcoxson v. Sprague, 51 Cal. 640.

[d] The owner of two lots, one of which was inclosed, sold the latter, the deed describing its north line as being fifty-seven and five-twelfths feet from a certain street; but it was understood between the parties that the description was of the inclosed lot, which was never denied by the owner. Thereafter the other lot, lying north of the inclosed lot, was sold; the description reciting that it extended fifty-seven and five-twelfths feet south of the street, and to the other lot. Held, that the reference in the latter deed to the lot first sold was controlling, and the grantee could not claim a strip from the inclosed lot, though subsequent surveys might show that it was located less than fifty-seven and five-twelfths feet from the street.—Powers v. Bank of Oroville, 136 Cal. 486, 69 Pac. 151.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 630; 16 Cent. Dig., cols. 410-415, § 325.

§ 105. Quantity of Interest Conveyed.

[a] A deed for "one-half of my lot" conveys only an undivided one-half interest in the lot.—Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

[b] Where a deed conveys a given quantity of land, a parcel of a larger tract, and fails to locate the quantity by a sufficient description, the grantee has no right to locate it on any portion of the larger area against the will of his grantor, since the grantee merely acquires an undivided interest in the entire tract.—Schenk v. Evoy, 24 Cal. 104.

[c] A. owned a one-half interest in an undivided tenth part of a tract of land. He made a conveyance of "one-half interest" in his right, title and interest "in and to an undivided one-tenth part" of the tract. Held, that A.'s grantee took an undivided fortieth, not a twentieth.—Hayes v. Wetherbee, 60 Cal. 396.

[d] Plaintiff was given by her husband's will a life estate in his undivided one-fifth interest in certain land, with remainder to her children. No reference was made in the will to her community interest By the death of two sons she acquired greater interests in the land. In 1880, she conveyed to her son A. all her interest in a portion of the land. In a partition suit A. admitted that it was not intended to convey to him plaintiff's life estate. By deed, in 1882, she conveyed to A. all her interest in the rest of the land. In 1884, she made a third deed, conveying to him all her life estate, as well as her claim in the community property. The consideration expressed was one dollar and support during life, and the deed stated that it was intended to correct any mistake as to the interest intended to be conveyed, and that such interest was an undivided one-tenth interest and a life interest in the remaining undivided one-tenth. Held, that the provisions of the last deed must govern, and the grantee acquired the one-tenth undivided community interest and the undivided one-tenth life interest, but not the property inherited from the children.—Sepulveda v. Sepulveda, 77 Cal. 605, 20 Pac. 145.

[e] Where deed conveys all right, title and interest of grantor, words "being one-half undivided interest" do not limit previous terms or except any interest conveyed by them, and all grantor's title passes.—McLennan v. McDonnell, 78 Cal. 277, 20 Pac. 566.

[f] Where an undivided quarter interest in land was conveyed to a man and his wife, and on her decease he took the community property, his deed for an undivided half interest in the land should not be construed to mean the undivided half of the quarter interest, but conveyed all his interest, since, as the greater includes the less, the undivided half necessarily included the undivided quarter.—Jordan v. Fay, 98 Cal. 264, 33 Pac. 95.

[g] A description in a deed, omitting immaterial parts, was as follows: "All my right, title, and interest to one and half square miles of farming land, ... being a portion of the lands granted to me in 1841, etc., ... known as the 'Sobrante,' running from the corral of Joaquin Castro, one and a half mile and bounded by the Creek one and mile." Held, that the deed conveyed an undivided in-

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terest in the "Sobrante."—Adams v. Hopkins, 69 Pac. 228.

[h] One owning an undivided interest in a certain extensive tract of land executed a deed purporting to quitclaim to grantee all his interest in and to fifty acres thereof. Held, that the deed did not convey fifty acres of the undivided interest of the grantor, but only his interest in fifty acres.—Adams v. Hopkins, 69 Pac. 228.

[i] One owning about six hundred and seventy-three acres, undivided, of his original undivided one-tenth of an extensive Mexican grant known as the "Sobrante," conveyed "all his right, title and interest . . . . to three hundred and twenty acres of land, to be taken out of his interest which he now holds in a certain tract of land," etc. (the "Sobrante"), "not to be taken where the said W. [the grantor] or any of his tenants are in possession in said grant, the right here sold is an undivided one," etc. Held, that he did not thereby grant three hundred and twenty acres undivided of the land owned by him, or an interest equal to that quantity, but granted only his interest in three hundred and twenty acres, to be taken by grantee in some part other than where he (grantor) or any of his tenants were in possession.—Adams v. Hopkins, 69 Pac. 228.

[j] One owning a part of a Mexican grant, known as the "Sobrante," executed a deed describing the land conveyed as "the one undivided half of all my interest in and to that certain tract or portion of land . . . . known as the 'Castro Sobrante,' which was granted," etc., "meaning to convey three-fourths of one-twentieth of said rancho, less three hundred and twenty acres. . . . . The aforesaid three-fourths of one-twentieth acres of land was heretofore conveyed to the party of the first part by Marcella B. Bradley by deed," etc. Prior to this deed grantor owned three-fourths of one-twentieth of the "Sobrante," less three hundred and twenty acres. Held, that he thereby intended to convey only half his interest therein.—Adams v. Hopkins, 69 Pac. 228.

§ 106. Particular Words or Terms.

[a] The grantor in a deed may, by a call inserted therein, set aside the general sense of the words he uses, and assign to them a different meaning.—Morrison v. Wilson, 30 Cal. 344.

[b] The words "situated to the south of the house of B.," in the description of the premises embraced in a (Mexican) grant of lands, do not necessarily mean immediately adjoining the house of B. on the south. A finding that the lands intended were those immediately adjoining the "lot" on which the house of B. stood, on the south, may be sustained on appeal.—Romie v. Casanova, 45 Cal. 131.

§ 107. Appurtenances, Incidents and Rights Passing with Deed.

[a] The rule is that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee.—Sparks v. Hess, 15 Cal. 186.

[b] Grant of a thing carries all things included, without which grant cannot be had.—Kripp v. Curtis, 71 Cal. 64, 11 Pac. 879.

[c] Everything essential to beneficial use of land conveyed passes by conveyance, in absence of contrary indication by grantor.—McShane v. Carter, 80 Cal. 315, 22 Pac. 178.

[d] When a party grants a thing, he by implication, grants whatever is incident to it or necessary to its enjoyment.—Smith v. Corbit, 116 Cal. 591, 48 Pac. 725.

FOR AUTHORITIES FROM OTHER STATES:

What are appurtenances: 81 Am. St. Rep. 764, note.

What pass as appurtenances: 40 Am. Rep. 381, note; 15 L. R. A. 652, note. See, also, 13 Cyc. 639-642; 16 Cent. Dig., cols. 431-440, §§ 336-341.

§ 108. —— Real Estate.

[a] The sale of a "bridge" across a certain stream, "together with the toll-house, stables, and outhouses of every description," and "all the privileges and appurtenances appertaining, or in any wise belonging to said bridge," passes the land upon which the bridge rested and the other buildings were erected.—Sparks v. Hess, 15 Cal. 186.

[b] Land will sometimes pass without any specific designation of it as land. Thus, the grant of a messuage, or a messuage with the appurtenances, will pass the dwelling-house and adjoining buildings, and also its curtilage, garden, and orchard, together with the close in which the house is built.—Sparks v. Hess, 15 Cal. 186.

[c] The recital in an instrument of sale that there was conveyed "that certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery," will be construed as conveying the land on which the store and the bakery attachment stand, and so much as may be necessary for their ordinary use.—Pottkamp v. Buss, 31 Pac. 1121.

§ 109. —— Artificial Waterways.

[a] Artificial waterway is appurtenant to land and passes by deed as such.—Stanart v. Round Valley Water Co., 77 Cal. 402, 403, 19 Pac. 689.

[b] Conduit or ditch, through which water flows to mill or mine is an appurtenance.—McShane v. Carter, 80 Cal. 315, 22 Pac. 178.

§ 110. —— Water Rights.

[a] Water rights are easements which pass as incidents to conveyance of land.—Cross v. Kitts, 69 Cal. 221, 10 Pac. 409.

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[b] Grant of land carries with it water flowing over soil.—Cameron v. San Francisco, 69 Cal. 390, 9 Pac. 430.

[c] Water used for operating mine is appurtenant to mine and passes by conveyance thereof.—McShane v. Carter, 80 Cal. 313, 22 Pac. 178.

[d] Water right is appurtenant to mill.—McShane v. Carter, 80 Cal. 313, 22 Pac. 178.

[e] Conveyance of ditch carries with it, as appurtenant, water appropriated and acquired by means of it.—Williams v. Harter, 121 Cal. 51, 53 Pac. 405.

§ 111. —— Rights of Way.

[a] Right of way of necessity will pass as appurtenant to the estate.—Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

[b] Nothing passes as incident to a grant of a right of way but that which is necessary for its reasonable and proper enjoyment; and the question as to the extent of the right and duty of the respective owners toward each other is one of fact, to be determined by the language of the grant and all the circumstances existing at the time the grant was made.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

§ 112. —— Gold and Silver.

[a] Where individuals convey lands, the minerals of gold and silver pass, unless expressly reserved.—Moore v. Smaw, Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123.

§ 113. —— Fixtures.

[a] Chattels annexed to realty become appurtenances, and pass by deed.—Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251.

§ 114. —— Accretions.

[a] Accretion passes by deed of land which it adjoins.—Tappendorf v. Downing, 76 Cal. 170, 18 Pac. 247.

§ 115. —— Rents, Issues and Profits.

[a] Conveyance of land passes title to its rents, issues and profits, subject only to such limitations as are contained in the instrument of transfer, or of which the grantee has actual or constructive notice.—Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

§ 116. —— Right to Operate.

[a] Plaintiff having conveyed to defendant all his right and title to "all the buildings, tanks, derricks, pipes, pipe-lines, fixtures, and all other personal property whatsoever," situated on any portion of the ranch, it thereby not only became the owner of the property specifically mentioned, and property of a kindred nature, but also acquired the right to operate them in the manner they had theretofore been operated. Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380.

§ 117. After-acquired Title.

[a] Where a vendor conveys land to which he has no title, and afterward acquires the title, it will inure to the benefit of his vendee, though the after-acquired title is taken in the name of a third person, who has no interest in the transaction.—Quivey v. Baker, 37 Cal. 465.

[b] By the Spanish law the vendor of land was under the implied obligation to make his sale and conveyance effective, and a title afterward acquired by him inured to the benefit of the vendee.—Schmitt v. Giovanari, 43 Cal. 617.

[c] Where an applicant for the purchase of school lands, who has received a certificate of location or of purchase, conveys all his interest in the land described in the certificate, the conveyance vests in the grantee all the right which the grantor may afterward acquire from the state by virtue of a patent issued to him pursuant to his appplication.—Stanway v. Rubio, 51 Cal. 41.

[d] Deed and mortgage executed under a power will bind a title of principal acquired after the power and before the deed.—Ayres v. Palmer, 57 Cal. 309.

[e] It seems that title acquired on death of ancestor passes to grantee of heir-apparent under deed made prior to death of ancestor.—Ryder, Estate of, 119 Cal. 371, 74 Pac. 993.

FOR AUTHORITIES FROM OTHER STATES:

Acquisition of after-acquired title by estoppel: 37 Am. Dec. 129, note.

When after-acquired title does not pass by deeds: 54 Am. Dec. 635, note.

When after-acquired title passes to grantee: 41 Am. St. Rep. 722; 58 Am. Dec. 583, notes. See, also, 13 Cyc. 637; 16 Cent. Dig., cols. 422-433, § 330.

§ 118. —— Instruments Passing.

Deeds passing after-acquired title. See, also, Estoppel, §§ 33-36.

[a] The thirty-third section of the act concerning conveyances changes the rule of the common law as to the effect of deeds, under the statute of uses, upon subsequently acquired interests of the grantor, and gives to them an operation equivalent to the most expressive covenant of warranty, and this section applies to mortgages equally as to conveyances absolute in their form.—Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

[b] By common law there were only two classes of conveyances which were held to operate upon the after-acquired title—those by feoffment, by fine, or by common recovery, and those by indenture of lease. No other forms of conveyance, in the absence of covenants of warranty, had any effect in transferring the title subsequently acquired. A grant or lease only operated upon the estate actually held at the time of its execution by the grantor or releasor.—Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

[c] The general doctrine prevailing in the United States is, that no estate can be passed

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by the ordinary terms of a deed, unaccompanied with covenants of warranty, which is not vested in interest at the time, and that estates subsequently acquired, whether by purchase or descent, are unaffected by such previous conveyance in the hands of the grantor or those claiming under him.—Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

[d] A deed of conveyance in fee simple, with the usual words of grant, but limited in its effect by a clause that it is to be considered, as to the title, only a quitclaim deed, will be held not to pass an after-acquired title, but only the present interest of the grantor.—Morrison v. Wilson, 30 Cal. 344.

[e] A quitclaim deed will not convey an after-acquired title of the vendor.—Cadiz v. Majors, 33 Cal. 288.

[f] The principle that a title acquired by the vendor after a conveyance by him in fee inures to the benefit of his purchaser does not apply when the vendor's deed was a quitclaim, even if it contain a qualified warranty against a specified adverse claim set up by a third party. Quivey v. Baker, 37 Cal. 465.

[g] A deed, whereby grantor bargains, sells and conveys realty, carries with it an after-acquired title of the grantor.—Dalton v. Hamilton, 50 Cal. 422.

[h] Deed of grant and quitclaim made by homestead claimant passes after-acquired title. Pekin Min. and Mill. Co. v. Kennedy, 81 Cal. 358, 363, 22 Pac. 679.

[i] A deed of school lands, made before a certificate of purchase was issued to the grantor, passes no interest under the statute of California, in force in 1869, providing that a subsequently acquired title shall pass to the grantee where the grantor had made no application to purchase the land, nor had paid anything on it.—People v. Blake, 84 Cal. 611, 22 Pac. 1142; People v. Hemme, 22 Pac. 1143.

[j] Quitclaim by owner of incipient title passes title acquired thereafter by patent.—Wholey v. Cavanaugh, 88 Cal. 136, 25 Pac. 1112.

[k] Defendant's grantor executed an instrument by which he released and quitclaimed to defendant land on which he had only a school land certificate of purchase, and by which he further agreed to perfect his title, and make defendant a good deed. Held, that the subsequent issue of a patent to the grantor inures to defendant's benefit, and invests him with the legal title.—Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112.

[l] As a rule quitclaim deed does not pass after-acquired title.—Wholey v. Cavanaugh, 88 Cal. 136, 25 Pac. 1112.

[m] A grantor in a quitclaim deed, who at the time of the execution thereof had simply filed his application to purchase the land from the state, had no interest subject to transfer, and his after-acquired title did not vest in his grantee, even though the deed purported to convey to the grantee all the "estate, right, title and interest which the grantor might thereafter acquire in and to" the premises.—Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500.

[n] A subsequently acquired title does not relate back so as to give effect to a void instrument.—Powell v. Patison, 100 Cal. 236, 34 Pac. 677.

[o] A deed of a title in fee simple absolute, expressly purporting to convey all after-acquired title of the grantor, operates upon all the interest in the property thereafter acquired by him, and causes it to inure to the benefit of the grantor and his heirs.—Green v. Green, 103 Cal. 108, 37 Pac. 188.

C. ESTATES AND INTERESTS CREATED.

OPERATION OF QUITCLAIM DEED, § 119.
OPERATION OF DEED IN REPRESENTATIVE OR OFFICIAL CAPACITY, § 120.
FEE SIMPLE, § 121.
LIFE ESTATES, § 122.
ESTATES-TAIL, § 123.
REVERSIONS, § 124.
REPUGNANT AND CONFLICTING PARTS OR CLAUSES DESIGNATING ESTATE CREATED, § 125.
APPLICATION OF RULE IN SHELLEY'S CASE, § 126.
JOINT INTERESTS OR ESTATES, § 127.

§ 119. Operation of Quitclaim Deed.

[a] A quitclaim deed only purports to release and quitclaim whatever interest the grantor possesses at the time. He does not thereby affirm the possession of any title, and is not precluded from subsequently acquiring a valid title and attempting to enforce it. So a grantee in a quitclaim deed may deny that he received any estate by the deed.—San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

[b] A quitclaim deed conveys whatever title the grantor had in the land.—Sullivan v. Davis, 4 Cal. 291; Carpentier v. Williamson, 25 Cal. 154; Graff v. Middeton, 43 Cal. 341; Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Wholey v. Cavanaugh, 88 Cal. 135, 25 Pac. 1112.

[c] A covenant of nonclaim operates only upon the interests that the grantor had or may have claimed to have at the date of the deed.—Morrison v. Wilson, 30 Cal. 344.

[d] A quitclaim deed of a Spanish grant, executed by one afterward receiving a patent therefor from the United States, conveys the title to the purchaser, and the patent inures to his benefit.—Crane v. Salmon, 41 Cal. 63.

[e] Where a town, as the successor in interest of a Mexican pueblo, owns the pueblo lands within its limits, and its board of trustees grant a block of the land to a petitioner for the same, and he then conveys the same by a quitclaim deed, and the board of trustees of the town afterward make a conveyance to the grantor, the grantee acquires by the quitclaim deed the title to the premises, as against a subsequent purchaser from the grantor. The deed of the board of trustees relates back to

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the date of the grant.—Thompson v. Spencer, 50 Cal. 532.

[f] A quitclaim deed conveys the title in fee simple, if the grantor has such title and does not imply any precedent interest or easement in the releasee.—Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47.

[g] A deed executed by one having paper title to an individed one-third of a certain tract of land, executed on the day that suit was instituted against him and others for a decree that by reason of mistakes in description he was the owner of a third interest in the eastern half, instead of the northern half, of the tract, and which resulted in such a decree, will be held to quitclaim his interest in the entire tract, not merely the north half; it, after granting the undivided one-third of the northern half of the tract known as M., proceeding: "Together with all the estate," etc., "which I had or may have of, in or to the same, or any part or parcel thereof, to have and to hold the aforesaid premises."—Walsh v. Abbott, 145 Cal. 285, 78 Pac. 715.

FOR AUTHORITIES FROM OTHER STATES:

Effect of quitclaim deed on prior unrecorded deed: 25 Am. Dec. 164, note.

What are quitclaim deeds and their effect: 105 Am. St. Rep. 854-863, note. See, also, 13 Cyc. 652-654; 16 Cent. Dig., cols. 489-501, §§ 394-400.

§ 120. Operation of Deed in Representative or Official Capacity.

[a] Where, under a will, a wife took as legatee, executrix and guardian, and made a conveyance of the devised property, describing herself in the deed as executrix, it was held that this was a mere matter of description, and not a limitation upon the estate conveyed.—Norris v. Harris, 15 Cal. 226.

[b] Where an executrix without authority executes a deed as executrix, and also in her individual capacity, it will pass her interest in the property, although not that of other devisees.—Morrison v. Bowman, 29 Cal. 337.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 656, 657; 16 Cent. Dig., cols. 503-506, §§ 402-405.

§ 121. Fee Simple.

[a] The words "Enagenasion . . . . del torreno," without any other limiting term, in a conveyance under the Mexican law, indicates an intent on the part of those executing the instrument to convey the fee, and not an intent to create a mere servitude upon the land as a use or usufruct.—Mulford v. Le Franc, 26 Cal. 88.

[b] A deed which, in its granting part, simply grants, bargains and sells to the party of the second part, and contains no words of inheritance under our statute, conveys a fee simple title; but the title thus conveyed may be limited, in the habendum clause, to an estate for life.—Montgomery v. Sturdivant, 41 Cal. 290.

[c] Under section 1105 of the Civil Code a fee-simple title is presumed to be intended to pass upon a grant of real property, only where it does not appear from the grant that a lesser estate was intended, and where it clearly appears from the grant that a lesser estate was intended, a fee simple title does not pass.—Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 642-644; 16 Cent. Dig., cols. 444-455, §§ 344-355.

§ 122. Life Estates.

[a] A conveyance to husband and wife for their joint lives, and to the survivor during the life of the survivor, with remainder to the issue and heirs of their bodies, and the heirs of such issue forever, vests a life estate in the grantees and a full estate in their children.—Montgomery v. Sturdivant, 41 Cal. 290.

[b] Under section 779 of the Civil Code a deed of land purporting to "give, grant, alien and confirm unto the said party of the second part, and to his heirs all those certain lots, etc., ... to have and to hold, all and singular, the said premises . . . . unto the said party of the second part, for and during his natural life, and to the issue and heirs of the body of the said party of the second part," conveys a life estate only to the immediate grantee.—Barnett v. Barnett, 104 Cal. 208, 37 Pac. 1049.

[c] A person entitled to a homestead entry executed an agreement by which, in consideration of care and attention, she granted to her son all her personal property and all her interest in her homestead right under a specified homestead entry certificate giving to the grantee the right to cultivate or rent the land during the grantor's lifetime, with full power at her death to prove up on the same as the grantor's sole heir to the land, reserving her right to occupy and reside in the house thereon so long as she should live. Held, that such agreement was not a lease, but a conveyance of a freehold estate for life in the land entered by the grantor.—Mann v. Mann, 141 Cal. 326, 74 Pac. 995.

[d] Deed to husband and wife construed and held that on the death of the husband the wife had only an estate for life.—Burnett v. Piercy, 86 Pac. 603.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 646; 16 Cent. Dig., cols. 459-462, §§ 360-365.

§ 123. Estates-tail.

[a] Civil Code, section 763, providing that "every estate which at common law would be djudged to be a fee-tail is a fee simple," does not apply to an instrument conveying only a life estate, though at common law it would convey a fee-tail.—Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049.

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FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 645; 16 Cent. Dig., cols. 456-459, §§ 358, 359.

§ 124. Reversions.

[a] Where a deed conveying a life estate in lands recited that it was the "purpose" of the grantor that after the death of the grantee the land "shall become and be the property of R.," the recital was insufficient to convey any interest to R., and a reversion was left in the grantor after the life estate.—McGarrigle v. Roman Catholic Orphan Asylum of San Francisco, 145 Cal. 694, 79 Pac. 447.

§ 125. Repugnant and Conflicting Parts or Clauses Designating Estate Created.

[a] In a conveyance of "all the right, title and interest of" C. to a certain piece of real estate, made by a sheriff upon an execution sale thereof, the words in the description, "being a leasehold unexpired," were held not to limit the extent of the previous terms of conveyance, or except out any interest conveyed thereby.—Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61.

[b] The statute which provides that every conveyance of real estate shall pass all the estate of the grantor, unless a different intent shall appear by express terms or necessary implication, was not intended to prohibit the use of a habendum clause limiting the estate granted, it being sufficient that the limitation appear in the deed, though not in the granting part thereof.—Montgomery v. Sturdevant, 41 Cal. 290.

§ 126. Application of Rule in Shelley's Case.

[a] Words in restraint of alienation will not limit operation of rule in Shelley's case.—Norris v. Hensley, 27 Cal. 451.

FOR AUTHORITIES FROM OTHER STATES:

11 Am. St. Rep. 99, note. See, also, 13 Cyc. 658; 16 Cent. Dig., cols. 512-514, §§ 413-415.

§ 127. Joint Interests or Estates.

[a] The grantee in a deed for "one-half of my lot" will take only as a tenant in common with the grantor.—Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

[b] Where a deed conveys a portion of a tract of land, and fails to locate the quantity so conveyed by a sufficient description, the grantee becomes a tenant in common of the whole grant with his grantor.—Schenk v. Evoy, 24 Cal. 104.

[c] A deed purporting to describe a specific tract of land, giving the number of acres, and calling it part of a larger tract, but which fails to describe the tract of land intended to be conveyed, or any tract, does not convey an undivided interest in the larger tract, nor make the grantee a tenant in common with the grantor in the latter.—Grogan v. Vache, 45 Cal. 610.

[d] If, after owner has conveyed undivided one-third of same, he retains adverse possession until the title of the grantee is extinguished, and then executes a conveyance to another party of "the interest in said lands or rancho heretofore conveyed" to said grantee, and "all the undivided third part of" the whole tract of land and rancho, the latter conveyance vests in the grantee, not the particular third first conveyed, but an undivided third, without distinguishing which third.—Hartman v. Reed, 50 Cal. 485.

[e] A deed by which a husband bargains and sells real estate to his wife and son by name, and to such other heirs as the wife may have during the marriage, and after her decease to the children of the marriage, their heirs and assigns, forever, vests the estate in the wife and son named in the conveyance in equal parts, as tenants in common, in fee simple, even if other children are born to the spouses.—Brenham v. Davidson, 51 Cal. 352.

[f] When a deed conveys a certain number of acres without describing the land conveyed, to be taken out of a larger tract described, the grantee becomes, by his deed, a tenant in common, having a fractional interest, represented by a fraction having for its denominator a number equal to the number of acres in the larger tract described, and for its numerator a number equal to the number of acres conveyed. The grantee acquires such fractional interest in every acre of the larger tract.—Wallace v. Miller, 52 Cal. 655.

[g] A grant of water rights, reservoirs, etc., for the purpose of working ore conveyed, does not convey exclusive dominion of any portion of the ground, so as to make the grantee a joint tenant, or tenant in common, with the grantor.—Smith v. Cooley, 65 Cal. 46, 2 Pac. 880.

[h] Conveyance of definite quantity of land, within and as part of larger tract of land well described, but without locating land conveyed, conveys undivided interest in larger tract, unless deed purports to describe smaller tract and fails to do so.—Cullen v. Sprigg, 83 Cal. 61, 23 Pac. 222.

[i] A deed purported to convey "all the right, title, and interest" of the grantor, being an undivided interest in a specific tract of lands held in common. The grantee executed a deed purporting to grant, bargain and sell the specific tract, and reciting that it was the same land thus conveyed to him. At that time the grantor in the second deed had no general interest in the common land, as his grantee knew, but he subsequently acquired one. Held, that the grantee in the second deed took only an undivided interest in the specific tract.—Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cent. Dig., cols. 541-547, §§ 431-433.

D. EXCEPTIONS AND RESERVATIONS.

VALIDITY OF EXCEPTION OR RESERVATION, § 128.
RIGHT TO OCCUPY, § 129.
PROPERTY EXCEPTED, § 130.
CONSTRUCTION AND OPERATION OF EXCEPTIONS OR RESERVATIONS, § 131.

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FOR AUTHORITIES FROM OTHER STATES:

Deeds reserving use of premises during grantor's life: 38 Am. Rep. 621, note. See, also, 13 Cyc. 672-682; 16 Cent. Dig., cols. 586-614, §§ 456-468.

§ 128. Validity of Exceptions or Reservation.

[a] Covenant or reservation in favor of third person, without declaring a trust, or limiting a remainder, is void.—Eldridge v. Gee Yup Co., 17 Cal. 52.

[b] Where a grant by metes and bounds excepts a tract by the name under which it is generally known, the tract so excepted does not pass by the grant.—Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

[c] Where a deed described the land conveyed by courses and distances, and conveyed no specific number of acres, it was competent for the grantor to except a swamp or marsh from the operation of the deed.—Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

[d] A reservation of a right of profit a prendre in a deed is equivalent to an express grant of the right by the grantee to the grantor.—Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

[e] When rights reserved are either exceptions or profits a prendre, neither words of inheritance nor an express power of assignment is required to be stated in the deed, in order to enable the grantor to make a transfer of such rights.—Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

[f] Reservation forbidding grantee from furnishing to others rock taken from premises sold is not in restraint of trade.—Pavkovich v. Southern Pac. Ry. Co., 87 Pac. 1097.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 675, 676; 16 Cent. Dig., cols. 590-595, §§ 458, 459.

§ 129. Right to Occupy.

[a] Where a father and mother deeded to the husband of their deceased daughter the property which she had devised to them in fee, and he agreed, in consideration therefor to employ the father to farm and cultivate the property, the agreement reciting that its object was to insure to them "a home on said ranch during their lives, free of rent and all charges whatsoever," the father and mother were entitled, as long as they fully performed the agreement, to the undisputed use and occupation of the property, and this whether or not the agreement gave them a life estate therein.—Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

§ 130. Property Excepted.

[a] The owner of an undivided interest in land sold and conveyed all his right, title and interest therein, except a specified portion, described by metes and bounds, which was then in his exclusive possession. The grantees stipulated by instrument in writing that in consideration of said deed they would consent and agree that he, the said grantor, should have set off to him in any decree of partition of said land that portion of the land so reserved, and that they would use all their influence to secure the same to him as the part reserved out of the interest which he held in the land before his deed to them. Held, that under such an agreement the said grantor only reserved to himself the equivalent of his undivided interest in the part reserved, and not the equivalent of the whole of the land reserved as described, and that such agreement did not constitute the grantee's trustees, so that, when the reserved portion was allotted to them under a partition, they would be bound to convey it all to him, but that a decree of partition allotting to him so much of the land in the reserved portion as was equivalent to his undivided interest therein gave him all that he was entitled to.—McBrown v. Dalton, 70 Cal. 89, 11 Pac. 583.

§ 131. Construction and Operation of Exceptions or Reservations.

[a] Where a deed conveys a tract of land by name and description, and then excepts from its operation certain parcels of the tract, and the language of the exception leaves it doubtful whether it was the intention of the grantor to except a particular parcel, the deed must be construed most favorable to the grantee, and the doubt resolved in his favor.—Muller v. Boggs, 25 Cal. 175.

[b] Deed reserving a wharf does not reserve a house on piles abutting the wharf.—Upham v. Hosking, 62 Cal. 250.

[c] Where the intention of the parties is clearly expressed in a deed containing an exception or reservation of marsh or water-bearing land, and of the right to develop the same, little weight should be attached to technical definitions of the terms used, and it matters little what name is given to the rights reserved. Painter v. Pasadena Land etc. Co., 91 Cal. 74, 27 Pac. 539.

[d] A reservation in a grant is to be interpreted in favor of the grantor.—Martin v. Lloyd, 94 Cal. 195, 24 Pac. 491.

[e] Where a husband and wife join in a conveyance of the wife's separate property, reserving a portion thereof to the grantors, and the grantees convey it, excepting the portion previously reserved by such husband, such latter conveyance does not vest any title in the husband, since a reservation in a conveyance cannot confer title on a stranger to the instrument.—Butler v. Gosling, 130 Cal. 422, 62 Pac. 596.

[f] A conveyance of a canal by deed reserved a perpetual right of way to carry three hundred and fifty inches of water, subject to the vendor's payment of such proportion of the entire expense of maintaining and repairing such canal as the three hundred and fifty inches should bear to the entire amount of water from time to time being carried through such canal. Held, that the vendor's successors were not

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obliged to pay the expenses specified in the reservation as a condition precedent to have their water flow through the canal, the right thereby given being one of reimbursement merely.—Smith v. Stearns Ranchos Co., 132 Cal. 178, 64 Pac. 261, 716.

[g] A deed of land for church purposes, containing the provision, "with the exception of the timber thereon," reserved in the grantor the fee simple title to the timber, and not merely the right to enter and remove the same within a reasonable time; Civil Code, section 1069, Code of Civil Procedure, section 1864, providing that exceptions and reservations in grants are to be interpreted in favor of the grantor, and Civil Code, section 1072, providing that words of inheritance are unnecessary to transfer a fee in real property.—Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.

[h] A deed conveying to the grantees all the lands embraced in the grant, "excepting and reserving from this conveyance all lands which have been heretofore conveyed" by the grantors, excepts from the conveyance all lands previously sold.—Adams v. Hopkins, 69 Pac. 228.

[i] Reservation forbidding grantee from furnishing others rock taken from premises sold is not in restraint of trade.—Pavkovich v. Southern Pac. Ry. Co., 87 Pac. 1097.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 676-682; 16 Cent. Dig., cols. 607-614, §§ 465-468.

E. CONDITIONS AND RESTRICTIONS.

NATURE AND CREATION, § 132.
—— CONDITION OR RESERVATION, § 133.
VALIDITY OF CONDITIONS, § 134.
—— RESTRAINT OF ALIENATION, § 135.
—— RESTRAINT OF USE, § 136.
CONSTRUCTION AND OPERATION OF CONDITIONS, § 137.
CONDITIONS PRECEDENT, § 138.
—— IMPOSSIBILITY OF PERFORMANCE, § 139.
—— DISTINGUISHED FROM CONTRACT SALE, § 140.
CONDITIONS SUBSEQUENT, § 141.
PERSONS ENTITLED TO BENEFIT OF CONDITION OR OF BREACH, § 142.
PERSONS BOUND TO PERFORM CONDITIONS, § 143.
PERFORMANCE OR BREACH, § 144.
—— CONDITIONS RELATING TO SALE, § 145.
—— EXCUSE FOR NONPERFORMANCE OF BREACH, § 146.
BREACH AND EFFECT THEREOF, § 147.
RELEASE OR WAIVER OF CONDITION, § 148.

§ 132. Nature and Creation.

[a] To create condition in deed apt words must be appended to grant which, ex vi termini, import that vesting of continuance of estate is to depend upon condition.—Cullen v. Sprigg, 83 Cal. 64, 23 Pac. 222.

[b] Estate upon condition cannot be created by deed except when terms of grant admit of no other reasonable interpretation.—Cullen v. Sprigg, 83 Cal. 64, 23 Pac. 222.

[c] A provision in a conveyance of land for railroad purposes that, as a further consideration for such grant, the grantee will place certain stations on such land, is not available to defeat the estate created by the grant, as it is only a personal covenant of the grantee.—Behlow v. Southern Pac. R. Co., 130 Cal. 16, 62 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 683-685; 16 Cent. Dig., cols. 615-620, §§ 469-472.

§ 133. —— Condition or Reservation.

[a] The restrictions were on the power of disposition; there were rights of way reserved; the grantee was directed to have a judicial survey, etc.; and the judge was to make a report thereof. Held, that these were not conditions, but qualifications.—Scott v. Ward, 13 Cal. 458.

§ 134. Validity of Conditions.

[a] Where an owner of land conveys it absolutely, and afterward executes a conveyance to grantee under conditions, the conditions cannot operate, for there is no estate remaining in the grantor on which they can take effect.—Alemany v. Daly, 36 Cal. 90.

FOR AUTHORITIES FROM OTHER STATES:

Validity of conditions and restrictions: 95 Am. St. Rep. 214-224, note. See, also, 13 Cyc. 685-687; 16 Cent. Dig., cols. 621-629, §§ 473-481.

§ 135. —— Restraint of Alienation.

[a] Where the granting clause of a deed conveys an estate in fee simple, a subsequent proviso that the grantee shall not convey without the consent of the grantor is void, as a restriction on alienation, general as to time and persons, and therefore repugnant to the estate created.—Murray v. Green, 64 Cal. 363, 28 Pac. 118.

[b] Condition that grantee should sell to no one but grantor is in restraint of alienation.—Maynard v. Polhemus, 74 Cal. 143, 15 Pac. 451.

[c] An agreement reciting that defendant furnished as a gift the purchase money for land conveyed to his mother, and that his mother agreed that the land should not be conveyed without defendant's consent, is within Civil Code, section 711, providing that conditions restraining alienation, when repugnant to the interest created, are void.—Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

[d] Civil Code, sections 711, 1636, 1641, 1642, construed and held that where, on a fair consideration of all the parts of a deed and of contemporaneous instruments, intent is shown to limit the granting clause so that it should transfer only a limited estate, the rule that repugnant conditions restraining alienation are void

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does not apply.—Burnett v. Piercy (Cal. Sup.), 86 Pac. 603.

FOR AUTHORITIES FROM OTHER STATES:

Conditions in deeds in restraint of alienation: 57 Am. Dec. 488, note. See, also, 13 Cyc. 686; 16 Cent. Dig., col. 624, § 478.

§ 136. —— Restraint of Use.

[a] The rule that a prohibition or limitation of the use of property granted, which is inconsistent with the title conveyed, is void, has no application where an estate in fee does not pass to the grantee.—Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465.

§ 137. Construction and Operation of Conditions.

[a] Where a deed conveys land in praesenti for a valuable consideration, and the grantee covenants to perform certain acts, or, in case of his failure to perform, the deed to be void, the grantor to remain in possession until the performance, this will not constitute a mortgage, nor are the conditions in the deed conditions precedent.—Hihn v. Peck, 30 Cal. 280.

[b] The deed is to be construed as intending that the condition should apply to each lot conveyed, the same as if there had been four separate deeds of the separate lots, each containing the same condition set forth in the deed.—Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

[c] A purchaser of real estate, with both actual and constructive notice of a condition in a deed in the chain of title, is bound thereby, though the conveyance to him does not contain such condition.—Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

[d] Where an interest in a mining claim was conveyed to plaintiff in consideration of an agreement that he should work the mine, and give the grantor one-third of the minerals obtained, plaintiff and the grantee of a part of his interest cannot have their titles quieted as against the grantor and his grantee, since plaintiff and his grantee took and held their interests subject to the contract. Judgment (1900), 62 Pac. 1055, modified.—Downing v. Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160, 65 Pac. 385.

[e] Where land is conveyed on condition that it shall be used solely for the erecting and maintaining thereon of a school, and residences for teachers and students thereof, and for no other purpose, the estate conveyed is conditional, and, on the land being abandoned for such purpose, all rights thereto revert to the grantor, and a clause of re-entry is not necessary.—Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10.

[f] A deed to a reclamation district created to reclaim land in the district and construct and maintain works for the reclamation of such land, which provided that the district is to hold the premises, for reclamation only, and that, if the land shall cease to be so used, it shall revert to the grantor, gave the grantee no right to use the land for different purposes than that of reclamation, and on its use for such purposes it would revert to the grantor.—Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638.

[g] Conditions held to forbid grantor from furnishing to others rock taken from deeded premises.—Pavkovich v. Southern Pac. Ry. Co., 88 Pac. 1097.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 687-695; 16 Cent. Dig., cols. 630-664, §§ 482-504.

§ 138. Conditions Precedent.

[a] An instrument in the form of a deed of bargain and sale, duly recorded, contained a power of attorney to the grantees, authorizing them to manage and dispose of the property in the name of the grantor, with an agreement that the grantor would not exercise any right or disposition over the property unless on failure of the grantees to pay the price at time agreed on, and with a covenant that if the grantees should perform their covenants, or if the grantor should fail to perform his, the deed should take effect as an absolute conveyance. Held, that the title remained in the grantor until the strict and punctual performance by the grantees of their covenants, which was a condition precedent upon the performance of which the estate vested in them.—Brannan v. Mesick, 10 Cal. 95.

[b] An owner whose land had been used for some years for cemetery purposes conveyed same to a city for nominal consideration, provided the city obtain authority from the legislature, and remove the dead therefrom within certain time; said city to preserve the land as an ornamental public square, or use it for erection of public buildings, with reverter to the grantor in case of sale or otherwise to private uses. Held, that abandonment of the land for cemetery purposes and removal of the bodies was a condition precedent to the vesting of title.—City of Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

FOR AUTHORITIES FROM OTHER STATES:

What are conditions precedent in deeds and wills and their effect: 102 Am. St. Rep. 366, note. See, also, 13 Cyc. 688; 16 Cent. Dig., cols. 636, 637, § 487.

§ 139. —— Impossibility of Performance.

[a] A condition precedent, though impossible from the beginning, or for any reason incapable of performance, is not for that reason void, but operates to prevent the estate from vesting.—Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

§ 140. —— Distinguished from Contract of Sale.

[a] Deed upon condition precedent, distinguished from contract of sale.—Brannan v. Mesick, 10 Cal. 95, 107.

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§ 141. Conditions Subsequent.

[a] Two of the members of a partnership conveyed to the others partnership property, reciting that the parties of the first part have bargained, sold, and conveyed all their right to the property, and, after stipulating as to the manner of paying the consideration, stated that if the consideration was not paid the property was to be delivered to the grantors, to be disposed of to pay it. Held, that the conveyance did not depend on the performance of the condition, but passed the title in præsenti.—Cayton v. Walker, 10 Cal. 450.

[b] Agreement in deed to assume and pay mortgage is not condition upon breach of which title revests in grantor.—Martin v. Splivalo, 69 Cal. 614, 11 Pac. 484.

[c] A deed which reserves to the grantor the right to live on the land until his death, and provides that his minor children shall be supported out of the proceeds thereof until each shall have received a certain sum, and that the grantee shall pay to each of the minor children a certain sum on certain dates, and that, when the grantee shall have performed the conditions expressed, the legal title to the land shall vest in him absolutely, creates a condition subsequent.—Bank of Suisun v. Stark, 106 Cal. 202, 39 Pac. 531.

[d] Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are to be construed liberally in favor of the holder of the estate, and strictly against an enforcement of the forfeiture.—Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

Conditions subsequent in deeds: 31 Am. St. Rep. 46, note.
Conditions subsequent in deeds, what language creates: 57 Am. Rep. 63, note. See, also, 13 Cyc. 689-691; 16 Cent. Dig., cols. 637-651, §§ 488-495.

§ 142. Persons, Entitled to Benefit of Condition or of Breach.

[a] Only grantor can complain of breach of conditions subsequent.—Vanderslice v. Hanks, 3 Cal. 28.

[b] Question of performance of conditions of a land grant can only be raised by granting power.—Vanderslice v. Hanks, 3 Cal. 28.

[c] Questions as to the performance of the conditions contained in a grant can only be made by the grantor, and not by a mere naked trespasser.—Buckelew v. Estell, 5 Cal. 108.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 692; 16 Cent. Dig., cols. 652-657, §§ 496-499.

§ 143. Persons Bound to Perform Condition.

[a] An instrument in the form of a deed, duly recorded, contained a power of attorney to the grantees, authorizing them to manage and dispose of the property, in the name of the grantor, with an agreement that the grantor would not exercise any right or disposition over the property unless on failure of the grantees to pay the price at time agreed on, and with a covenant that if the grantees should perform their covenants, or if the grantor should fail to perform his, the deed should take effect as an absolute conveyance. Held, that the grantees' vendee must take notice of the grantees' title, and hence was bound by its conditions.—Brannan v. Mesick, 10 Cal. 95.

[b] Covenant in deed held binding on assigns of grantees.—Pavkovich v. Southern Pac. Ry. Co., 87 Pac. 1097.

FOR AUTHORITIES FROM OTHER STATES:

23 L. R. A. 396, note. See, also, 13 Cyc. 694; 16 Cent. Dig., cols. 657-659, §§ 500, 501.

§ 144. Performance or Breach.

[a] At civil law mere nonperformance within a stipulated time does not, ipso facto, annul a contract, unless time is of the very essence of the contract.—Holliday v. West, 6 Cal. 519.

[b] Performance of condition precedent vests title without further act.—Brannan v. Mesick, 10 Cal. 95.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 695-706; 16 Cent. Dig., cols. 664-698, §§ 505-521.

§ 145. —— Conditions Relating to Sale.

[a] An instrument in the form of a deed of bargain and sale, duly recorded, contained a power of attorney to the grantees authorizing them to manage and dispose of the property, in the name of the grantor, with an agreement that the grantor would not exercise any right or disposition over the property unless on failure of the grantees to pay the price at time agreed on, and with a covenant that if the grantees should perform their covenants, or if the grantor should fail to perform his, the deed should take effect as an absolute conveyance. Held that, on failure of the grantees to pay at the time agreed on, the grantor held, and could convey as if the deed had never been made.—Brannan v. Mesick, 10 Cal. 95.

§ 146. —— Excuse for Nonperformance of Breach.

[a] Where the consideration of a deed was that the grantee should marry the grantor, and live with him the rest of their joint lives, and they were married and lived as man and wife for a number of years, the husband is not entitled to a reconveyance because the wife refused to live longer with him, though, before the execution of the deed, the wife falsely represented to the husband that she was a woman of chaste character.—Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904.

§ 147. Breach and Effect Thereof.

[a] At common law, breach of condition subsequent will not revest title without office

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found or re-entry for forfeiture.—Norris v. Moody, 84 Cal. 145, 24 Pac. 37.

[b] Under civil law no formal denouncement was necessary to forfeit alcalde grant for nonperformance of condition subsequent.—Norris v. Moody, 84 Cal. 151, 24 Pac. 37.

[c] Under a deed conveying four town lots, and conditioned that any dwelling-house erected "upon these premises" shall cost not less than a sum named, the erection of a house costing a less sum on one of two lots adjoining each other works a forfeiture only as to the lot on which the house is erected. Quatman v. McCray, 128 Cal. 285, 60 Pac 855.

[d] The conveyance of land by a reclamation district, in which the right is reserved to use a part of the building on the premises for tools, does not show that the premises have ceased to be used for the purposes of reclamation, in violation of a clause of the deed restricting the conveyance to one for reclamation purposes only.—Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638.

[e] Under Civil Code, section 1442, providing that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, every presumption, on conveyance of land for certain purposes and providing for a reverter to the grantor in case of its use for other purposes, is against such reverter, and the party claiming the same must clearly show that the land has ceased to be used for the purpose for which it was granted.—Reclamation Dist No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638.

[f] In an action by a reclamation district to quiet title to land conveyed to it for reclamation purposes only, and which was to revert to the grantor in case of its use for any other purposes, evidence held to support a finding that the land was used for reclamation purposes, and had never ceased to be so used.—Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638.

[g] A deed by a reclamation district purporting to convey lands granted to it for reclamation purposes only, if void because of want of power in the district to make the conveyance, still left the title to the property in the reclamation district, and did not operate to put it in the owner of the reversion, which was dependent on the cessation of the use of the land for reclamation purposes.—Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638.

FOR AUTHORITIES FROM OTHER STATES:

Conditions subsequent, when and at whose instance deeds may be avoided for a breach of: 44 Am. Dec. 743, note. See, also, 13 Cyc. 705, 706; 16 Cent. Dig., cols. 694-698, § 521.

§ 148. Release or Waiver of Condition.

[a] Defendant contracted to purchase certain lots, with verbal notice from the grantor that the deed to the premises would be conditioned that any dwelling-house erected thereon should cost not less than twelve hundred dollars. Before delivery of the deed, defendant removed to one of the lots a house of much less value, and the deed was delivered on his promise that he would improve same so as to conform with the condition. Defendant also promised at different times after the delivery of the deed to so improve the property, but failed to do so, and before this action was commenced defendant had paid interest on notes and mortgages given for part of the purchase price, but which had been assigned to another by the grantor. Held, that the condition of the deed was not waived.—Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 706-708; 16 Cent. Dig., cols. 698-703, §§ 522-525.

F. LOSS OR RELINQUISHMENT OF RIGHTS.

§ 149. Redelivery of Deed to Grantor.

[a] A subsequent surrender to the grantor of a deed which has been executed and delivered will not revest the title.—(Cal. 1861) Kearsing v. Kilian, 18 Cal. 491; (1867) Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670.

[b] After one has conveyed land by deed, and taken promissory notes for the purchase money, an agreement between the vendor and purchaser to rescind the sale, and the actual delivering up and cancellation of the deed and notes, does not revest the title in the vendor, so as to enable him to maintain an action of ejectment against a third party to recover possession of the land. There must be a reconveyance.—Cranmer v. Porter, 41 Cal. 462.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 723; 16 Cent. Dig., cols. 738-741, § 551.

§ 150. Destruction of Deed by Parties.

[a] The destruction of a deed of conveyance by or at the instance of the grantee does not reinvest the grantor with the legal title. (Cal. 1866) Bowman v. Cudworth, 31 Cal. 148; (1867) Killey v. Wilson, 33 Cal. 690.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 720-722; 16 Cent. Dig., cols. 741-744, § 553.

IV. PLEADING AND EVIDENCE.

PLEADING, § 151.
JUDICIAL NOTICE—MERIDIAN LINES, § 152.
PRESUMPTIONS AND BURDEN OF PROOF, § 153.
—— IDENTITY OF PARTIES, § 154.
—— IDENTITY OF LAND, § 155.
—— CONSIDERATION, § 156.
—— DELIVERY, § 157.

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ADMISSIBILITY OF EVIDENCE, § 158.
WEIGHT AND SUFFICIENCY OF EVIDENCE, § 159.
—— IDENTITY OF PARTIES, § 160.
—— IDENTITY OF LAND, § 161.
—— EXECUTION, § 162.
—— DELIVERY, § 163.
—— VALIDITY, § 164.

§ 151. Pleading.

[a] Allegation that signature to deed was procured through undue influence is an allegation of nondelivery.—Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264.

[b] Where execution of deed is admitted, and it is sought to avoid it on ground of duress it must be specially pleaded.—Nordholt v. Nordholt, 87 Cal. 556, 22 Am. St. Rep. 268, 26 Pac. 599.

[c] The complaint in an action to set aside a deed, alleged that the deed in question was made by plaintiff to defendant in view of death and to take the place of a will; that it was placed in defendant's hands only to enable her to prove the same after plaintiff's death; that it was understood that the deed was not to take effect until after plaintiff's death; that, after acknowledging the deed, plaintiff retained possession of it, and it was understood that he should retain possession of it until his death; that defendant thereafter wrongfully obtained possession of the deed, and had the same recorded. Held, that the facts stated were sufficient to entitle plaintiff to a trial as to the delivery of the deed.—Denis v. Velati, 96 Cal. 223, 31 Pac. 1.

[d] A party offering a deed in evidence need not prove a delivery thereof, as against defendants, who by answer aver said deed was delivered.—Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

[e] A complaint alleging that defendant had "placed upon" a lot conveyed to him a house of the value of four hundred dollars, is a sufficient allegation of a breach of a condition in the deed that any dwelling-house "erected" on said premises should cost not less than twelve hundred dollars, where it appears that the parties to the deed understood the word 'erected" to include the removal of a building, and placing it upon the premises.—Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 724; 16 Cent. Dig., cols. 745-749, §§ 566-561.

§ 152. Judicial Notice—Meridian Lines.

[a] Court takes judicial notice of meridian line.—Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594.

§ 153. Presumption and Burden of Proof.

[a] Under our law no presumption of knowledge, on the part of a married woman, of the contents of a deed arises from the fact of executing it.—Pease v. Barbiers, 10 Cal. 436.

[b] Where the calls of a deed to a given quantity of land of a larger tract did not identify the land with certainty, the mere fact that at the time of the delivery the grantee paid the purchase price raised no presumption that the grantor put him in possession of a particular tract of the land conveyed.—Schenk v. Evoy, 24 Cal. 104.

[c] Deed expressing a money consideration is not presumed beneficial, in absence of proof of payment.—Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473; 8 Pac. 46.

[d] Deed using apt words of grant without other words indicating less estate is presumed to have intended to pass fee simple title.—Klumpke v. Baker, 68 Cal. 561, 10 Pac. 197.

[e] It must be presumed that grantor intended to make valid grant of some property unless contrary appears.—Cullen v. Sprigg, 83 Cal. 63, 23 Pac. 222.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 725-739; 16 Cent. Dig., cols. 750-791, §§ 562-594.

§ 154. —— Identity of Parties.

[a] Code of Civil Procedure, section 1963, provides that identity of person shall be presumed from identity of name. Held, that a deed executed in the name of defendant will be presumed to be defendant's deed.—Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

§ 155. —— Identity of Land.

[a] Where a deed conveys the south half of 16 blocks, excepting certain lots, numbered 5, 6, 7, and 8, and there are 64 lots in all, the presumption is that the south half of each block contained lots numbered 5, 6, 7, and 8.—Sanchez v. Neary, 41 Cal. 485.

[b] A deed having described the land by reference to the plat of an addition to a town, an unrecorded plat is, as against the grantor and his privies, prima facie identified as the one referred to by evidence that he afterward exhibited it as the plat of the addition.—Redd v. Murry, 95 Cal. 48, 24 Pac. 841.

§ 156. —— Consideration.

[a] Presumption that consideration named in deed was paid by grantee named, can only be overcome by full, clear and satisfactory proof.—Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889.

[b] Under Code of Civil Procedure, sections 1614, 1963, subdivision 39, providing that a written instrument is presumptive evidence of a consideration, the introduction of a deed in evidence places the burden of showing want of consideration on the party alleging it, and carries with it a presumption that it was given for a valuable consideration. Blair v. Squire, 127 Cal. xviii, 59 Pac. 211.

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§ 157. —— Delivery.

[a] The due execution, acknowledgment, and record of a deed are prima facie proof of its delivery.—Bensley v. Atwill, 12 Cal. 231; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

[b] If the delivery of a deed of concession made by an alcalde was essential to pass the title the presumption is that the delivery was made at the time the deed was executed. Whether such delivery was essential, not decided.—Lick v. Diaz, 30 Cal. 65.

[c] The recording of a deed is not evidence of its delivery unless the deed comes from the hands of the grantee or some one claiming through or under him.—Barr v. Schroeder, 32 Cal. 609.

[d] A deed will be presumed, in the absence of any evidence to the contrary, to have been delivered on the day on which it bears date. (Cal. 1873) Treadwell v. Reynolds, 47 Cal. 171.

[e] When a deed is regularly executed, and is found in the hands of the grantee, the presumption is that it has been duly delivered.—Branson v. Caruthers, 49 Cal. 374.

[f] No legal presumption of the delivery of a deed arises from signing and acknowledgment. The party claiming under it must prove its delivery.—Boyd v. Slayback, 63 Cal. 493.

[g] Possession by grantee is prima facie evidence of delivery.—Ward v. Dougherty, 75 Cal. 242, 7 Am. St. Rep. 151, 17 Pac. 193.

[h] Under code deed is presumed delivered at its date.—War v. Dougherty, 75 Cal. 243, 7 Am. St. Rep. 151, 17 Pac. 193.

[i] Presumption of delivery from possession is rebuttable.—Ward v. Dougherty, 75 Cal. 242, 7 Am. St. Rep. 15, 17 Pac. 193.

[j] Under Civil Code, section 1055, providing that "a grant duly executed is presumed to have been delivered at its date," delivery by recording the deed will be presumed to have been at the date of the deed. War v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

[k] Possession of deed by grantee presumes delivery.—McLennan v. McDonnell, 78 Cal. 276, 20 Pac. 566.

[l] A deed which was signed, acknowledged, and recorded on the day of its date, and produced in evidence by the grantee, carries with it the presumption that it was delivered on that day.—McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279.

[m] Under Code of Civil Procedure, section 1951, providing that every instrument conveying real property, duly acknowledged and certified, may be read in evidence without further proof; Civil Code, section 1055, declaring that a grant duly executed is presumed to have been delivered at its date; Code of Civil Procedure, section 1959, defining a "presumption" as a deduction which the law expressly directs to be made from particular facts; and section 1961, providing that, unless a presumption is controverted by evidence, the jury are bound to find according to the presumption—where a deed is produced in court by the grantee, and offered in evidence by the party attacking the deed, without limiting the purpose for which it is offered, and there is no evidence as to the question of delivery, delivery at the date of the deed should be presumed.—McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778.

[n] Proof that the consideration for a deed was not paid is not alone sufficient to rebut the presumption under Civil Code, section 1055, providing that "a grant duly executed is presumed to have been delivered at its date."—Gerke v. Cameron, 50 Pac. 434.

FOR AUTHORITIES FROM OTHER STATES:

Delivery of deeds, whether presumed to have been at their dates or at the dates of their acknowledgment: 86 Am. Dec. 63, note. See, also, 13 Cyc. 730-734; 16 Cent. Dig., cols. 763-780, §§ 574-583.

§ 158. Admissibility of Evidence.

[a] When the beginning point of the survey of the tract conveyed is a visible monument which is clearly ascertained, and the descriptive calls are certain and definite, the title passes. A subsequent survey, changing the location of a larger tract, within which it was said in the deed, the land conveyed was located, or restricting its area, cannot devest the title of the grantee, or impair his rights and evidence thereof is inadmissible. Widbur v. Washburn, 47 Cal. 67.

[b] On the issue whether the grantor, at the time he executed the deed, was of sound mind sufficient to make the deed a valid one, a will executed by him, and the probate proceedings accompanying the same, wherefrom it appeared that the will was refused probate because of mental unsoundness at the time of its execution, was inadmissible.—Gridley v. Boggs, 62 Cal. 190.

[c] Deed is admissible without pleading or proving consideration for its execution. Martin v. Splivalo, 69 Cal. 614, 11 Pac. 494.

[d] Evidence aliunde deed is admissible to identify actual grantor conveying by fictitious name.—Wilson v. White, 84 Cal. 243, 24 Pac. 114.

[e] To determine whether delivery to third person was a delivery, it is competent to show intent of grantor but not that of depositary. Dean v. Parker, 88 Cal. 289, 26 Pac. 91.

[f] Declaration of grantor at or after delivery of deed is admissible to prove his intention to deliver it.—Dean v. Parker, 88 Cal. 289, 26 Pac. 91.

[g] The recital in a deed that the consideration has been paid is not conclusive, but the

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real character of the consideration may be shown.—Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 739-743; 16 Cent. Dig., cols. 792-805, §§ 595-613.

§ 159. Weight and Sufficiency of Evidence.

[a] Evidence showing a mere expectation on the part of the brother that the sister was going to pay for his support the sum of seventy-five dollars per month, without any testimony of the plaintiff that there was such an agreement, and without the production of any written contract to that effect, does not establish such an agreement as a consideration for the deed.—Odell v. Moss, 130 Cal. 352, 62 Pac. 555.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 743-756; 16 Cent. Dig., cols. 806-882, §§ 614-650.

§ 160. —— Identity of Parties.

[a] A grantor stated his residence as the Island of Hawaii, and after describing the property as situated in a certain county, and known as "Johnson's Ranch," and giving its boundaries, stated that it was originally granted to G. by the Mexican government, and had been confirmed to him by the commissioners to settle private land claims in California. In ejectment on a patent from the United States, referring to Johnson as claimant and as the person filing the petition before the land commission, for confirmation of his claim under the grant to G., but not naming the residence of the claimant, such deed was offered in evidence, and was objected to because there was no proof of the identity of the Johnson of the deed with the Johnson of the patent. Held that the deed, from the identity of names and the reference to the source of title, contains sufficient evidence as to the identity of the person to admit it in evidence.—Mott v. Smith, 16 Cal. 533.

[b] Evidence held sufficient to sustain finding that deed was made to grantor's sister and not to his daughter.—Luty v. Cresta (Cal. App.), 88 Pac. 642.

§ 161. —— Identity of Land.

[a] Where a deed conveyed land as a numbered block, as marked on the plat of the grantor's addition to a town, this evidences the existence as against him of such a plat; and evidence tending to show a survey of the town prior to the conveyance, and that the grantor produced the plat in question some years afterward as such plat, is sufficient to identify it as that mentioned in the deed.—Redd v. Murry, 95 Cal. 48, 30 Pac. 132.

[b] In 1837 the Mexican government granted P. and V. a tract called the "San Jose Rancho," and in 1840 regranted the same land and an additional league to P., V. and A. In 1846 partition was made, and, in proceedings thereafter for confirmation of the grants, separate patents were issued for each tract. In 1864 V conveyed his interest in the Rancho San Jose, the description being the "rancho known as 'San Jose,'" and referring for further description to the Mexican government grant, the confirmation thereof by the United States land commission and district court, and the government survey. On an issue as to whether V. intended to convey his interest in the additional league, it appeared that some years prior to such conveyance he had made a lease to the grantees in such conveyance, wherein the property was described as the "Rancho San Jose," being the same land conveyed to V., P. and A. by the Mexican government. In a mortgage by V. and wife the property was described as the "Rancho San Jose," being the same originally granted to V. and P., and afterward regranted to V., P. and A., with an addition of one league. There was only one grant of land to V., P. and A. by the Mexican government. A nephew of P. testified that he had known the Rancho San Jose since the grant was made by the Mexican government, and that the two tracts were considered one ranch. Other witnesses also testified that the two tracts were known as the "Rancho San Jose." Held, that V. intended to include his interest in the additional league in such conveyance.—Vejar v. Mound City Land etc. Assn., 97 Cal. 659, 32 Pac. 713.

[c] P. devised to his wife "the land of the rancho," and in the probate proceedings a decree was entered giving the widow three thousand three hundred and thirty-five acres in the Rancho San Jose. Held to show that P. understood that he had an interest in only one rancho—the "San Jose"—and that included whatever interest he had in the additional league.—Vejar v. Mound City Land etc. Assn., 97 Cal. 659, 32 Pac. 713.

[d] In 1875 separate patents were issued to the Rancho San Jose, and to the additional league, under the name of the "San Jose addition"; and in 1877 V.'s widow executed a conveyance of her interest in the "Rancho San Jose." A nephew of P. testified that, after the grant of the original league, it was always considered one rancho. Other witnesses testified that they had never heard the additional league spoken of other than San Jose addition until 1881. Held, that at the time the widow made such conveyance the two tracts were not well known by different names, and that the widow must be deemed to have included in the tract conveyed the additional league.—Vejar v. Mound City Land & Water Assn., 97 Cal. 659, 32 Pac. 713.

[e] The mere fact that at the corner of a map was written a statement that one lot was "surveyed for J." at a date later than that at which the map was received for record, and signed by "P., County Surveyor," does not show that the entire map was a

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survey by P.—McCullough v. Olds, 108 Cal. 529, 41 Pac. 420.

[f] A subdivision map of a tract of land deposited in the office of the county recorder, and by him pasted in a deed-book, at a particular page, is sufficiently identified by a deed which refers to it as "recorded" in such book and page, and is admissible in evidence, in connection with the deed, to identify the land intended to be conveyed. McCullough v. Olds, 108 Cal. 529, 41 Pac. 420.

§ 162. —— Execution.

[a] Evidence that a deed was signed by the grantor by her mark, followed by a statement by a witness to the deed that the grantor could not write; that she made her mark; that her name was written near it by the witness at her request and in her presence; and that the name of the witness was subscribed as one of the witnesses to the mark and signature, as required by Civil Code, section 14, and that it was also duly acknowledged—was prima facie evidence of the execution thereof, though not conclusive. Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 743-746; 16 Cent. Dig., cols. 806-819, §§ 614-624.

§ 163. —— Delivery.

[a] Where a deed is offered in evidence, which purports on its face to be a deed of bargain and sale for an alleged consideration, executed and acknowledged by the defendant, and on the same day recorded, it is some evidence to go to the jury of the delivery of such deed.—Bensley v. Atwill, 12 Cal. 231.

[b] The testimony of a single witness may be sufficient to prove that a deed was delivered on a day different from that given in the body of the deed.—Treadwell v. Reynolds, 47 Cal. 171.

[c] The production, on a trial, by the attorneys of plaintiff, of a deed to him, is sufficient evidence of its delivery to and acceptance by him to justify its reception in evidence without any further proof of delivery or acceptance.—Branson v. Caruthers, 49 Cal. 374.

[d] In an action to cancel a deed purporting to have been signed by plaintiff's decedent a few hours before his death, it appeared that at the time of the alleged execution decedent was paralyzed so that he could not use his arm, and that a bystander, by his direction, took and guided his hand, and thus made the signature. Held, that a finding that the deed was not signed or delivered by the decedent, or by any one authorized to sign or deliver it, was not sustained by the evidence.—Harris v. Harris, 59 Cal. 620.

[e] Fact that deed was found among papers of grantee after her death is some evidence at least that it had been delivered to and accepted by her; and evidence tending to prove nondelivery would simply raise a conflict in the testimony.—Kidder v. Stevens, 60 Cal. 414.

[f] Delivery of a deed cannot be disproved by the testimony of a third person, with whom the grantor left it, that if he had afterward called for it he would have given it to him, since it does not tend to show the grantor's intention.—Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Corker v. Corker, 95 Cal. 308, 30 Pac. 541.

[g] In an action by the widow of a grantor to cancel a deed on the ground of nondelivery, the evidence showed that some months prior to the grantor's death he made the deed conveying land to defendant, his son; that the day prior to his death the grantor delivered the instrument to one W., who took it to the register, stating that the grantor wished the same recorded, and then sent to defendant, which was done. Held, that the evidence failed to show a nondelivery.—Corker v. Corker, 95 Cal. 308, 30 Pac. 541.

[h] The presumption, declared by Civil Code, section 1055, that a deed duly executed was delivered on the day of its execution, is not overcome by the fact that it was not acknowledged until six months after its execution.—Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301.

[i] In absence of contrary proof, evidence of due recordation of deed is sufficient to establish delivery.—Davis v. Pacific Imp. Co., 118 Cal. 49, 50 Pac. 7.

[j] Where no objection is made to the introduction of a deed in evidence on the ground that it was never delivered, it is not necessary to make actual proof of delivery. Davis v. Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

[k] The father of plaintiff told him that if he would go on the land in controversy, and could make a living out of it, he would give it to him; and five years thereafter—in 1889—executed a deed to plaintiff, which the father testified was not to be delivered until his death. Plaintiff claimed delivery at its execution, and also testified that he received it from the notary on June 8, 1891, when it was recorded. Held, that a finding that plaintiff was not the owner of the land prior to June 8, 1891, was proper, since the weight of the evidence showed that the deed was not delivered until then.—Huntley v. San Francisco Sav. Union, 130 Cal. 46, 62 Pac. 255.

[l] A husband signed and acknowledged a deed conveying land to his wife, stating to the notary before whom he acknowledged it that he wished to give the property to her. The wife testified that her husband put the deed on the table, told her what it was, and directed her to put it away, saying that it could be recorded at any time. She stated that she put the deed in the trunk,

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and at another time said that her husband did so. Their daughter corroborated her mother, and stated that her father said he would put it away for her mother, and that she could record it any time. An inmate of the house stated that she was in a position to have heard any such conversation, if it had occurred, and that she neither saw nor heard anything of the deed, but her testimony was vague as to the continuousness of her presence. Held, that the deed was delivered.—McGrath v. Hyde, 21 Pac. 948.

[m] Where rights of third persons have intervened, proof of nondelivery must be clear and convincing.—Central Trust Co. v. Stoddard (Cal. App.), 88 Pac. 806.

[n] Where deed duly signed and acknowledged is in possession of grantee presumption of delivery must be overcome to prove nondelivery.—Central Trust Co. v. Stoddard (Cal. App.), 88 Pac. 806.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 746-750; 16 Cent. Dig., cols. 819-841, §§ 625-634.

§ 164. —— Validity.

[a] The evidence showed that the grantor was an illiterate woman, and was ignorant of business outside of her household and domestic affairs, but had good, natural intellectual faculties, and that, after the execution of the deed in question, she had given to some of the witnesses her motive for making it. Held, that the grantor had sufficient capacity to execute a deed.—Soberanes v. Soberanes, 106 Cal. 1, 39 Pac. 39.

[b] Plaintiff deeded a lot to her son, retaining a life estate therein. In an action by her to cancel the deed, the attorney drawing it testified that at the time of executing it her mind was sound. There was no evidence that she was of weak intellect, though she was old and in feeble health. Held, that a finding that she was of sound mind will not be reversed.—Springer v. Springer, 132 Cal. xviii, 64 Pac. 470.

[c] In a suit to have deed of gift executed by decedent to defendant, her brother, a few days before her death, canceled as fraudulent and void, the evidence was conflicting as to whether at the date of the execution of the deed defendant was drunk, and laboring under delusions. There was evidence that decedent first suggested deeding the property to defendant, and that she had, through defendant, obtained a lawyer's advice as to the way to make the gift so as to take effect at her death. Held insufficient to show mental incapacity on decedent's part.—Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298.

[d] Evidence in an action to set aside a conveyance of land alleged to have been procured by means of fraud and undue influence considered, and held to warrant a judgment for plaintiff.—Gatje v. Armstrong, 145 Cal. 70, 78 Pac. 872.

[e] Evidence held to show deed to have been obtained through mistake or misrepresentations and undue influence.—Allen v. Bryant (Cal. App.), 88 Pac. 294.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 751; 16 Cent. Dig., cols. 842-844, §§ 635, 636.

DE FACTO CORPORATIONS.

What are. See Corporations, §§ 31-38.
Rights, duties and liabilities of officers of. See Corporations, § 286.
Powers of. See Corporations, § 323½.

DE FACTO COURTS.

See Courts, § 55.

DE FACTO DIRECTORS.

Power to levy stock assessment. See Corporations, § 111.
General powers of. See Corporations, § 279.

DE FACTO DISTRICT ATTORNEY.

Validity of acts of. See District and Prosecuting Attorneys, § 19.

DE FACTO GRAND JURY.

See Grand Jury, § 20.
Finding of indictment by. See Indictment and Information, § 14.

DE FACTO JUDGES.

Who are. See Judges, § 8
Validity of acts of. See Judges, § 26.

DE FACTO JUSTICES OF THE PEACE.

See Justices of the Peace, § 8.

DE FACTO OFFICERS.

In general. See Officers, § 15.
Of corporations. See Corporations, §§ 274-276.

DE FACTO POWER.

Of corporations. See Corporations, § 323½.

DEFAMATION.

See Libel and Slander.

DEFAULT.

Appealability of default judgment. See Appeal and Error, § 187; Justices of the Peace, § 109.
Right of guarantor to notice of. See Guaranty, § 21.
In justice cases. See Justices of the Peace, § 88.

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Failure to terminate employment of servant on default as discharge of surety. See Principal and Surety, § 35.
Setting aside. See Trial, § 5.
Effect of default in performance of contract to convey land. See Vendor and Purchaser, § 61.
In payment of purchase price of land. See Vendor and Purchaser, § 67.

DEFAULT JUDGMENT.

See Judgment, IV.

Right to appeal from. See Appeal and Error, § 187; Justices of the Peace, § 109.
Time to appeal from. See Appeal and Error, § 472.
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As bar to further proceedings. See Judgment, § 387.
Collateral attack on. See Judgment, § 341.

DEFEASIBLE FEES.

Wills creating. See Wills, § 280.

DEFECTIVE BONDS.

Liability of county officers on defective bonds. See Counties, § 91.

DEFECTIVE BRIDGES.

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DEFECTIVE CORPORATIONS.

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As partnerships. See Partnership, § 17.

DEFECTIVE DEEDS.

Ratification of. See Deeds, § 39.

DEFECTIVE DRAINS.

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In civil actions. See Parties, §§ 9-20.

DEFENSE OF HABITATION.

Killing in defense of habitation as justifiable homicide. See Homicide, § 60.

DEFENSE OF PROPERTY.

As justification for assault. See Assault and Battery, § 2.
As defense to criminal prosecution for assault and battery. See Assault and Battery, § 33.
Killing in defense of property as justifiable homicide. See Homicide, § 60.

DEFENSES.

To civil actions. See Action, § 24.
Joinder of. See Action, § 37.
Right to raise defenses on appeal not made below. See Appeal and Error, §§ 243-247.
To civil action for assault. See Assault and Battery, §§ 2-4.
To criminal prosecution for assault and battery. See Assault and Battery, §§ 29-33.
To actions on assigned claims. See Assignments, § 64.
To suit in assumpsit. See Assumpsit, § 4.
To suit on attachment bonds. See Attachment, § 176.
To actions against attorneys for negligence. See Attorney and Client, § 101.
To actions on bail bonds. See Bail, § 36.
In actions on note and drafts. See Bills and Notes, §§ 284-291.
Against assignees and bona fide holders of commercial paper. See Bills and Notes, §§ 165, 190.
In actions on bonds. See Bonds, § 28.
To contempt proceedings. See Contempt, § 33.
In actions for breach of contract. See Contracts, § 252.
To actions on bonds of county officers. See Counties, § 96.
To action for breach of covenant. See Covenants, § 36.
To criminal prosecutions. See Criminal Law, § 8.
To action for wrongful death. See Death, § 9.
To suit for divorce. See Divorce, §§ 16-25.
To actions to enforce drainage assessments. See Drains, § 52.
Burden of proving. See Evidence, § 80.
To actions by or against executors and administrators. See Executors and Administrators, §§ 464, 469.
To actions on administration bonds. See Executors and Administrators, § 583.
To ejectment suit. See Ejectment, I, C.
To election contest. See Elections, § 98.
To prosecution for embezzlement. See Embezzlement, § 19.
To condemnation proceedings. See Eminent Domain, § 91.
To action for false imprisonment. See False Imprisonment, § 4.
To prosecution for swindling. See False Pretenses, §§ 17-20.
To suit for forcible entry and detainer. See Forcible Entry and Detainer, §§ 36-42.
To prosecution for forgery. See Forgery, § 16.
To actions for fraud. See Fraud, § 33.
Pleading statute of frauds as defense. See Frauds, Statute of, § 55.
To prosecution for assault with intent to kill. See Homicide, § 41.
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Alleging matters of defense in criminal pleading. See Indictment and Information, § 44.
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In actions by city to recover assessments for improvements. See Municipal Corporations, § 241.
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To action for dissolution of firm. See Partnership, § 124.
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To prosecution for perjury. See Perjury, § 10.
Affidavit of defense. See Pleading, § 92.
Pleading defenses in civil actions. See Pleading, §§ 45-56.
In actions by or against principal and agent. See Principal and Agent, § 99.
To actions against sureties. See Principal and Surety, § 42.
To writ of prohibition. See Prohibition, § 26.
To prosecution for rape. See Rape, § 8.
To application for appointment of receiver. See Receivers, § 4.
In actions to reform instruments. See Reformation of Instruments.
To replevin suit. See Replevin, § 6.
In actions for goods sold. See Sales, § 61.
To prosecution for seduction. See Seduction, § 7.
In actions against sheriffs and their indemnitors. See Sheriffs and Constables, § 23.
To suit for specific performance. See Specific Performance, § 8.
In actions for tort. See Torts, § 4.
To action for trespass. See Trespass, § 9.
To suit for wrongful conversion. See Trover and Conversion, § 12.
To action to rescind contract to purchase land. See Vendor and Purchaser, § 42.
Available against bona fide purchasers. See Vendor and Purchaser, § 101.
To suit by vendor for damages for breach of contract to purchase land. See Vendor and Purchaser, § 130.
In actions for purchase price of land. See Vendor and Purchaser, § 124.
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Of murder. See Homicide, §§ 19-21.
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In performance of contract. See Contracts, §§ 223-225.
As bar to relief in equity. See Equity, §§ 51-55.
In claiming estoppel. See Estoppel, § 51.
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DELIBERATIONS OF JURY.

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Insane delusion defined. See Insane Persons, § 2.

DEMAND.

Before suit, as condition precedent to suit. See Action, § 23.
As condition precedent to suit in assumpsit. See Assumpsit, § 2.
By third person having claim against attached property. See Attachment, §§ 153, 154.
As condition precedent to suit on attachment bond. See Attachment, § 175.
Necessary to charge indorser of commercial paper. See Bills and Notes, §§ 133, 198-228.
As condition precedent to suit on note. See Bills and Notes, §§ 206-208.
On directors as condition precedent to suit by stockholders. See Corporations, § 219.

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Construction of statute relating to demand for deposit. See Depositaries, § 2.
As condition precedent to ejectment suit. See Ejectment, § 17.
As condition precedent to prosecution for embezzlement. See Embezzlement, § 3.
By claimant of property levied on. See Execution, § 87.
As condition precedent to replevin of fixtures. See Fixtures, § 28.
For gas as condition precedent to suit for failure or refusal to supply. See Gas, § 14.
Necessary to fix liability of guarantor. See Guaranty, § 20.
Before suit on injunction bond. See Injunction, § 155.
Of insurance premium as waiver of forfeiture of policy for nonpayment. See Insurance, § 127.
As marking time from which interest runs. See Interest, § 41.
For jury trial. See Jury, §§ 29, 30.
For rent necessary to terminate tenancy. See Landlord and Tenant, § 55.
Necessary to set statute of limitations in motion. See Limitation of Actions, § 54.
Necessary before bringing mandamus proceeding. See Mandamus, § 13.
For payment of city assessments. See Municipal Corporations, § 31.
As condition precedent to suit for specific performance. See Specific Performance, § 30.
As condition precedent to suit for wrongful conversion. See Trover and Conversion, § 11.
For performance of contract to convey land. See Vendor and Purchaser, § 56.
For payment of purchase money in performance of contract to purchase land. See Vendor and Purchaser, § 64.
For change of venue in civil cases. See Venue, § 29.

DEMAND PAPER.

Nature of contract of indorser of. See Bills and Notes, § 139.
Time of maturity of. See Bills and Notes, § 75.

DE MEDIETATE LINGUAE.

Jury de medietate linguae. See Jury, 3.

DEMENTED PERSONS.

See Criminal Law, §§ 13-18; Insane Persons.

DEMISE.

Property subject to. See Landlord and Tenant,

DEMONSTRATIVE EVIDENCE.

In criminal cases. See Criminal Law, §§ 153-158.
In civil cases. See Evidence, VI.

DEMONSTRATIVE LEGACIES.

Abatement of. See Wills, § 342.

DEMURRAGE.

See Shipping, § 20.

DEMURRER.

Effect of overruling of demurrer to application for writ of certiorari. See Certiorari, § 36.
Right to appeal from ruling on, in criminal case. See Criminal Law, § 616.
To complaint in action of forcible entry and detainer. See Forcible Entry and Detainer, § 64.
Pleading statute of frauds by demurrer. See Frauds, Statute of, § 56.
To indictment or information. See Indictment and Information, §§ 128-134.
Default on failure to plead after decision on demurrer. See Judgment, § 61.
Judgment on demurrer as bar. See Judgment, § 404.
Right to enter default after demurrer filed, but not served or ruled on. See Judgment, § 63.
Conclusiveness of judgment on demurrer. See Judgment, § 453.
Raising defense of limitations by demurrer. See Limitation of Actions, § 119.
In civil cases. See Pleading, § V.
Amendment of. See Pleading, § 164.
Objections to demurrer and rulings thereon. See Pleading, § 237.
To amend pleading. See Pleading, §§ 154, 162.

DEMURRER TO EVIDENCE.

See Trial, § 67.

DENIAL OF JURY TRIAL.

See Jury, §§ 39-43.

DENIALS.

In civil pleading. See Pleading, §§ 59, 64.
Of allegations in answer in civil pleading. See Pleading, § 98.

DENTISTS.

See Physicians and Surgeons.

DEPARTMENT DECISION.

As stare decisis. See Courts, § 81.

DEPARTMENTS.

Of cities. See Municipal Corporations, § 43.

DEPARTMENTS OF COURTS.

See Courts, § 46.
Decisions in department as stare decisis. See Courts, § 81.

DEPENDENT AND INDEPENDENT COVENANTS.

In contracts. See Contracts, § 121.

DEPENDENT PERSONS.

See Paupers.

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DEPOSITARIES.

Include delivery of money or other personal property for safekeeping, either with or without compensation, to be redelivered in accordance with the purpose of the deposit; rights, duties, and liabilities of those receiving such deposits in general, and more particularly of depositaries of public moneys; and remedies relating thereto.

WHAT CONSTITUTES, § 1.
DEMAND FOR DEPOSIT—STATUTE CONSTRUED, § 2.
ACTIONS AGAINST DEPOSITARIES, § 3.

Mode of levying attachment on property in hands of. See Attachment, § 86.
Designation of depositary of public moneys as grant of special privilege. See Constitutional Law, § 200.
Embezzlement by. See Embezzlement, § 14.
Of escrows. See Escrows.

FOR AUTHORITIES FROM OTHER STATES:

Liability of safety deposit companies: 72 Am. St. Rep. 206, note. See, also, 13 Cyc. 792-820; 16 Cent. Dig., cols. 897-900, §§ 1, 2.

§ 1. What Constitutes.

[a] A certain amount of gold coin, which had been deposited with a sheriff to dissolve an attachment, was, under a private agreement, divided, pending the litigation, between the attorneys of the plaintiff and defendant in the attachment suit, they agreeing to pay interest thereon. Held, that they were not bailees of the coin, but mere debtors; and that the court could not order them to pay over the money in gold coin, as being a specific deposit with them as bailees.—Hathaway v. Brady, 26 Cal. 581.

[b] Plaintiff made a deposit with defendant of certain gold. Thereafter he agreed with defendant for the payment of interest on such deposit. Held, that such agreement turned the special deposit into an account.—Howard v. Roeben, 33 Cal. 399.

[c] Under the direct provision of Civil Code, section 1503, refusal to take back property sold held to create depositary for hire.—Sierra Land etc. Co. v. Bricker (Cal. App.), 85 Pac. 665.

§ 2. Demand for Deposit—Statute Construed.

[a] Demand upon attorney of a depositary is not a demand upon the depositary.—Wilson v. Southern Pacific R. R. Co., 53 Cal. 735.

[b] Where, under Civil Code, section 1822, providing that a depositary must deliver the thing to the person for whose benefit it was deposited, on demand, unless he has been forbidden or prevented from doing so by the real owner, or by act of the law, a deposit is attached by creditors of the bailor's husband, the depositary, claiming that the deposit was held by the bailor only as agent for her husband, can justify his retention of the deposit only by proof that it actually belonged to the husband.—Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045.

[c] Under Civil Code, section 1823, providing that a depositary shall not be bound for the delivery of a deposit until demand made, a demand by an administrator on a depositary for the effect of his decedent, coupled with a statement that he held a paper calling for a certain sum of money is a sufficient demand for the money.—Northrop v. Knott, 114 Cal. 612, 46 Pac. 599.

§ 3. Actions Against Depositaries.

[a] Where personal property consisting of all of the goods owned by the vendor in a retail liquor saloon is sold for an agreed price, and as a further and separate agreement between the parties the purchaser agrees to deposit with third parties an additional sum to be paid to the vendor upon the procurement of the right to sell and carry on a retail liquor business within the saloon, a complaint by the assignee of the vendor to recover the amount of the deposit is insufficient if it does not aver that the vendee procured the right to carry on the business or could carry on the business without the procurement of the license, or that by his own neglect or default he had failed to secure the privilege.—Kiefer v. Laventhal, 110 Cal. 667, 43 Pac. 205.

DEPOSITIONS.

Include testimony taken in judicial proceedings in writing, upon interrogatories, oral or written, with opportunity for cross-examination, whether taken under a bill to perpetuate testimony, or to take testimony de bene esse, or under a commission or letters rogatory issued for the purpose, or on notice to or consent of parties to the proceeding, as authorized by provisions of statute or of rules of court, to be used instead of the oral examination of the witness in open court; in what actions or proceedings and for what purposes such depositions may be taken and used; requisites of bills to perpetuate testimony or take testimony de bene esse, and proceedings thereon; issue of commissions, etc., settlement of interrogatories, taking and requisites of depositions, and returning and filing them; objections to and motions to suppress depositions and amendment of defects; and use in evidence in general.

NATURE AND FUNCTIONS, IN GENERAL, § 1.
CONSTITUTIONAL AND STATUTORY PROVISIONS, IN GENERAL, § 2.
AGREEMENTS AND STIPULATIONS, IN GENERAL, § 3.
RIGHT TO TAKE AND USE DEPOSITIONS—ADMISSIONS TO PREVENT TAKING, § 4.
—— DISCRETION OF COURT, § 5.
ACTIONS AND PROCEEDINGS IN WHICH DEPOSITIONS MAY BE TAKEN—CRIMINAL PROSECUTIONS, § 6.
GROUNDS FOR TAKING, § 7.
APPLICATION FOR ORDER, COMMISSION OR LETTERS—NOTICE, § 8.
—— AFFIDAVIT, § 9.
ORDER TO TAKE TESTIMONY OR FOR COMMISSION, § 10.
COMMISSION TO TAKE TESTIMONY—FORM AND REQUISITES, IN GENERAL, § 11.
INTERROGATORIES—ANSWERS, § 12.

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OFFICERS AUTHORIZED TO TAKE DEPOSITIONS, § 13.
NOTICE OF TAKING—NECESSITY AND SUFFICIENCY, § 14.
—— CERTAINTY AS TO PLACE OF TAKING, § 15.
—— REASONABLENESS AS TO TIME, § 16.
—— PERSONS ENTITLED TO NOTICE, § 17.
—— PROOF OF SERVICE, § 18.
ATTENDANCE OF WITNESSES—PROCEEDINGS TO PROCURE, § 19.
—— PUNISHMENT FOR CONTEMPT IN REFUSING TO ATTEND, § 20.
EXECUTION OF COMMISSION—PROCEDURE, IN GENERAL, § 21.
—— COMPLIANCE WITH STATUTES, § 22.
—— EXAMINATION OF WITNESS, § 23.
—— COMPELLING WITNESS TO ANSWER, § 24.
—— TAKING DOWN TESTIMONY, § 25.
MAKING AND REQUISITES OF RETURN, § 26.
—— MATTERS CERTIFIED, § 27.
—— TRANSMISSION, § 28.
—— ATTACHING EXHIBITS, § 29.
—— FILING, § 30.
SUPPRESSION, § 31.
PARTIES ENTITLED TO USE DEPOSITIONS, § 32.
ADMISSIBILITY IN EVIDENCE, § 33.
—— CONTINUED EXISTENCE OF GROUNDS FOR TAKING, § 34.
—— PRESENCE OF DEPONENT, § 35.
—— PARTS OF DEPOSITION, § 36.
—— SUBSEQUENT INCOMPETENCY OF DEPONENT, § 37.
—— CONTRADICTING, § 38.
—— AMENDMENT OF PROCESS OR PLEADING AFTER TAKING DEPOSITION, § 39.
ACTIONS IN WHICH ADMISSIBLE—OTHER ACTIONS BETWEEN DIFFERENT PARTIES. § 40.
DEFECTS AND OBJECTIONS, § 41.
—— TIME TO MAKE, § 42.
—— RENEWAL AT TRIAL OF PREVIOUS OBJECTION, § 43.
—— MODE OF MAKING OBJECTION, § 44.
—— SUFFICIENCY AND SCOPE OF OBJECTION, § 45.
—— WAIVER OR ESTOPPEL, § 46.

As part of statement on appeal. See Appeal and Error, § 763.
Necessity for objection to deposition in lower court. See Appeal and Error, § 281.
Expense of procuring, as costs. See Costs, § 45.

§ 1. Nature and Functions in General.

[a] Shorthand notes of oral testimony of witness given at criminal trial are not a deposition.—People v. Northey, 77 Cal. 629, 19 Pac. 865, 20 Pac. 129.

[b] On the granting of a continuance, the testimony of witnesses in attendance, taken by the judge in the form of a deposition, under Code of Civil Procedure, section 596, and reduced to writing by a stenographer, but not read over to, corrected, or signed by the witnesses, nor certified by the judge, does not constitute a deposition, within the requirements of section 2032.—Thomas v. Black, 84 Cal. 221, 23 Pac. 1037.

[c] Ordinary extrajudicial deposition taken de bene esse is one taken conditionally before commissioner or other officer authorized to administer oaths upon the theory of danger of witness dying or being unable to attend court.—People v. Sierp, 116 Cal. 251, 252, 48 Pac. 88.

[d] Taking of deposition is a "proceeding in court."—Burns v. Superior Court, 140 Cal. 5, 9, 10, 73 Pac. 597.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 832; 16 Cent. Dig., cols. 927-929.

§ 2. Constitutional and Statutory Provisions in General.

[a] Section 13, article 1, of the present constitution is no prohibition upon the power of the legislature to authorize the taking of depositions by the defendant in every class of criminal cases.—People v. Hurtado, 63 Cal. 288.

[b] Ninth clause of section 1209 of the Code of Civil Procedure is intended to invest the superior court with power to prevent interference with any and all proceedings taken by the court or agencies acting in its behalf; and the word "proceedings" used therein should be given a meaning broad enough to embrace its intended purpose, and to include the taking of the deposition of a witness to be used in an action as a "proceeding of the court" in that action.—Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 835, 846-848. See 16 Cent. Dig., cols. 929-933, §§ 2, 3.

§ 3. Agreements and Stipulations in General.

[a] A stipulation between parties that a deposition taken in another case should be used on the trial "with the same force and effect, and subject to the same exceptions and objections, in all respects, as if taken in this case," held to be a waiver of objection of incompetency, on account of interest of the witness.—Brooks v. Crosby, 22 Cal. 42.

[b] Deposition taken under stipulation is governed by it and not by provisions of Penal Code.—People v. Grundell, 75 Cal. 305, 17 Pac. 214.

§ 4. Right to Take and Use Depositions—Admissions to Prevent Taking.

[a] Under Penal Code, section 1354, the court may refuse to order a commission to take testimony in a foreign country, where the state admits the principal facts that it is claimed the witness would testify to.—People v. Young, 108 Cal. 8, 41 Pac. 281.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cent. Dig., col. 942, § 9.

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§ 5. —— Discretion of Court.

[a] Under section 2033, Code of Civil Procedure, something is left to court's discretion in excluding deposition.—Lucas v. Richardson, 68 Cal. 621, 10 Pac. 183.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cent. Dig., cols. 933-935, § 4.

§ 6. Actions and Proceedings in Which Depositions may be Taken—Criminal Prosecutions.

[a] Superior court has jurisdiction and is bound to grant order for commission to take deposition in behalf of accused upon proper showing.—People v. Lundquist, 84 Cal. 26, 24 Pac. 153.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 845;16 Cent. Dig., cols. 956-958, § 25.

§ 7. Grounds for Taking.

[a] Under section 428 of the practice act, the testimony of a witness may be taken by deposition when he is a party to the suit, or where he resides in another county than that in which the action is tried, although he lives less than thirty miles from the place of trial. Skidmore v. Taylor, 29 Cal. 619.

[b] Deposition of absent witnesses who reside out of state, and who are not amenable to processes of our courts, is expressly prohibited by the provisions of the Criminal Practice Act.—People v. Francis, 38 Cal. 183.

[c] Where a witness for the people in a criminal case is required to enter into an undertaking with sureties to appear and testify, and is committed for failure to comply, and it appears that he is unable to procure sureties, he may be discharged, under Penal Code, section 882, and his deposition taken forthwith on behalf of the people, and used on the trial.—People v. Lee, 49 Cal. 37.

[d] Under Code of Civil Procedure, section 2021, subdivision 3, and section 2032, the deposition of a witness taken during the trial may be used on proof that he was absent from the state at the time his deposition was sought to be used.—Dolbeer's Estate, In re, (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

[e] It is not necessary to the taking of the deposition of a witness without the state, authorized by Code of Civil Procedure, section 2024, that the witness should be a nonresident.—Dolbeer's Estate, In re (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 836, 837, 839-843; 16 Cent. Dig., cols. 958-964, §§ 26-29.

§ 8. Application for Order, Commission, or Letters—Notice.

[a] Under the statutes, upon an application for a commission to take the deposition of a witness residing out of the state, it is sufficient to serve on the opposite party the copy of an order of the court or judge requiring the party to show cause on a day named why a commission should not issue. No other notice is required. If the day named is less than the five days required for notice by the statute, the order and the issuing of the commission are equivalent to an order shortening the time.—Dambmann v. White, 48 Cal. 439.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 873, 874; 16 Cent. Dig., cols. 976-980, §§ 44-46.

§ 9. —— Affidavit.

[a] On a trial for murder, where the defense was insanity, it was shown by affidavits of defendant and his counsel that, by agreement with the prosecution, there were admitted at the former trial informal depositions of certain witnesses residing in Sweden, to the effect that defendant's mother was subject to epilepsy, and died insane, and his brother was an idiot, and that the prosecution had notified the defense that such depositions would be objected to at the next trial. Held, that this showing entitled defendant to the issuance of a commission to take the depositions of such persons in proper legal form.—People v. Lundquist, 84 Cal. 23, 24 Pac. 153.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 867-873; 16 Cent. Dig., cols. 980-986, §§ 47-51.

§ 10. Order to Take Testimony or for Commission.

[a] An order to take testimony by deposition should specify the notice to be given to the adverse party.—Ellis v. Jaszynsky, 5 Cal. 444.

FOR AUTHORITIES FROM OTHER STATES:
See 13 Cyc. 879-882; 16 Cent. Dig., cols. 988-990, § 53.

§ 11. Commission to Take Testimony—Form and Requisites in General.

[a] Commission to take a deposition need not state on its face that the person to whom it issued was a judge or a justice of the peace.—Dambmann v. White, 48 Cal. 439.

[b] Commissioner has no right to take testimony of persons other than those named in the commission.—Smith v. Westerfield, 88 Cal. 382, 26 Pac. 206.

§ 12. Interrogatories—Answers.

[a] Answer must be responsive to interrogatory.—Mill etc. Co. v. Machine Works, 82 Cal. 186, 23 Pac. 45.

§ 13. Officers Authorized to Take Depositions.

[a] Depositions may be taken by notaries public; but only when the witness resides

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out of the county where the suit is pending, and a commission is regularly sued out and directed to the notary.—McCann v. Beach, 2 Cal. 25.

[b] The deposition of a witness residing in the county where the suit is pending can be taken only by a commissioner for such county.—McCann v. Beach, 2 Cal. 25.

[c] Notice of time and place of taking a deposition having been given it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule.—Williams v. Chadbourne, 6 Cal. 559.

[d] It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk.—Williams v. Chadbourne, 6 Cal. 559.

§ 14. Notice of Taking—Necessity and Sufficiency.

[a] A slight error in title of cause, where there is no other suit pending between the parties, will not invalidate the notice to take a deposition.—Mills v. Dunlap, 3 Cal. 94.

[b] An order to take testimony by deposition should specify notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, ought not to be read in evidence.—Ellis v. Jaszynsky, 5 Cal. 444.

[c] Reasonable notice of the taking of a deposition should be given to the opposite party, and what is reasonable notice will depend upon the particular circumstances.—Attwood v. Fricot, 17 Cal. 37.

[d] Under section 2033, Code of Civil Procedure, deposition is properly excluded when notice does not specify place of taking.—Lucas v. Richardson, 68 Cal. 621, 10 Pac. 183.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 899-913; 16 Cent. Dig., cols. 1032-1068, §§ 90-117.

§ 15. —— Certainty as to Place of Taking.

[a] Notice of taking of deposition in city not specifying office or place of taking is insufficient.—Lucas v. Richardson, 68 Cal. 620, 10 Pac. 183.

[b] Notice of taking deposition should specify place of taking by such designation as will make it easy of ascertainment.—Lucas v. Richardson, 68 Cal. 621, 10 Pac. 183.

§ 16. —— Reasonableness as to Time.

[a] The judge's original order for taking a deposition fixed the time of notice at three days, and the counsel of the opposite party acknowledged service of a written copy of notice more than three days before the taking of the deposition. Held, that no grounds for setting aside the deposition were shown.—Attwood v. Fricot, 17 Cal. 37.

[b] Under Code of Civil Procedure, section 2031, providing that notice to take depositions must be served at least five days before the taking thereof, unless the judge prescribe a shorter time, an order to take depositions on the day of the order, and directing service of notice forthwith, is insufficient to justify less than five days' notice.—Howell v. Howell, 66 Cal. 390, 5 Pac. 681.

[c] An order shortening the time for which notice of the taking of a deposition shall be given must designate a definite time of notice. Howell v. Howell, 66 Cal. 390, 5 Pac. 681.

§ 17. —— Persons Entitled to Notice.

[a] Under the Practice Act, as it existed before the adoption of the Code of Civil Procedure, a notice to take deposition was required to be served on the attorney of the other party, even if he lived out of the county where the action was pending. Notice to the party himself was not sufficient.—Griffith v. Gruner, 47 Cal. 644.

§ 18. —— Proof of Service.

[a] The service of a notice to take depositions may be proved by oral testimony.—Hobbs v. Duff, 43 Cal. 485.

§ 19. Attendance of Witnesses—Proceedings to Procure.

[a] If a subpoena issued by a notary for a witness to appear before him and give his deposition, fails to specify the precise locality where notary will take deposition, witness will not be excused for nonattendance if he is not misled thereby.—Keisker v. Ayres, 46 Cal. 82.

[b] The previous order of the court requiring the witness to attend in obedience to the subpoena of a notary adds nothing to the legal obligation of the witness to obey the notary's subpoena, where the action is in a court of this state.—Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

[c] Code of Civil Procedure, section 2035, provides that any party to an action or special proceeding in a court of a sister state may obtain the testimony of a witness residing in California, to be used in such action in the cases mentioned in the succeeding sections, and section 2036 declares that, if a commission to take such testimony has been issued from the court, or a judge thereof, before which such action or proceeding is pending, on producing the commission to a judge of the superior court with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness requiring him to appear and answer before the commissioner named in the commission at a specified time and place. Held, that section 2036 applied only to proceedings to take depositions to be used in sister states, and did not authorize an order

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of the domestic court requiring a witness to attend before a notary public, and give his deposition, to be used in an action pending in such court.—Burns v. Superior Court of City and County of San Francisco, 140 Cal. 1, 73 Pac. 597.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 919, 920; 16 Cent. Dig., cols. 1077, 1078, § 125.

§ 20. —— Punishment for Contempt in Refusing to Attend.

[a] Code of Civil Procedure, section 2021, authorizes the taking of the testimony of a witness by depositions in an action or special proceeding when the witness is a party, etc., or in any other case where the oral examination of the witness is not required, and where he is the only one who can establish facts or a fact material to the issue, provided that the deposition shall not be used where the witness' presence can be procured; and section 1209 authorizes the court to punish as for a contempt any unlawful interference with the "process or proceedings of the court." Held, that the taking of a witness' deposition before a notary public, to be used in a pending action, was "a proceeding of the court," within section 1209, and hence the court had power to punish such witness for his refusal to attend and be examined in pursuance of the notary's subpoena.—Burns v. Superior Court of City and County of San Francisco, 140 Cal. 1, 73 Pac. 597.

[b] The superior court in which an action is pending has jurisdiction, upon a proper showing by affidavit, to punish as a contempt the disobedience of a witness to the subpoena of a notary public requiring him to attend and give his deposition to be used as evidence in such action. The case of Lezinsky v. Superior Court, 72 Cal. 510, 14 Pac. 104, overruled, in so far as holding to the contrary. (Angelotti, J., McFarland, J., and Lorigan, J., dissenting.)—Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

[c] Code of Civil Procedure, section 177, provides that every judicial officer shall have power to compel obedience to his lawful orders, and compel attendance of persons to testify in proceedings before him. Section 178 declares that for the effectual exercise of the powers conferred by section 177 a judicial officer may punish for contempt in cases provided by the code. Held, that where a deposition of a defendant in an action pending before the superior court was taken before a judge of such court, and the defendant refused to answer any questions relating to the matters inquired about, the judge had power to punish him as for a contempt.—Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

[d] Where a defendant in a pending action refused to give his deposition before the judge of the court in which the action was pending, and the witness could not be coerced to give his deposition except by commitment, the judge had no discretion but to commit him until the contempt was purged, under Code of Civil Procedure, section 1219, providing that, if the contempt consists in an omission to perform an act which is in the power of the person to perform, he may be imprisoned until he has performed it.—Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

[e] A justice of the peace before whom a witness' deposition was sought to be taken in a cause pending in the superior court held without jurisdiction to punish the witness for contempt.—Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221.

[f] Refusal of a witness to give his deposition to be used in a pending cause held a contempt for which the witness is punishable. Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221.

§ 21. Execution of Commission—Procedure in General.

[a] The code conferring no authority on the court to quash subpoenas in a proceeding to take depositions on affidavit and notice, they cannot be quashed, though the affidavit is insufficient.—Pfister v. Superior Court of Santa Clara County, 64 Cal. 400, 1 Pac. 492.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 913; 16 Cent. Dig., cols. 1068, 1069, § 118.

§ 22. —— Compliance with Statute.

[a] Taking of depositions is in derogation of common law, and the officers must follow the statute strictly.—Dye v. Bailey, 2 Cal. 383.

[b] All requisitions of statute in relation to taking must be strictly complied with; and this must appear upon the deposition to entitle it to admission.—Dye v. Bailey, 2 Cal. 383.

[c] Taking testimony by depositions is in derogation of the common law, and must not only be done before the proper officer, but every requirement of law must be complied with.—McCann v. Beach, 2 Cal. 25, 32.

[d] In taking deposition all essential requirements of statute must be complied with. Lucas v. Richardson, 68 Cal. 620, 10 Pac. 183.

§ 23. —— Examination of Witness.

[a] It is no objection to a deposition taken by a party in this state, where the opposite party, after due notice failed to appear, that it is in a narrative form, and not taken by question and answer.—Pralus v. Pacific Gold etc. Min. Co., 35 Cal. 30.

[b] That the magistrate taking a deposition excluded a question on cross-examination is not ground for the exclusion of the deposition, where the evidence sought by the question was immaterial.—People v. Keith, 50 Cal. 157.

[c] Penal Code, section 869, subdivision 3, provides that in taking depositions to be used in a criminal action, if a question be objected

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to and overruled, that fact, with the ground on which it was overruled, must be stated. Held sufficient if it appear that the question was overruled as "immaterial and irrelevant."—People v. Riley, 75 Cal. 98, 16 Pac. 544.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 925-941; 16 Cent. Dig., cols. 1088-1117, §§ 133-164.

§ 24. —— Compelling Witness to Answer.

[a] The judge before whom the deposition of a defendant is taken at the instance of the plaintiffs, should compel the witness to answer, and has no discretion to refuse to exercise the powers vested in him by law, so far as necessary to secure to such plaintiffs the right to take such deposition; and mandamus from this court is the proper remedy to compel such judge to complete the taking of the deposition, and to employ the process of contempt against the witness to compel him to answer.—Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

§ 25. —— Taking Down Testimony.

[a] The notary taking a deposition may either appoint a clerk or a shorthand reporter to take down the testimony; and the fact that such reporter was not appointed by the court and that his transcript of the testimony into longhand was objected to by defendant's counsel, is immaterial, if the certificate of the notary states that the transcription into longhand was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness ir the presence of the notary.—Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 935-937; 16 Cent. Dig., cols. 1104-1109, §§ 147-154.

§ 26. Making and Requisites of Return.

[a] Certificate of officer must conform to the statute or the deposition will be excluded. Dye v. Bailey, 2 Cal. 383.

[b] Certificate of the notary to a deposition as set forth in the case was a substantial compliance with the statute, and sufficient.—Mills v. Dunlap, 3 Cal. 94.

[c] Certificate of notary to a deposition is sufficient without seal.—Mills v. Dunlap, 3 Cal. 94.

[d] Several depositions may be included in one certificate, if it is sufficiently formal. It is not necessary that a separate certificate should be appended to each deposition.—Praus v. Pacific Gold etc. Min. Co., 35 Cal. 30.

[e] A deposition of a witness in a criminal case, taken by a committing magistrate under Penal Code, section 869, is not admissible in evidence against the defendant under section 686, unless taken and certified in the form prescribed in section 869. A mere jurat is not a sufficient certifying therefor.—People v. Morine, 54 Cal. 575.

[f] Penal Code, section 869, subdivision 5, provides that a deposition taken down by a stenographer, and written out in longhand, and certified as being a correct statement of the testimony and proceedings, shall be prima facie evidence thereof. Held, that a certificate that the "foregoing is a correct transcript of the examination in the above-entitled case" is sufficient.—People v. Riley, 75 Cal. 98, 16 Pac. 544.

[g] Section 2032 of the Code of Civil Procedure, requiring the certificate to a deposition to state that the deposition, when completed, was read over to the witness and corrected by the witness if so desired, applies only to depositions taken in this state, and not to depositions taken out of the state.—St. Vincent's Inst. for Insane v. Davis, 129 Cal. 20, 61 Pac. 477.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 942-966; 16 Cent. Dig., cols. 1117-1182, §§ 165-207.

§ 27. —— Matters Certified.

[a] Where the certificate does not show that the deposition was taken on the day of notice, the deposition will be excluded.—Dye v. Bailey, 2 Cal. 383.

[b] Certificate to deposition must state that deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute.—Williams v. Chadbourne, 6 Cal. 559.

[c] It is not essential to the certificate of a notary to a deposition taken before him that it state that the deposition was read over to the witness before signing. But if the certificate state that the deposition was corrected by the notary, under the direction of the witness, it is a sufficient compliance with the statute.—Higgins v. Wortell, 18 Cal. 330.

[d] The omission of the date in the final certificate appended to a deposition to the effect that it was read over to the witness is of no consequence when another certificate appended to the deposition gives the date when it was sworn to and subscribed. Especially is such omission of no consequence when it appears that the deposition was not required to be taken at any given time.—Elgin v. Hill, 27 Cal. 372.

[e] Under Penal Code, sections 882, 869, providing that in criminal cases the deposition of a witness on behalf of the people may be taken when it appears from the oath of the witness himself or some other person that he is unable to give sureties for his appearance at the trial, and that it must be read over to and signed by the witness, and certified to by the officer before whom it is taken, a deposition is inadmissible when it does not show that the witness or some other person made oath that he could not give sureties, nor that it was read over to the witness, nor that it was certified to by the offi-

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cer before whom it was taken.—People v. Mitchell, 64 Cal. 85, 27 Pac. 862.

[f] Deposition in criminal case need not show that stenographer who took down testimony was sworn.—People v. Riley, 75 Cal. 101, 16 Pac. 544.

[g] A deposition which states that deponent is a boy sixteen years of age, living with his brother on a place in the mountains, contains a sufficient designation of deponent's business or profession, under Penal Code, section 869.—People v. Grundell, 75 Cal. 301, 17 Pac. 214.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 943-957; 16 Cent. Dig., cols. 1127-1158, §§ 169-189.

§ 28. —— Transmission.

[a] Code of Civil Procedure, section 2032, requires a deposition, after being certified, to be inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending, etc. Held, that an indorsement of the name of the witness and case on the envelope was extraofficial, and no part of the deposition, and that an error in the initials of the witness in such indorsement did not detract from the validity and authenticity of the deposition, and might be explained by parol.—Wise v. Collins, 121 Cal. 147, 53 Pac. 640.

[b] An objection to the admission of a deposition in evidence, because not immediately transmitted to the clerk after being taken, was properly overruled, since the law does not require an immediate transmission.—Bank of Ukiah v. Mohr, 130 Cal. 268, 62 Pac. 511.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 961-963; 16 Cent. Dig., cols. 1172-1175, §§ 200, 201.

§ 29. —— Attaching Exhibits.

[a] In the absence of a positive statutory provision, exhibits properly identified need not be attached to the depositions in connection with which they are offered in evidence.—Toby v. Oregon Pac. R. Co., 98 Cal. 490, 33 Pac. 550.

§ 30. —— Filing.

[a] A record must show affirmatively that the reporter's "original notes" of a deposition are not on file with the transcript before it will have violated Penal Code, section 869, providing that a reporter shall file his "original notes" of a deposition with the clerk, together with the transcript of the same.—People v. Grundell, 75 Cal. 301, 17 Pac. 214.

[b] The provision of Penal Code, section 869, providing that a reporter shall, within ten days after the close of a deposition, file with the clerk a certified copy of his notes, transcribed in longhand, is merely directory, and the deposition is admissible if the filing is within a reasonable time.—People v. Grundell, 75 Cal. 301, 17 Pac. 214.

§ 31. Suppression.

[a] A motion to suppress the reading of a deposition before the case in which it was taken is put upon trial is premature; the proper time to object to such deposition is when it is offered in evidence on the trial.—Mills v. Dunlap, 3 Cal. 94; Ramsay v. Chandler, 3 Cal. 90.

[b] Decision of a motion to suppress a deposition rests in the sound discretion of the court, who must decide upon the sufficiency, or otherwise, of the grounds upon which such motion is made.—Mills v. Dunlap, 3 Cal. 94.

[c] Defendant, claiming to be injured by the insufficiency of a notice of the taking of a deposition, held required to promptly move to suppress.—Kelly v. Ning Yung Ben. Assn. (Cal. App.), 84 Pac. 321.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 972-975; 16 Cent. Dig., cols. 1192-1198, §§ 219-226.

§ 32. Parties Entitled to Use Depositions.

[a] Deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial.—Turner v. McIlhaney, 8 Cal. 575.

[b] Deposition of one not party to suit at time it was taken is properly excluded.—McDonald v. Cutter, 120 Cal. 46, 52 Pac. 120.

§ 33. Admissibility in Evidence.

[a] Deposition not properly taken is inadmissible.—McCann v. Beach, 2 Cal. 25.

[b] Depositions properly taken of witness residing in another county and absent at trial are admissible.—Sunol v. Molloy, 63 Cal. 369.

[c] The admission of the reporter's certified transcript of the testimony of a deposing witness is not error, under Penal Code, section 864, placing such a transcript, when properly filed, on the same footing as depositions, and section 1345, providing that depositions may be read in evidence by either party in criminal trial, etc.—People v. Grundell, 75 Cal. 301, 17 Pac. 214.

[d] Testimony taken before court as condition to granting continuance is inadmissible if it lack essential elements of deposition.—Thomas v. Black, 84 Cal. 225, 23 Pac. 1037.

[e] Deposition taken under section 882, Penal Code, pending information, on void commitment, is not taken in a pending case, and is inadmissible at trial of second information after recommitment.—People v. Thompson, 84 Cal. 604, 24 Pac. 384.

[f] Depositions taken de bene esse in criminal cases cannot be read in evidence without

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consent of accused.—People v. Sierp, 116 Cal. 252, 48 Pac. 88.

[g] Where the certificate of the notary to a deposition shows that, when the deposition was transcribed into longhand, it was read by the notary to the witness, and subscribed by him, an objection to such deposition being read in evidence, on the ground that it was taken in shorthand by a shorthand reporter not appointed by the court, and transcribed into longhand by such reporter, is properly overruled.—Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

[h] On a criminal prosecution the trial was set for April 14th, and continued to May 5th, because of the absence of the prosecuting witness. Before offering the deposition of the prosecuting witness on May 5th, it was shown that efforts had been made to serve a subpoena on him, but that the only information that could be obtained about him was that he was in another state. Held, that the evidence of diligence was sufficient.—People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 981-1001; 16 Cent. Dig., cols. 1214-1266, §§ 242-279.

§ 34. —— Continued Existence of Grounds for Taking.

[a] Evidence held sufficient to show absence of prosecuting witness from state in order to admit his deposition.—People v. Riley, 75 Cal. 101, 102, 16 Pac. 544.

[b] Showing that witness is out of state, held sufficient.—Renton, Holmes & Co. v. Monnier, 77 Cal. 458, 19 Pac. 820.

[c] Plaintiff's deposition is admissible in evidence where he is absent from the county, and one of his counsel testifies that he knows of no other witness in the county by whom certain facts can be proven.—Johnston v. McDuffee, 83 Cal. 30, 23 Pac. 214.

[d] Where the deposition of a witness is taken without the state, under Code of Civil Procedure, section 2024, preliminary proof that the witness continues absent, etc., is not required as a condition precedent to the use of such deposition under section 2032.—Dolbeer's Estate, In re (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cent. Dig., cols. 1219-1238, §§ 246. 257.

§ 35. —— Presence of Deponent.

[a] Deposition of plaintiff taken at instance of defendant may be read without showing his absence.—Newell v. Desmond, 74 Cal. 47, 15 Pac. 369.

[b] Where party has testified and been fully examined, it is in discretion of court to refuse to allow his counsel to read his deposition taken before trial.—Grigsby v. Shwarz, 82 Cal. 281, 22 Pac. 1041.

[c] Deposition may be read at trial notwithstanding presence of deponent except where deposition was taken under subdivision 6, section 2019, Code of Civil Procedure.—Johnston v. McDuffee, 83 Cal. 32, 23 Pac. 212.

[d] Code of Civil Procedure, section 2032, excluding certain depositions when deponent is present in court, does not apply to the deposition of a party taken on behalf of the adverse party under section 2021, subdivision 1.—Adams v. Weaver, 117 Cal. 42, 48 Pac. 972.

§ 36. —— Parts of Deposition.

[a] Under Code of Civil Procedure, sections 2028, 2032, 2034, providing that depositions may be taken and used, it is error to permit a party to read a portion of a deposition taken in his behalf when he has stated that he should not read it all.—Bank of Orland v. Finnell, 133 Cal. 475, 5 Pac. 976.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 983-985; 16 Cent. Dig., cols. 1260-1263, §§ 276, 277.

§ 37. —— Subsequent Incompetency of Deponent.

[a] A legislature may at any time modify the rules of evidence; and, if a witness is rendered incompetent by a change in the law, his deposition, offered after the law has taken effect, must be excluded, although, when it was taken, he was competent.—Mitchell v. Haggenmeyer, 51 Cal. 108.

§ 38. —— Contradicting.

[a] If the deposition of a witness has been introduced on behalf of one party, the other may prove his confessions or declarations for the purpose of contradicting his deposition or impeaching his credit.—Fox v. Fox, 25 Cal. 587.

§ 39. —— Amendment of Process or Pleading After Taking Deposition.

[a] Depositions taken before an amended answer is filed will not for that reason be rejected if the issue has not been materially changed.—Pico v. Cuyas, 47 Cal. 174.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 1001; 16 Cent. Dig., cols. 1263-1266, §§ 278, 279.

§ 40. Actions in Which Admissible—Other Actions Between Different Parties.

[a] The deposition of a deceased surveyor, offered in connection with a map made by him to prove a boundary line, which deposition was used in a previous suit between different parties, is competent evidence.—Morton v. Folger, 15 Cal. 275.

[b] Depositions taken in action between two parties are admissible in actions between their

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successors in interest.—Briggs v. Briggs, 80 Cal. 255, 22 Pac. 334.

[c] It is proper to exclude a deposition offered in proceedings in aid of execution, where the deposition was taken in the action in which the judgment was rendered, but where there were some defendants against whom no judgment was taken, in view of Code of Civil Procedure, section 2034, providing that "a deposition . . . . may be read . . . . in any other action between the same parties."—Lyons v. Marcher, 119 Cal. 382, 51 Pac. 559.

[d] Where two actions were consolidated by an order reciting that the parties beneficially interested therein were the same, to which no exception was taken, it was error to exclude a deposition taken in one of them on the trial of the issues involved in the other. Judgment (1899) 57 Pac. 73, reversed.—Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143.

[e] Where neither the parties nor the issues in two different actions are identical, depositions taken in one are inadmissible in the other.—Wolters v. Rossi, 57 Pac. 73.

[f] Depositions taken in one action are inadmissible in another, where neither the parties nor the issues are the same, as against a party who had no opportunity to cross-examine the witnesses.—Wolters v. Rossi, 57 Pac. 73.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cent. Dig., cols. 1282-1285, §§ 297, 298.

§ 41. Defects and Objections.

[a] Proof of notice to take a deposition where the written notice was defective was held good when made by parol, and it conforms substantially to the statute.—Mills v. Dunlap, 3 Cal. 94.

[b] Where rule of court is that "all exceptions to depositions, unless appearing on the face thereof, must be filed," etc. This means, not that the objectionable matter must appear, but that the objection must appear on the face of the depositions.—Myers v. Casey, 14 Cal. 542.

[c] Depositions are subject to all legal exceptions at trial, save only the objection to the form of an interrogatory where the parties attend the examination.—Lawrence v. Fulton, 19 Cal. 683.

[d] Party not appearing may object to reading of deposition for insufficiency of notice.—Howell v. Howell, 66 Cal. 390, 5 Pac. 681.

[e] Depositions are taken subject to all legal exceptions except as to the form of the interrogatory; and, when read upon a retrial of an action, the parties are at liberty to interpose new objections.—Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101.

[f] Under Code of Civil Procedure, section 2034, an objection that a copy of records made a part of a deposition was not the best evidence held untenable.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 27.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 979; 16 Cent. Dig., cols. 1208-1213, §§ 237-241.

§ 42. —— Time to Make.

[a] There is nothing in the statute that requires that exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence.—Dye v. Bailey, 2 Cal. 383.

[b] Depositions should be objected to when offered in evidence.—Mills v. Dunlap, 3 Cal. 94.

[c] When deposition of a witness is taken, objections to his competency must be taken at the time and not reserved till the trial, or they will be deemed waived.—Jones v. Love, 9 Cal. 68; Brooks v. Crosby, 22 Cal. 42.

[d] If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing.—Myers v. Casey, 14 Cal. 542.

[e] Where a rule of the district court requires three days' written notice of exceptions to depositions, if they are returned and filed with the clerk that length of time before trial, and such notice is not given on a first trial, the deposition may be admitted on a second trial, though it took place the day after the first trial. The party was in default in not giving the notice before the first trial. Myers v. Casey, 14 Cal. 542.

[f] Rejection of answer on defendant's objection is not waived because not raised when the deposition was taken.—Lawrence v. Fulton, 19 Cal. 683.

[g] Objections to depositions must be made at the trial and the fact that the party against whom they were used was not present at the trial does not alter the rule.—Clark v. Gridley, 35 Cal. 398.

[h] Objections to the admission of depositions cannot be raised for the first time on appeal.—Hobbs v. Duff, 43 Cal. 485.

[i] Where both parties were present at the taking of a deposition, the objection that questions were leading must be taken at the time of the interrogatory, and if no objection was then made to the form of the interrogatory, it cannot be urged at the trial.—Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

§ 43. —— Renewal at Trial of Previous Objection.

[a] When an exhibit to a deposition is objected to when produced by the witness, and the objection noted in the deposition, but there is nothing in the record to show that the objection was renewed at the trial, it will not be considered on appeal.—Parrott v. Byers, 40 Cal. 614.

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FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 1024; 16 Cent. Dig., cols. 1317-1319, § 320.

§ 44. —— Mode of Making Objection.

[a] An objection to the admission in evidence of a deposition, on the grounds that the witness had neglected to answer certain interrogatories put by the party objecting, and that the deposition was not complete or responsive, in order to be available, must call the attention of the court to the particular interrogatories which the witness had refused to answer, or the answer to which was evasive or not fully responsive.—Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 1012-1019; 16 Cent. Dig., cols. 1319-1321, §§ 321, 322.

§ 45. —— Sufficiency and Scope of Objection.

[a] Whole deposition cannot be excluded on ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions, otherwise any error in permitting the questions will be waived.—Higgins v. Wortell, 18 Cal. 330.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 1020-1023; 16 Cent. Dig., cols. 1321-1329, §§ 323-328½.

§ 46. —— Waiver or Estoppel.

[a] Objection to competency of a witness must be taken at time of taking deposition, and is waived by cross-examination.—Jones v. Love, 9 Cal. 68.

[b] By filing cross-interrogatories, and stipulating as to the manner of returning a deposition, a party estops himself to object to the authority of the commissioner.—Crowther v. Rowlandson, 27 Cal. 376.

[c] A party held not estopped to object to a question put to a witness in taking his deposition. Code Civ. Proc., sec. 2032.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 27.

[d] Objection that the notice of the taking of certain depositions was insufficient is waived by appearance.—Kelly v. Ning Yung Benev. Assn. (Cal. App.), 84 Pac. 321.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 1025, 1026; 16 Cent. Dig., cols. 1329-1347, §§ 329, 339.

DEPOSIT OF JURY FEE.

As condition precedent to jury trial. See Jury, § 31.

DEPOSITS.

Deposit in lieu of bond on appeal. See Appeal and Error, §§ 456-458.
Right of auctioneer in deposit made to bind sale. See Auctions, § 8.
To secure sureties on bail bonds. See Bail, § 28.
In state banks. See Banks and Banking, II, A.
In savings banks. See Banks and Banking, §§ 115-120.
With brokers. See Brokers, § 45.
Gifts of bank deposits. See Gifts, §§ 11, 26.
Liability of guardian for loss of bank deposit. See Guardian and Ward, § 48.
To prevent or discharge mechanic's lien. See Mechanics' Liens, § 68.
Deposit of will for safekeeping. See Wills, IV, C.

DEPOSITS IN COURT.

Include delivery of money or goods to courts or officers of courts, incident to civil actions, made pursuant to statute, rule or order of court, or consent of parties to the action; rights and liabilities of the parties in respect of such money or property; and payment or delivery out of court or other disposition thereof.

Interest on funds in litigation. See Interest, § 17.
In interpleader cases. See Interpleader, § 8.
Payment of amount tendered or admitted to be due into court. See Tender, § 13.

§ 1. In General.

[a] Public treasurer is not obliged, in case of conflicting claims to money in his hands, to pay it into court to avoid costs and interest.—Newport etc. Co. v. Drew, 141 Cal. 107, 74 Pac. 697.

[b] In an action to set aside a deed, held error to require plaintiff, as a condition precedent to the continuance of the action, to pay into court, under Code of Civil Procedure, section 572, the consideration received by him when he executed the deed.—Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

FOR AUTHORITIES FROM OTHER STATES:

See 13 Cyc. 1030-1041; 16 Cent. Dig., cols. 1355-1366, §§ 1,13.

DEPOTS.

Liability of carrier for injuries from defects in. See Carriers, § 102.
Validity of contract inducing disclosure of intended location of. See Contracts, § 79.

DEPRECIATED WARRANTS.

Payment of claims against county in depreciated warrants. See Counties, § 166.

DEPRECIATION OF ASSETS.

Liability of executor or administrator for. See Executors and Administrators, §§ 185-189.

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DEPRIVATION OF LIBERTY OR LIFE.

Without due process of law. See Constitutional Law, §§ 238-240.

DEPRIVATION OF PROPERTY.

Without due process of law. See Constitutional Law, §§ 245-259.

DEPUTIES.

Deputy clerks of court. See Clerks of Court, § 3.
Powers of deputy county clerks. See Counties, § 81.
Deputy public officers in general. See Officers, § 16.

DEPUTY COLLECTOR.

Appointment of deputy internal revenue collector. See Internal Revenue, § 6.

DEPUTY SHERIFFS.

Appointment and qualification of. See Sheriffs and Constables, § 3.
Liability of sheriff for acts or omissions of. See Sheriffs and Constables, § 17.

DEROGATION OF LAW.

Validity of custom or usage in derogation of law. See Customs and Usages, § 4.

DESCENT AND DISTRIBUTION.

Include transmission of property, real or personal, by hereditary succession; rights to inherit or share in the division of intestates' estates in general; and liabilities of heirs, next of kin, and other distributees.

I. NATURE AND COURSE IN GENERAL, §§ 1-10.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES, §§ 11-31.
A. Heirs and Next of Kin, §§ 11-23.
B. Surviving Husband or Wife, §§ 24-31.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES, §§ 32-61.
A. Nature and Establishment of Rights, §§ 32-59.
B. Debts of Intestate and Advancements, §§ 60, 61.

See, also, Escheat; Executor and Administrators; Wills.

Capacity of adopted child to inherit. See Adoption, § 17.
Right of aliens to inherit. See Aliens, §§ 12-16.
Inheritance by bastards. See Bastards, §§ 8-11.
Right of heir to sue to cancel instrument executed by ancestor. See Cancellation of Instruments, §§ 20.
Validity of inheritance tax law. See Constitutional Law, § 206.
Inheritance by convicts. See Convicts, § 2.
Conveyance by heir before death of ancestor. See Deeds, § 8.
Descent of homestead. See Homesteads, § 167.
Inherited property as separate property. See Husband and Wife, § 60.
Distribution of community property. See Husband and Wife, § 170.
Rights and liabilities of heirs of community property. See Husband and Wife, § 164.
Conclusiveness of judgment establishing heirship. See Judgment, § 505.
Conclusiveness, against heirs, of judgment against ancestor. See Judgment, § 474.
Distribution of property of dissolved firm. See Partnership, §§ 115-121.
Legacy and inheritance taxes. See Taxation, §§ 203-206.
Legacies charged with share of omitted heir. See Wills, § 340.
Capacity to take by devise or bequest. See Wills, § 5.

I. NATURE AND COURSE IN GENERAL.

SOURCE OF RIGHT, § 1.
WHAT LAW GOVERNS, § 2.
—— COMMON OR CIVIL LAW, § 3.
STATUTES CONSTRUED, § 4.
—— "HEIR" DEFINED, § 5.
POWER OF LEGISLATURE TO CHANGE RULES OF DESCENT, § 6.
SOURCE OF TITLE AND SEISIN OF INTESTATE, § 7.
—— SUCCESSION DEPENDENT ON WHETHER INTESTATE'S TITLE IS BY PURCHASE OR BY DESCENT, § 8.
—— EQUITABLE TITLE, § 9.
NECESSITY FOR DEATH—CIVIL DEATH, § 10.

§ 1. Source of Right.

[a] Right of inheritance is purely statutory. Wilmerding's Estate, 117 Cal. 284, 59 Am. St. Rep. 179, 49 Pac. 181; Sharp v. Loupe, 120 Cal. 91, 56 Pac. 134, 586.

§ 2. What Law Governs.

[a] The estates of persons who died prior to the passage of the probate laws, whether testate or intestate, whether leaving adult or minor heirs, are not within the operation of those laws, but are regarded as having vested in the devisees, or heirs, under the Mexican law.—Coppinger v. Rice, 33 Cal. 408.

[b] Inheritance is regulated by law in force at time of death.—Brenham v. Story, 39 Cal. 179.

[c] If, in an antenuptial contract, made in France, each of the future spouses gives or conveys to the survivor of them all the property which the first one dying shall leave, except what the law gives to the children of the marriage, the children take, not under the contract, but under the law, and if the survivor of the spouses dies in California, leaving property there, the same will be distributed by the probate court in accordance with the statutes of this state.—Baubichon's Estate, In re, 49 Cal. 18.

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[d] In the absence of an antenuptial contract, property in California left by a foreigner, dying in that state, and leaving children, must be distributed in accordance with the statutes of this state.—Baubichon's Estate, In re, 49 Cal. 18.

[e] The laws of the state furnish the rule in regard to the inheritance and distribution, and the courts will not resort to the laws of a foreign country, unless those laws are expressed in, and made a part of, a marriage contract.—Baubichon's Estate, In re, Myr. Prob. 55.

[f] Distribution of a decedent's personalty is governed by the law of his domicile at the time of his death.—Apple's Estate, In re, 66 Cal. 432, 6 Pac. 7.

[g] Until the law regulated the administration, descent, and distribution of estates, the Mexican law was applicable.—McNeil v. First Congregational Soc., 66 Cal. 105, 4 Pac. 1096.

[h] Law in force at time of ancestor's death governs descent.—Tyrrell v. Baldwin, 78 Cal. 473, 21 Pac. 116.

[i] The rights of the heirs of an intestate are controlled by a statute in force at the time of the death of the intestate, regulating the administration of the estate of the sale of its property.—Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78, 61 Pac. 659.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 20-24; 16 Cent. Dig., cols. 1382-1396, §§ 16-27.

§ 3. —— Common or Civil Law.

[a] In computing the degrees of consanguinity, the common law is the rule of decision in all cases except in relation to descent and distribution, in which the rule of computation which prevails under the civil law has been adopted.—People v. De La Guerra, 24 Cal. 73.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 24; 16 Cent. Dig., cols. 1395-1396, §§ 25-27.

§ 4. Statutes Construed.

[a] Seventh clause of the statute of descents and distribution is not contradictory of, but simply provides a specific exception to, the second clause of the same.—De Castro v. Barry, 18 Cal. 96.

[b] Descent from deceased child to surviving child is governed by the seventh clause of the statute of descents and distributions (Wood's Digest, 423), and not by the second clause. The second clause lays down the general rule, while the seventh clause provides for the case where the intestate leaves several children and one of them dies unmarried. De Castro v. Barry, 18 Cal. 96.

[c] Section 1384, Civil Code, as adopted in 1874, is declarative of law as previously interpreted by this court.—Bates v. Howard, 105 Cal. 173, 38 Pac. 715.

[d] Section 1386, Civil Code, does not classify successors to an estate but merely declares who they are under different conditions. Wilmerding's Estate, 117 Cal. 286, 59 Am. St. Rep. 179, 49 Pac. 181.

[e] Section 1386, Civil Code, must be read as a whole.—Wilmerding's Estate, 117 Cal. 286, 59 Am. St. Rep. 179, 49 Pac. 181.

§ 5. —— "Heir" Defined.

[a] Word "heir," in Code of Civil Procedure, section 1658, as to distribution of estate, includes all who succeed to, or have, the estate of decedent.—Ricaud's Estate, Myr. Prob. 158.

§ 6. Power of Legislature to Change Rules of Descent.

[a] Legislature may change rule of inheritance, but cannot devest vested right of heirs. Partridge v. McKinney, 13 Cal. 159.

[b] Legislature may change rule of inheritance, where not devesting vested rights of heirs.—Brenham v. Story, 39 Cal. 179.

§ 7. Source of Title and Seisin of Intestate.

[a] If the grantee of a Mexican grant petitioned for its confirmation, and died during the pendency of the proceedings, and his children were substituted in his place, and the confirmation was made, and the patent issued to them as his heirs, a sale of the land made under the direction of the probate court before the patent issues will confer on the purchaser a better right than the heirs possess, and a court of equity will enforce such right against the heirs, or a purchaser from them.—McCauley v. Harvey, 49 Cal. 497.

[b] Under subdivision 6 of section 1386 of the Civil Code, which provides that "if the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree," the next of kin in equal degree in such cases are the aunts and uncles of the decedent, and, if they are of the whole blood, the estate must go to them in equal shares, regardless of the source from which the estate was derived.—Pearsons, Estate of, 110 Cal. 524, 42 Pac. 960.

[c] Section 1386 of the Civil Code has no allusion to the blood of the first purchaser, and makes no attempt at any distinction founded upon the sources from which the estate of the decedent may have been derived; and section 1394, which deals entirely with cases of kindred of the half-blood, does not qualify or change the rule of section 1386, respecting kindred of the whole blood, who, if next of kin, share in all the estate of the decedent no matter from what source it comes.—Pearsons, Estate of, 110 Cal. 524, 42 Pac. 960.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 27-33; 16 Cent. Dig., cols. 1406-1427, §§ 40-56.

§ 8. —— Succession Dependent on Whether Intestate's Title is by Purchase or by Descent.

[a] Under statutes of 1862, page 570, property of an intestate acquired by devise descends in equal shares to his surviving brothers, sisters, and mother, and the children of a deceased brother or sister by representation; but if acquired by inheritance the mother does not share.—Donahue's Estate, 36 Cal. 329.

[b] An estate acquired by inheritance is one that has descended to the heir and been cast upon him by the single operation of the law. A devisee acquires by "purchase," in the technical sense of the term, and not by "descent."—Donahue's Estate, 36 Cal. 329.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 28-32; 16 Cent. Dig., cols. 1408-1414, § 42.

§ 9. —— Equitable Title.

[a] An equitable title will descend to heirs. Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641.

§ 10. Necessity for Death—Civil Death.

[a] Testator, a resident of New York, bequeathed his entire property to his daughter "in case she should become a widow." The daughter's husband was convicted of a felony, and sentenced to imprisonment for life. The daughter petitioned for distribution, in California, of his entire estate in that state. Held, that the husband being civilly dead in New York, his wife should be regarded here as a widow, and entitled to distribution. Stott's Estate, In re, Myr. Prob. 168.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 18, 20; 16 Cent. Dig., cols. 1379, 1380, § 10.

II. PERSONS ENTITLED, AND THEIR RESPECTIVE SHARES.

A. Heirs and Next of Kin, §§ 11-23.

B. Surviving Husband or Wife, §§ 24-31.

A. HEIRS AND NEXT OF KIN.

WHO MAY INHERIT, § 11.
DEGREES OF CONSANGUINITY—LAW GOVERNING COMPUTATION, § 12.
PARENTS, § 13.
GRANDCHILDREN, § 14.
BROTHERS AND SISTERS, § 15.
—— HALF-BLOOD, § 16.
NEPHEW OR NIECE, § 17.
OPERATION AND EFFECT OF WILL, § 18.
—— OMITTED HEIRS, § 19.
—— INTENTIONAL OMISSION AND EVIDENCE THEREOF, § 20.
—— CHILDREN OF INTENTIONALLY OMITTED HEIR, § 21.
—— POSTHUMOUS CHILD, § 22.
—— CHILD BORN AFTER EXECUTION OF WILL, § 23.

§ 11. Who May Inherit.

[a] Anyone may inherit who is not expressly prohibited.—People v. Folsom, 5 Cal. 379.

[b] Anyone qualified to purchase and hold real estate may take it by inheritance.—People v. Folsom, 5 Cal. 380.

FOR AUTHORITIES FROM OTHER STATES:

Who entitled to succeed to estates of intestates: 12 Am. St. Rep. 82, note.

§ 12. Degrees of Consanguinity—Law Governing Computation.

[a] Common law prevails in computing degress of consanguinity.—Romaine, Matter of, 23 Cal. 592.

FOR AUTHORITIES FROM OTHER STATES:

Degrees of consanguinity and affinity, how computed for the purposes of descent and distribution: 56 Am. Dec. 293, note.

Who are related by affinity: 79 Am. St. Rep. 200, note.

§ 13. Parents.

[a] A wife died, leaving a husband and two children, of whom one died soon after, at the age of three years. Held, that the case was governed by the seventh clause of the act of descents and distributions; that the husband took one-third of the wife's property, but that the whole of the deceased child's share passed to the surviving child.—De Castro v. Barry, 18 Cal. 96.

[b] Upon the death of the husband intestate, leaving no descendants, the surviving wife and surviving father of the deceased each inherit one-half of the husband's half of the common property.—Jewell v. Jewell, 28 Cal. 232.

[c] If deceased leave neither wife, issue nor father surviving him, mother is sole heir. O'Callaghan v. Bode, 84 Cal. 495, 24 Pac. 269.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 41-43; 16 Cent. Dig., cols. 1444-1454, §§ 84-90.

§ 14. Grandchildren.

[a] By the term "descendants," the statute means children or children's children to the remotest degree, and not all those who may properly take by descent.—Jewell v. Jewell, 28 Cal. 232.

[b] Under the provision in the statute of descents, as it has been generally adopted,

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regulating the distribution of property in the collateral descending line, the word "children" does not include grandchildren, but is confined to descendants in the first degree, the same being children of brothers and sisters of decedent.—Curry's Estate, 39 Cal. 529.

[c] Children of deceased brother or sister do not take by right of representation unless there is a surviving brother or sister.—Ingram, In re, 78 Cal. 588, 12 Am. St. Rep. 80, 21 Pac. 435.

§ 15. Brothers and Sisters.

[a] Under the Mexican law, if a father dies leaving land to his wife and children in certain proportions, the interests of children afterward dying vest in their mother, and not in the surviving children.—Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

§ 16. —— Half-blood.

[a] Property inherited from the father of a wife who has died intestate, leaving as sole heirs a husband and two half-sisters on the mother's side, must be distributed one-half to the husband and one-half to such half-sisters.—Smith, Estate of, 131 Cal. 433, 82 Am. St. Rep. 358, 63 Pac. 729.

[b] Subdivision 2 of section 1386 of the Civil Code must be construed in its proper sense, and according to the approved usage of the language, as including in the expression "brother and sisters of the decedent" those of the half-blood as well as those of the whole blood.—Smith, Estate of, 131 Cal. 433, 82 Am. St. Rep. 358, 63 Pac. 729.

[c] Under paragraph 2 of section 1386 of the Civil Code, providing that if there be no issue, and no father or mother, "one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation," the terms, "brothers and sisters," include brothers and sisters of the half-blood; and where surviving brothers and sisters of the half-blood are entitled to inherit thereunder the children of deceased brothers and sisters of the full blood are also entitled to inherit by representation, though there was no surviving brother and sister of the full blood.—Lynch, Estate of, 132 Cal. 214, 64 Pac. 284.

[d] The qualification made in section 1394 of the Civil Code, as to inheritance by kindred of the half-blood, does not limit their right of inheritance equally with those of the whole blood in the same degree, except in the particular case of the inheritance coming to the intestate in the way therein specified. The rights of half brothers and sisters to inherit from a deceased half brother or sister are conferred upon them by section 1386 of that code, and are only limited in the particular mentioned in section 1394.—Lynch, Estate of, 132 Cal. 214, 64 Pac. 284.

FOR AUTHORITIES FROM OTHER STATES:

Half-blood, inheritance by: 61 Am. Dec. 655, note; 25 L. R. A. 541, note. See, also, 14 Cyc. 45-47; 16 Cent. Dig., cols. 1463-1475, §§ 102-107.

§ 17. Nephew or Niece.

[a] Nephew or niece must have uncle or aunt living to inherit through deceased parent.—Ingram, In re, 78 Cal. 588, 12 Am. St. Rep. 80, 21 Pac. 435.

[b] Under the terms of subdivision 9 of section 1386 of the Civil Code, the nieces of the deceased husband may inherit from the deceased's widow the common property inherited by her from the deceased husband, notwithstanding there was no brother or sister of the deceased husband living at the date of the widow's death.—McCauley, Estate of, 138 Cal. 546, 71 Pac. 458.

§ 18. Operation and Effect of Will.

[a] Where testator devised his real estate to his wife for life and directed in the will that after her death it be sold and the proceeds divided between beneficiaries therein named, the right to the property as heirs at law was taken from the beneficiaries by the will, and by a decree distributing the property to the testator's widow pursuant to the terms of the will, though the beneficiaries were the only heirs at law of testator.—Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 54-61; 16 Cent. Dig., cols. 1494-1512, §§ 123-131.

§ 19. —— Omitted Heirs.

Effect of omission of children or issue of deceased children on validity of will. See Wills, § 31.

[a] Where a testator neglected to make provision for a child in his will, without showing that it was intentional, the child will take the same share in the estate and hold by the same title, as though the testator had died intestate; and if the latter leaves a surviving wife and other children, who are devisees, the pretermitted child takes the title by descent, and becomes a tenant in common with the devisees.—Pearson v. Pearson, 46 Cal. 609.

[b] Children unintentionally omitted from father's will take same interest in estate as if father had died intestate.—Grider, In re, 81 Cal. 575, 22 Pac. 908.

[c] Widow to whom whole estate is devised takes it as tenant in common with omitted heirs.—Grider, In re, 81 Cal. 575, 576, 22 Pac. 908.

[d] Section 1307, Civil Code, does not protect from effects of mere omission from will except those who were issue of deceased child when will was made.—Barter, Estate of, 86 Cal. 444, 25 Pac. 15.

[e] Under Civil Code, section 1306, providing that, where any testator omits to make provision for any of his children, and the will does not show that such omission was intentional, such child succeeds to such portion of the estate as he would have received if the testator had died intestate, the estate descends to him at once, and he becomes vested

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with such interest, subject only to a sale for the payment of debts; and where a will gives to the testator's wife all his property, with absolute power to sell any and all of it without application to or approval by the court, but omits to make provision for a child, a sale under such power will not convey a valid title, as against the right of the child.—Smith v. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336, 26 Pac. 521, 12 L. R. A. 46, affirming 22 Pac. 1143.

[f] Section 1307, Civil Code, is not intended to limit disposing power of testator, and applies only to case where heir is unknown, forgotten or unintentionally overlooked.—Callaghan's Estate, 119 Cal. 574, 51 Pac. 860.

[g] A testator bequeathed $10 to a son, who was dead at the time of making the will, but left a child living. The testator believed at the time that his son was living. Held, that the grandson was entitled to the same share of the testator's estate as if he had died intestate.—Ross' Estate, In re, 140 Cal. 282, 73 Pac. 976; Frear v. Ross, 140 Cal. 282, 73 Pac. 976.

§ 20. —— Intentional Omission and Evidence Thereof.

[a] Where a will leaves all of testator's property to his wife, with a request that she invest a certain sum for a designated grandson, and does not in any way refer to a certain child of testator's, it does not show on its face that such omission was intentional.—Stevens' Estate, In re, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379.

[b] Declarations of testator consistent with intent disclosed by words of will are inadmissible under our code, to prove his intention to omit child from will.—Stevens, In re, 83 Cal. 326, 17 Am. St. Rep. 252, 23 Pac. 379.

[c] Intent to omit child must appear on face of will by words indicating it directly or by implication equally as strong.—Stevens, In re, 83 Cal. 329, 17 Am. St. Rep. 252, 23 Pac. 379.

[d] A will reciting that testator, knowing that his wife would ever continue the same kind, devoted mother to their children which she had always proven herself, gave all his property to his wife, expressly excluding said children. Held, that an intentional omission to provide for issue of deceased children appeared on the face of the will, within Civil Code, section 1307, providing that in case of an omission to provide for any child or the issue of a deceased child, unless it appears that such omission was intentional, he shall take as though there had been no will.—Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513.

[e] Parol evidence is inadmissible to prove that the omission of the testator to provide in his will for any of his children, or for the issue of any of the deceased children, was intentional, and the face of the will itself can only be looked to to determine his intention.—Salmon, Estate of, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030.

[f] The fact that the testator mentioned in the will the widows of his deceased sons, the mothers of the omitted grandchildren, is not sufficient to show that he had his grandchildren in mind, and does not rebut the presumption that they were forgotten, or show that the omission was intentional.—Salmon, Estate of, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030.

§ 21. —— Children of Intentionally Omitted Heir.

[a] Intentional omission of mother from will disinherits her children.—Barter, Estate of, 86 Cal. 444, 25 Pac. 15.

§ 22. —— Posthumous Child.

[a] A posthumous child, for whom no provision is made in the will of the father, is entitled to one-half of the separate and common property where no express intention of the testator to the contrary appears.—Buchanan's Estate, 8 Cal. 507.

§ 23. —— Child Born After Execution of Will.

[a] Under Civil Code, section 1306, a son born after the execution of a will, and not having been provided for or mentioned therein, takes the same portion of his father's estate that he would have succeeded to if the testator had died intestate, and his right to do so will not be affected by a reference in the will to the testator's sons then living and who are specially mentioned.—Painter v. Painter, 113 Cal. 371, 45 Pac. 689.

FOR AUTHORITIES FROM OTHER STATES:

Children en ventre sa mere, when regarded as in being: 43 Am. Dec. 474.

B. SURVIVING HUSBAND OR WIFE.

STATUTE CONSTRUED, § 24.
RIGHTS OF SURVIVING WIFE, IN GENERAL, § 25.
—— EFFECT OF SEPARATION, § 26.
—— FAILURE OF ISSUE, § 27.
RIGHTS OF SURVIVING HUSBAND, IN GENERAL, § 28.
—— INTEREST IN INSURANCE POLICIES, § 29.
RIGHTS OF CHILDREN OF SURVIVOR OF SECOND MARRIAGE, § 30.
RELEASE OF RIGHT, § 31.

§ 24. Statute Construed.

[a] The words "shall go," as used in the eleventh section of the act of 1850, defining the right of the husband and wife, mean "shall vest," and apply equally to the descendant of the deceased husband or wife, as to the survivor.—Broad v. Broad, 40 Cal. 493.

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§ 25. Rights of Surviving Wife in General.

[a] Upon death of father, children become tenants in common, of community property, with mother.—Plass v. Plass, 121 Cal. 134, 53 Pac. 448.

[b] Testator deserted his wife, A, and subsequently went through a marriage ceremony with B, with whom he accumulated property, all of which he left to B by his will. B was ignorant, when she married testator, that he had a wife living. Held, that A was entitled to one-half as wife, and B to the other half under the will.—Winter's Estate, In re, Myr. Prob. 131.

§ 26. —— Effect of Separation.

[a] A wife who had never maintained conjugal relations with her husband, A, after a separation, married B, under the false impression that she was legally divorced from A. She bore children by B, was divorced from him, and on death of A claimed her share in A's estate. Held, that her right was to be tested by reference to her relations with A, and her right to call on him for support during his life, and that she was not entitled to an allowance in A's estate.—Byrne's Estate, Myr. Prob. 1.

§ 27. —— Failure of Issue.

[a] Decedent left no issue, father, mother, brother, or sister, but left a wife and nephews and nieces. The widow died, leaving children by a prior marriage. Held that, at decedent's death, his widow took, to the exclusion of nephews and nieces, the entire estate.—Linehan's Estate, In re, Myr. Prob. 83.

§ 28. Rights of Surviving Husband in General.

[a] Where wife dies leaving a husband and their two infant children, a boy and a girl and the boy dies unmarried, the father inherited one-third of the wife's separate estate; but the surviving sister, and not the father, inherits the deceased boy's share. De Castro, Estate of, v. Barry, 18 Cal. 96.

[b] Husband and children of deceased wife take as tenants in common of her separate estate.—Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641.

[c] The delay of administration and distribution of the wife's estate until after the death of the husband cannot affect his title or the title of his estate to a one-third interest in insurance policy on his life and its proceeds when paid to the estate of the deceased wife.—Estate of Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87.

§ 29. —— Interest in Insurance Policies.

[a] The policy of insurance in name of wife, is her separate property, payable to her heirs at the time of her death, she having died intestate before the death of the husband; and her husband took one-third interest therein by virtue of his heirship to the separate property of the wife, and when he died before administration of her estate one-third of the proceeds of the policy became part of his estate.—Estate of Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87.

§ 30. Rights of Children of Survivor of Second Marriage.

[a] Decedent left no issue, father, mother brother, or sister, but left a wife, and nephews and nieces. The widow died, leaving children by a prior marriage. Held that, at decedent's death, his widow took, to the exclusion of nephews and nieces, the entire estate, and that on her death the entire estate went to her children by a former marriage.—Linehan's Esate, In re, Myr. Prob. 83.

§ 31. Release of Right.

[a] Proponents of a deceased wife's will, relying on an agreement of separation and mutual relinquishment as to all property rights and rights of succession and inheritance entered into between decedent during her lifetime and her husband, as a defense to a contest by the latter of the admission of the will to probate, held not bound to prove the fairness of the contract in order to have equitable effect given thereto.—Edelman's Estate, In re (Cal. Sup.), 82 Pac. 962.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 81-83; 16 Cent. Dig., cols. 1569-1572, §§ 186-189.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

A. Nature and Establishment of Rights in General, §§ 32-59.

B. Debts of Intestate and Advancements, §§ 60, 61.

A. NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL.

ESTABLISHMENT AND DETERMINATION OF HEIRSHIP OR RIGHT TO DISTRIBUTION—JURISDICTION, § 32.
—— NATURE AND CONDUCT OF PROCEEDINGS, § 33.
—— RIGHT TO JURY TRIAL, § 34.
—— REPRESENTATION OF ABSENT HEIRS, § 35.
—— LIMITATIONS AND LACHES, § 36.
PRESUMPTION AND BURDEN OF PROOF, § 37.
ADMISSIBILITY OF EVIDENCE, § 38.
—— NONSUIT, § 39.
—— JUDGMENT, § 40.
—— APPEAL, § 41.
—— COSTS, § 42.
TITLE OF HEIRS OR DISTRIBUTEES, § 43.
—— TIME OF VESTING IN GENERAL, § 44.
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—— REAL PROPERTY AND INTERESTS THEREIN, § 46.
POSSESSION AND CONTROL OF PROPERTY, § 47.

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—— REAL PROPERTY, § 48.
—— PERSONAL PROPERTY, § 49.
DIVISION OF ESTATE BY LEGAL PROCEEDINGS, § 50.
RIGHTS OF SURVIVING WIFE, § 51.
CONVEYANCES AND ASSIGNMENTS BY HEIRS OR DISTRIBUTEES, § 52.
—— RIGHTS AND LIABILITIES OF PURCHASERS OR ASSIGNEES, § 53.
CONTRACTS BY HEIRS, § 54.
ACTIONS BETWEEN HEIRS AND DISTRIBUTEES—PLEADING, § 55.
ACTIONS BY HEIRS AND DISTRIBUTEES, § 56.
—— LIMITATIONS, § 57.
—— RELATING TO REAL PROPERTY, § 58.
ACTIONS AGAINST HEIRS OR DISTRIBUTEES —PARTIES, § 59.

§ 32. Establishment and Determination of Heirship or Right to Distribution—Jurisdiction.

[a] Court acquires no jurisdiction where the petition is filed within a year from the issuing of letters of administration.—Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

[b] Jurisdiction of superior court in "special proceedings" is limited by terms and conditions of statute authorizing such proceedings.—Smith v. Westerfield, 88 Cal. 379, 26 Pac. 206.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 95-100; 16 Cent. Dig., cols. 1605-1615, §§ 229-236.

§ 33. —— Nature and Conduct of Proceedings.

[a] Action to determine heirship of claimants to an estate is a special proceeding.—Smith v. Westerfield, 88 Cal. 379, 26 Pac. 206.

[b] It seems that the proceedings and decree provided for in section 1664 of the Code of Civil Procedure were intended by the legislature to be in rem, and conclusive against all persons, and the unquestioned basis for the decree of distribution which was to follow.—Estate of Blythe, 110 Cal. 231, 42 Pac. 643.

[c] "Distribution" of estate includes determination of persons entitled thereto and also the proportion to which each is entitled. Wm. Hill Co. v. Lawler, 116 Cal. 361, 48 Pac. 323.

[d] In a proceeding to determine heirship under section 1664 of the Code of Civil Procedure, each person who appears, and either by complaint or answer sets up a distinct claim of heirship, or right to distribution of the estate, peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to cross-examine the witnesses of hostile parties; and an independent actor styled a defendant cannot be compelled to yield his judgment as to cross-examination of a witness to that of counsel for the plaintiff.—Estate of Kasson, 127 Cal. 496, 59 Pac. 950.

[e] A proceeding under Code of Civil Procedure, section 1664, authorizing an action to determine the rights of the heirs of a decedent, cannot be converted into a hearing for the probate of a will of the decedent, for section 1299 et seq., relating to the probate of wills, provide for the only procedure under which a will can be probated.—Christensen's Estate, In re, 135 Cal. 674, 68 Pac. 112; Jacobsen v. Norton, 135 Cal. 674, 68 Pac. 112.

[f] In proceeding to determine heirship, every party is an independent actor and is plaintiff against all parties whose claims are adverse.—Kasson's Estate, 141 Cal. 39, 74 Pac. 436.

§ 34. —— Right to Jury Trial.

[a] It seems that issues raised in a proceeding to determine the question of heirship are a proper subject for a jury trial.—Estate of Sheid, 122 Cal. 528, 55 Pac. 328.

§ 35. —— Representation of Absent Heirs.

[a] Under section 159 of the probate act, as it stood prior to the amendment of 1861, it was not requisite that the attorney appointed to represent the minor heirs should have ten days' notice of the hearing of the petition.—Richardson v. Musser, 54 Cal. 196.

[b] Appointment of attorney for absent heirs and allowance of fee to him are discretionary with probate court.—Rety's Estate, 75 Cal. 256, 17 Pac. 65.

[c] Probate court may vacate order allowing fee to attorney for absent heirs at suggestion of any one or sua sponte, if it be improvident.—Dorsey's Estate, 75 Cal. 258, 17 Pac. 209.

[d] The probate court has exclusive jurisdiction to determine whether an attorney shall be appointed to represent absent or minor heirs, and to fix the amount of his compensation.—Dougherty v. Bartlett, 100 Cal. 496, 35 Pac. 431.

[e] Before the court can make an order appointing an attorney for nonresident devisees, legatees, heirs, or creditors of a deceased person, the court must be satisfied that such persons exist, and the order must designate who they are, and if their names are not known, they must still be identified in some mode in the order.—Lux's Estate, 134 Cal. 3, 66 Pac. 30.

[f] Where an attorney, appointed to represent absent heirs, agreed with them for a stipulated fee, he can thereafter recover from them no greater sum. The court had no jurisdiction to make a contract for the absent heirs; and an order made, fixing a quarterly compensation to be paid to such attorney each quarter year during administration, was void. The final allowance of the fee was in the discretion of the court, and was to be judicially determined by the court, after knowledge of the facts.—Lux's Estate, 134 Cal. 3, 66 Pac. 30.

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[g] The compensation of an attorney appointed by the court to represent nonresident persons interested in the estate is to be paid only on account of the interest of the persons represented, and nothing should be paid out of the estate for persons named, who turn out to have no interest in the estate.—Lux's Estate, 134 Cal. 3, 66 Pac. 30.

§ 36. —— Limitations and Laches.

[a] The statute of limitations does not begin to run against an action by the heirs and distributees of an estate against the devisees and legatees under the decedent's will, brought to determine the claims of all persons interested in the estate, as provided by Code of Civil Procedure, section 1664, until a final distribution is made. The plaintiff's have five years after attaining their majorities to institute such an action.—Grider's Estate, In re, 21 Pac. 532.

§ 37. —— Presumption and Burden of Proof.

[a] Evidence of inquiries made only at the last known residence of heirs, who appear to have removed from such place, and have not been heard from for a considerable time, will not serve as a basis for the presumption that they are dead; and in such a case it is proper to postpone the distribution, that further proofs may be obtained.—Garrity's Estate, In re, Myr. Prob. 180.

§ 38. —— Admissibility of Evidence.

[a] In a proceeding to deterimne heirship under Code of Civil Procedure, section 1664, authorizing an action to determine the rights of all persons to the estate of a decedent, evidence of the execution of decedent's holographic, unprobated will, under which certain persons claim an interest in his estate, is properly excluded.—Christensen's Estate, In re, 135 Cal. 674, 68 Pac. 112; Jacobsen v. Norton, 135 Cal. 674, 68 Pac. 112.

§ 39. —— Nonsuit.

[a] Under Code of Civil Procedure, section 1664, providing that in a proceeding to establish heirship, when the pleadings of all the parties are in, the subsequent proceedings shall be the same as in an ordinary civil action, etc., where a party claiming to be an heir failed to appear and introduce any proof to support her claim it was proper for the court to enter a nonsuit as to her.—Kason's Estate, In re, 141 Cal. 33, 74 Pac. 436; Lindy v. McChesney, 141 Cal. 33, 74 Pac. 436.

§ 40. —— Judgment.

[a] The final order or decree, in a proceeding under section 1664 of the Code of Civil Procedure, to determine heirship, is properly entered when spread at length upon the minute-book of the court in probate. It is not necessary that it should be entered in a judgment-book.—Estate of Blythe, 110 Cal. 26, 229, 42 Pac. 641, 642.

§ 41. —— Appeal.

[a] In a proceeding to determine heirship, where the finding of the superior court is against the kinship of the contesting claimant to the decedent, and to the effect that she has no interest in the estate, and the testimony in favor of the claimant is of an exceedingly slight and flimsy character, the conclusion of the trial judge will not be disturbed upon appeal, but it will be considered that she has no interest in the estate, and is not concerned with its distribution.—Estate of Blythe, 110 Cal. 231, 42 Pac. 643.

§ 42. —— Costs.

[a] Under Code of Civil Procedure, section 1664, providing for proceedings for the ascertainment of rights of persons claiming as distributees of an estate of a decedent, and declaring that the court shall apportion the costs of such proceedings between the parties, in its discretion, where a petitioner claimed the entire estate, and the other parties claimed as devisees, and the petitioner was unsuccessful, it was proper to tax him with the entire costs. Lindy v. McChesney, 141 Cal. 351, 74 Pac. 1034.

§ 43. Title of Heirs or Distributees.

[a] Possession of land at death of party gives prima facie title to his heirs or representatives. (Baldwin, J.)—Gregory v. McPherson, 13 Cal. 562.

[b] Title vests in heir or devisee subject to debts and expenses of administration.—Colton v. Onderdonk, 69 Cal. 157, 10 Pac. 395.

[c] Subject to administrator's right to dispose of land to pay debts heir has right to title and possession.—Spotts v. Hanley, 85 Cal. 167, 24 Pac. 738.

[d] Title of heirs of deceased person to real estate owned by him does not originate in the decree of distribution, but comes to them directly from their ancestor, subject only to the control of the probate court, and the possession of an administrator appointed by that court for the purpose of administration. Bates v. Howard, 105 Cal. 173, 38 Pac. 715.

[e] Under our probate system all deraignment of title to the property of deceased persons, whether dying testate or intestate, is through the decree of distribution entered as the final act in the administration of the estate.—Toland v. Earl, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914.

For Authorities from Other States:

See 14 Cyc. 102-109; 16 Cent. Dig., cols. 1616-1634, §§ 237-262.

§ 44. —— Time of Vesting in General.

[a] Upon the death of an intestate his estate vests immediately in such heirs, alien or not, as are resident here, and is not devested in favor of alien heirs who afterward

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come to reside within this state.—Farrell v. Enright, 12 Cal. 450.

[b] Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the lien of creditors, the support of the family of the deceased, and the expenses of administration, Subject to these liens and the administrator's temporary possession, he may sell, and may judge for himself as to the relative advantages of selling or holding; and the legislature has no more power to order a sale of his estate by the administrator than it has to direct the sale of the property of any other person, acquired in any other way.—Brenham v. Story, 39 Cal. 179.

[c] Rights of heirs do not vest until death casts the inheritance.—Herrold v. Reen, 58 Cal. 443.

[d] The title to land vests in the heirs of a deceased person at the time of his death, subject only to the law for the sale of lands of the decedent then operative. Where the deceased died prior to the amendments of 1893 to sections 1536, 1537, 1542, and 1543 of the Code of Civil Procedure, authorizing a sale when it appears to be for the advantage, benefit, and best interest of those interested, the vested rights of the heirs cannot be affected or impaired thereby.—Estate of Newlove, 142 Cal. 377, 75 Pac. 1083.

§ 45. —— In Absence of Administration.

[a] An action cannot be maintained by any heirs of a deceased person against the other heirs, to recover their distributive share of the decedent's property, when there has been no administration on his estate, but the defendants managed it, for a few years after the death of the deceased, under and for his widow, and the plaintiffs succeeded them in such management.—Valencia v. Bernal, 26 Cal. 328.

[b] Under the Mexican system, on the death of an intestate the heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased, whether they were adults or minors; and no administration in the sense of the common law was needed or could be had at any time. Coppinger v. Rice, 33 Cal. 408.

§ 46. —— Real Property and Interests Therein.

[a] An heir can maintain ejectment for the realty when a considerable period has elapsed since the ancestor's death, and no administration has been taken out, or is required to be taken, because no debts exist.—Updegraff v. Trask, 18 Cal. 458.

[b] Where a Mexican grantee dies, and his heirs petition for and obtain to themselves a confirmation of the grant, and the patent issues to them, the legal title vests in the heirs and their grantees.—Hartley v. Brown, 51 Cal. 465.

[c] Pending the administration of an estate no title to real estate vests in an heir sufficient to maintain an action of ejectment or to quiet title.—Harper v. Strutz, 53 Cal. 655.

[d] A direction to the executrix of a will to convert all the testator's property, real, personal, or mixed, into money, operates as a conversion of the land into money from the death of the testator only for the benefit of those for whose use the conversion is intended to be made, and does not operate as a devise of land to the executrix, or deprive the heir of the right to maintain an action of ejectment for the possession of the land, and for recovery of the rents, issues, and profits thereof, as against any person other than the executrix.—Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091.

§ 47. Possession and Control of Property.

[a] Under our peculiar system (as in Texas), real and personal estate vests in the heir, subject to the administrator's lien, derived from the deceased, for the payment of debts, etc., and to his right of present possession.—Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 110-112; 16 Cent. Dig., cols. 1634-1640, §§ 263-275.

§ 48. —— Real Property.

[a] The statute giving possession of real estate of intestates to their administrators until administration and distribution are had applies only to cases arising since the statute was passed. The heirs took the estate of intestates dying before its passage, and are proper parties to bring ejectment.—Soto v. Kroder, 19 Cal. 87.

[b] Under the state law, the right to possession of real estate of an intestate remains exclusively with the administrator until the estate is settled or distribution ordered by the probate court, and, until such time neither the heirs nor their grantees can maintain ejectment for the property.—Meeks v. Hahn, 20 Cal. 620.

[c] Under section 114 of the statute for the settlement of estates, giving the administrator the right to the possession of the realty of the intestate, and to receive the rents and profits therefrom until the estate is settled, the right of possession of such property is exclusively in the administrator, notwithstanding the statute provides that the estates of intestates shall descend to the heirs, subject to the payment of debts.—Meeks v. Hahn, 20 Cal. 620.

[d] Where an heir of realty belonging partly to an estate joins in a lease with the other owners, and thereafter such heir is appointed administrator of the estate, the lessees of heirs who did not join in the lease cannot oust the administrator having the right to possession, but are entitled to be let into possession jointly with the prior lessees, to the extent of the interest of their lessors, so

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far as authorized by their lease.—Berry v. Eyraud, 134 Cal. 82, 66 Pac. 74.

§ 49. —— Personal Property.

[a] Under the statute of descent, vesting the title of personalty in the heir, the administrator is entitled to its possession until disposed of in the course of administration, and the right of possession extends by relation back to the time of the death of the intestate.—Jahns v. Nolting, 29 Cal. 507.

§ 50. Division of Estate by Legal Proceedings.

[a] The probate court has no power to direct that the portion of an estate of an intestate, originally allotted to one of the heirs at law, a nonresident, shall be distributed among the other heirs, if he shall fail to appear and claim it within a year. The money should be paid into the state treasury, where it must remain until claimed by the owner, or, in case of his death, by his representatives.—Pyatt v. Brockman, 6 Cal. 418.

FOR AUTHORITIES FROM OTHER STATES:

Partition in connection with distribution of estates of decedents: 41 Am. St. Rep. 140, note.

§ 51. Rights of Surviving Wife.

[a] Under Civil Code, section 1402, the probate court has jurisdiction to declare certain property devised to testator's son to be community property, and to distribute it to the wife, who is not a legatee or devisee.—Burdick's Estate, In re, 40 Pac. 35.

§ 52. Conveyances and Assignments by Heirs or Distributees.

[a] If heir convey his interest in estate of his ancestor, he conveys such interest only as will remain to him after satisfying the objects of administration, unless the deed should in express terms cover more.—Moore's Estate, 57 Cal. 437.

[b] A power of attorney given by an heir to receive his distributive share of the estate to one who had purchased it does not constitute a transfer of the title thereto.—Freeman v. Rahm, 58 Cal. 111.

[c] Heir may contract about or convey title cast upon him by death of ancestor.—Chever v. Ching Hong Poy, 82 Cal. 71, 22 Pac. 1081.

[d] Code of Civil Procedure, section 1678, providing that distribution of real estate may be made to the grantees of the original heirs, legatees, or devisees, does not authorize distribution to a mortgagee of the testatrix.—Brook's Estate, In re, 125 Cal. 459, 58 Pac. 89.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 133-139; 16 Cent. Dig., cols. 1680-1694, §§ 322-336.

§ 53. —— Rights and Liabilities of Purchasers or Assignees.

[a] Deed of heir passes only right acquired by succession and not rights given by probate law.—Moore's Estate, 57 Cal. 437.

[b] Under Code of Civil Precedure, section 1678, providing that upon distribution, if any of the heirs, legatees, or devisees, have conveyed their shares to other persons, such shares must be assigned to the persons holding them in the same manner as they otherwise would have been to such heirs, legatees, or devisees, and that (section 1908) a judgment or final order in an action or special proceeding before a court having jurisdiction is conclusive, etc., a decree of the probate court assigning to an heir his share of the estate is conclusive upon one who purchased it prior to the decree, as against an attaching creditor of the heir, it appearing that such purchaser had notice of the proceedings of distribution, but failed to assert his rights therein.—Freeman v. Rahm, 58 Cal. 111.

[c] Distribution of a legatee's interest in an estate to his assignee's assignee should not be refused on account of the pendency of a suit to set aside the assignment, brought a few days before the date fixed for distribution, against the original assignee, in which suit the assignee claiming distribution was not a party, and no service had been had or appearance entered at said date, and there was no pretense but that the note to secure which the assignment was made was for a valuable consideration and without fraud.—Phillips, In re, 71 Cal. 285, 12 Pac. 169.

[d] Under a decree of distribution, adjudging that interest of the widow has passed to her vendee, vendee takes only the widow's interest in common with the children, though all the real estate left by decedent was described.—Grider, In re, 81 Cal. 571, 22 Pac. 908.

[e] Under Code of Civil Procedure, section 1664, which provides that, in all estates now being administered, any person claiming to be heir to the deceased, or entitled to distribution, in whole of in part, of such estate, may file a petition praying the court to "declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made," etc., one who has, by purchase, succeeded to the rights of the heirs to land before distribution, may maintain her petition in the superior court for the determination of the title and for distribution.—Burton, In re, 93 Cal. 459, 29 Pac. 36; distinguishing Theller v. Such, 57 Cal. 447; Bath v. Valdez, 70 Cal. 350, 11 Pac. 724; Barnard v. Wilson, 74 Cal. 512, 16 Pac. 307; and Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081.

[f] All the heirs of an estate except one conveyed all their interest in certain property to the latter, who conveyed it to petitioner, Held, that distribution thereof should be decreed to petitioner and not the legal heirs, where notice was served on all parties interested, and the fact of petitioner's ownership

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was before the court.—Vaughn's Estate, In re, 92 Cal. 192, 28 Pac. 221.

[g] One to whom the title of an heir of an estate is transferred or mortgaged as a rule takes only so much of the distributive share of such heir as remains after the purposes and objects of administration have been satisfied, and is presumed to know the law, but is not presumed to anticipate or have notice of any unusual or extraordinary proceeding taken under the form or guise of law.—Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951.

[h] The assignee of a deceased heir may have the assigned property distributed to him directly to pay a debt against the heir secured by such assignment, but the court cannot order a sale of real estate to pay the indebtedness, nor can it distribute real estate where the assignment contained a defeasance in case of payment of the debt.—Hite's Estate, In re, Myr. Prob. 232.

54. Contracts by Heirs.

[a] Heirs cannot bind estate by contract.—Stuttmeister, In re, 75 Cal. 348, 17 Pac. 223.

§ 55. Actions Between Heirs and Distributees—Pleading.

[a] A complaint showing that intestate, having a separate estate of eighteen hundred dollars in money, and other personalty, died in 1860, leaving him surviving a widow and two children, the plaintiffs, aged ten and eight years; that there were no claims against the estate, which was not administered upon; that the widow took possession of the money and personalty for the benefit of herself and plaintiffs, and sold the personalty for four hundred dollars, retaining the two thousand two hundred dollars until she married in 1861, when she invested it in real estate in her husband's name; that both knew of plaintiffs' interest in the money, and acknowledged their rights until within sixty days before suit brought; and praying for an accounting and a lien on the realty for the amount found due—is sufficient to put defendants to answer.—McClure v. Colyear, 80 Cal. 378, 22 Pac. 175.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 157-160; 16 Cent. Dig., cols. 1694-1698, §§ 337-345.

§ 56. Actions by Heirs and Distributees.

[a] In an action brought by a distributee against an executor to recover the value of land allotted to the plaintiff under a decree of distribution the complaint alleged that by the decree it was adjudged that the defendant came into possession of the land in question as executor, and was chargeable with the same, and that he be charged with it; but further alleged, in effect, that prior to the rendition of the decree the land had been lost to the estate through the negligence of the defendant, by an adverse possession of intruders for more than five years. Held, (1) that the complaint stated a good cause of action; and (2) that it did not rest upon the last-mentioned averment, but was based on the decree of distribution, and (being in due time after the decree) that the action was not barred.—Wheeler v. Bolton, 54 Cal. 302.

[b] Heir may maintain action to recover possession against anyone except administrator.—Spotts v. Hanley, 85 Cal. 167, 24 Pac. 738.

FOR AUTHORITIES FROM OTHER STATES:

Actions by heirs to recover possession of property before distribution in probate: 23 Am. Dec. 200. See, also, 14 Cyc. 139-157, 160, 161; 16 Cent. Dig., cols. 1698-1714, §§ 346-374.

§ 57. —— Limitations.

[a] When a wife dies, and her husband takes possession of her whole property, and interest in the common property, though she leaves heirs to whom a portion of it should pass, the statute of limitations does not run to bar the claims of such heirs, etc., against the husband or his representatives, who hold as trustees.—Ord v. De La Guerra, 18 Cal. 67.

§ 58. —— Relating to Real Property.

[a] An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship.—Castro v. Armesti, 14 Cal. 38.

[b] Under Code of Civil Procedure, section 384, providing that "all persons holding as tenants in common, ... or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party," one of several codistributees of the estate of a decedent may maintain ejectment against another person in possession of the entire premises distributed.—Moulton v. McDermott, 80 Cal. 629, 22 Pac. 296.

[c] Under Code of Civil Procedure, section 384, providing that tenants in common may jointly or severally commence any civil action to protect their rights, and section 1452, providing that heirs may themselves, or jointly with the administrator, maintain an action for possession of the real estate, but that they shall not be required to do so, one heir alone could bring action for the recovery of real property left by deceased.—Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428.

[d] The heirs may bring suit to set aside a deed made by intestate; Code of Civil Procedure, section 1452, providing they may maintain action for possession of his real estate, or to quiet title to it, against anyone but the administrator.—Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cent. Dig., cols. 1699-1706, §§ 351-358.

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§ 59. Actions Against Heirs or Distributees —Parties.

[a] As, under our system, all the estate vests in the heir, subject to certain rights of the administrator, on the death of one who holds title to lands owned by a firm of which he is a member, a bill in equity, making the heir, administrator, and widow defendants, is necessary to transfer the legal title to the partner who has the equitable right.—Gray v. Palmer, 9 Cal. 616.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 161, 162; 16 Cent. Dig., cols. 1717, 1718, §§ 382-388.

B. DEBTS OF INTESTATE AND ADVANCEMENTS.

§ 60. Rights of Creditors and Liability of Heirs for Debts.

[a] Upon the death of the ancestor, the heir becomes vested with the entire property, but subject to the lien of creditors.—Brenham v. Story, 39 Cal. 179.

[b] Under the Mexican law, on the death of an intestate, the heirs succeeded immediately to the estate, and became responsible for the debts of the decedent, and no administration could be had.—McNeil v. First Congregational Society of San Francisco, 66 Cal. 105; De La Guerra v. Packard, 17 Cal 182, 4 Pac. 1096.

[c] A judgment creditor of a widow held entitled to enforce his judgment only against such portion of the residue of the estate of the widow's deceased husband as belonged to her or her successors in interest.—Angle's Estate, In re (Cal. Sup.), 82 Pac. 668.

[d] After a decree of distribution the property no longer belongs to the estate of the deceased, but is the property of the distributees therein named, and a creditor of the estate cannot thereafter make any claim against the fund.—Dall's Estate, In re, Myr. Prob. 159.

FOR AUTHORITIES FROM OTHER STATES:

Liability of heirs for debts of ancestors: 48 Am. Dec. 395, note. See, also, 14 Cyc. 184-223; 16 Cent. Dig., cols. 1790-1872, §§ 433-522.

§ 61. Advancements.

[a] "Advancements" defined.—Zeile, In re, 74 Cal. 132, 15 Pac. 455.

[b] Where a parent purchases property in the name of a child, the presumption that an advancement was intended is rebuttable.—Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482.

FOR AUTHORITIES FROM OTHER STATES:

Advancements, what constitute: 80 Am. Dec. 559, note; 65 L. R. A. 578, note. See, also, 14 Cyc. 162-184; 16 Cent. Dig., cols. 1719-1789, §§ 389-432.

DESCRIPTION.

Of judgment in notice of appeal. See Appeal and Error, §§ 386, 387.
In civil complaint. See Pleading, § 29.
Of persons and property in wills. See Wills, VI, B, D.

DESCRIPTION OF ACCUSED.

In criminal pleading. See Indictment and Information, § 57.

DESCRIPTION OF BUILDING.

In indictment for arson. See Arson, § 11.

DESCRIPTION OF COURT.

In indictment. See Indictment and Information, § 19.

DESCRIPTION OF DEBTS.

In assignment for benefit of creditors. See Assignment for Benefit of Creditors, § 17.
In affidavit for attachment. See Attachment, § 54.
In land mortgage. See Mortgages, § 26.

DESCRIPTION OF JUDGMENT.

In appeal bond. See Appeal and Error, § 427.

DESCRIPTION OF PARTIES.

In promising notes. See Bills and Notes, § 14.
In deeds. See Deeds, §§ 25-27.
In memorandum or writing required by statute of frauds. See Frauds, Statute of, § 41.
In judgment. See Judgment, § 163.
To civil actions. See Parties, §§ 41-43.
In civil process. See Process, § 8.
In assessment-rolls. See Taxation, §§ 32-84.
Of devisees and legatees in will. See Wills, §§ 251-263.

DESCRIPTION OF PROPERTY.

In return to attachment writ. See Attachment, § 159.
In chattel mortgage. See Chattel Mortgages, § 21.
In deeds. See Deeds, §§ 28-32.
Construction of description of property in deed. See Deeds, §§ 99-127; Boundaries.
In indictment for embezzlement. See Embezzlement, § 25.
In declaration of homestead. See Homesteads, § 29.
In criminal pleading. See Indictment and Information, § 82.
In judgment. See Judgment, § 152.
In indictment for larceny. See Larceny, § 15.
In mechanic's lien claim or statement. See Mechanics' Liens, § 42.
In land mortgage. See Mortgages, § 25.
Property included in description in land mortgage. See Mortgages, § 53.
In tax deeds. See Taxation, § 189.
In assessment-rolls. See Taxation, §§ 85-88.
In wills. See Wills, §§ 268-277.

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DESCRIPTIVE WORDS.

See Words and Phrases.

As trademarks. See Trademarks and Trade Names, § 3.

DESERTION.

See Abandonment.

Right of deserted wife to sue for wrongful death of child. See Death, § 15.
As ground for divorce. See Divorce, § 15.
Effect on right of surviving wife to probate homestead. See Homesteads, § 118.
Of children. See Parent and Child, § 12.

DESERT LANDS.

See Public Lands, § 33.

DESIGNATION OF BENEFICIARIES.

Of mutual benefit insurance. See Insurance, § 237.

DESIGNATION OF INJURED PERSON.

In indictment or information. See Indictment and Information, §§ 79-81.

DESIGNATION OF MODE OF SALE.

Right of judgment debtor to designate manner in which property shall be sold. See Execution, § 97.

DESIGNATION OF OFFENSE.

In criminal pleading. See Indictment and Information, § 41.

DESIGNATION OF PROPERTY.

Right of judgment debtor to designate property to be levied on. See Execution, § 56.

DESIGNS.

As trademarks or trade names. See Trademarks and Trade Names.

DESK SERVICE.

Service of notice of appeal by leaving on desk of appellee's attorney. See Appeal and Error, § 393.

DE SON TORT.

Executor de son tort. See Executors and Administrators, XIV.
Guardian de son tort. See Guardian and Ward, § 7.

DESTITUTE CRIMINALS.

Duty of attorneys to defend. See Attorney and Client, § 2.

DESTITUTE PERSONS.

See Paupers.

DESTROYED INSTRUMENTS.

See Lost Instruments.

DESTROYED PLEADINGS.

See Pleading, § 189.

DESTROYED WILL.

Probate or establishment of. See Wills, § 99.
Destruction of will as revocation. See Wills, § 72.

DESTRUCTIBLE PROPERTY.

Sale of attached perishable property. See Attachment, § 117.

DESTRUCTION.

Of information. See Indictment and Information, § 86.

DESTRUCTION OF DEED.

Effect of destruction of deed by parties. See Deeds, § 150.

DESTRUCTION OF PROPERTY.

Measure of damages for. See Damages, § 71.

DESTRUCTION OF TIMBER.

Right to enjoin. See Injunction, § 51.

DESTRUCTION OF WRITING.

As ground for admission of secondary evidence. See Evidence, §§ 179-181.

DETECTIVES.

Entrapment of burglar. See Burglary, § 9.
As accomplices within rule requiring corroborating evidence. See Criminal Law, § 248.

DETENTION.

Wrongful detention of property. See Trover and Conversion.

DETENTION OF MONEY.

Measure of damages for. See Damages, § 72; Interest.

DETENTION OF WITNESSES.

See Witnesses, § 8.

DETERMINATION.

Of appealability of judgment or order. See Appeal and Error, § 36.
Of motion to dismiss appeal. See Appeal and Error, § 1014.

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Of appeal—in civil cases. See Appeal and Error, XVI.
—— In criminal cases. See Criminal Law, § 802 et seq.
Of right to proceeds of sale of attached perishable property. See Attachment, § 119.
Of rights of third persons to attached property. See Attachment, § 151.
Of jurisdiction. See Courts, § 40.
Of motion for involuntary dismissal or nonsuit. See Dismissal and Nonsuit, § 42.
Of proceedings to establish drains. See Drains, § 25.
Of result of election. See Elections, §§ 82-84.
Of right to, and exercise of, power of eminent domain. See Eminent Domain, § 25.
Of right to take private property for public use. See Eminent Domain, § 108.
Of necessity for probate sale. See Executors and Administrators, § 408.
Of right to probate homestead. See Homesteads, § 154.
Of value of homestead. See Homesteads, § 50.
Of existence of valid discharge in insolvency. See Insolvency, § 137.
Of challenges to jurors. See Jury, §§ 97, 108.
Of jurisdiction of courts of justices of the peace. See Justices of the Peace, § 47.
Of motion for new trial. See New Trial, § 113.
Of issues in partition suit. See Partition, §§ 35, 36.
Of demurrer See Pleading, § 125.
Of objections to evidence and motions to strike out. See Trial, §§ 44, 52.
Of application for change of venue. See Venue, § 44.
Of competency of witness. See Witnesses, § 26.

DETERMINATION OF ADVERSE CLAIM.

See Quieting Title; Replevin; Trespass to Try Title; Trover and Conversion.

Election contests. See Elections, X.
To property condemned for public use. See Eminent Domain, § 78.
To property levied on. See Execution, §§ 86-91.
Right to jury trial in action to determine adverse claim to land. See Jury, § 15.
To public office. See Officers, §§ 35, 36.
In government land office. See Public Lands, § 107.

DETERMINATION OF HEIRSHIP.

See Descent and Distribution, §§ 32-42.

DETERRING BIDDERS.

Effect of conspiracy to deter bidders at execution sale. See Execution, § 99.

DETINUE.

Include actions for recovery of specific personal property wrongfully detained, or the value thereof as damages where it cannot be delivered, founded on the right of property; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; alternative or incidental recovery of damages; verdict and judgment and enforcement thereof; review of proceedings; and costs in such actions.

§ 1. In General.

[a] In the action of detinue, the manner of laying the possession of the property has always been held to be inducement. It is usual to aver a bailment or finding.—Otero v. Bullard, 3 Cal. 188.

[b] Possession by defendant, of subject of action at time of its commencement is not essential to recovery in detinue.—Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

[c] The usual judgment in an action of detinue is in the alternative that the plaintiff recover the possession of the property, or its value, in case delivery cannot be had; but where it appears that delivery cannot be had, the defendant is not prejudiced by a judgment for value only, without any alternative. Faulkner v. First Nat. Bank 130 Cal. 258, 62 Pac. 463.

[d] The action in this case being based upon a contract of bailment, in which the original taking was lawful but the detention was unlawful, the wrong is one for which the common-law action of detinue is especially appropriate. In such action, it was no defense that the defendant had voluntarily disposed of the bailed property before the commencement of the action, in breach of his duty as bailee.—Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

[e] Notwithstanding Code of Civil Procedure, sections 509-520, provide an auxiliary remedy to one suing to recover specific property by which he may secure possession before trial, an action analogous to the common-law action of detinue may be maintained against a bailee who has wrongfully delivered plaintiff's property to a third person, without invoking the auxiliary remedy, and hence a judgment for the value of the property is proper, though the prayer in the complaint be for either the return of the property or judgment for its value.—Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

For Authorities from Other States:

See 14 Cyc. 239-282; 16 Cent. Dig., cols. 1887-1939.

DEVASTAVIT.

What constitutes and place of enforcing administrator's liability therefor. See Executors and Administrators, § 189½.

DEVELOPMENT.

Of mine location. See Mines and Minerals, § 27.
Of subterranean water. See Waters and Watercourses, § 86.

DEVESTITURE OF JURISDICTION.

See Courts, § 33; Criminal Law, § 29.

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DEVESTITURE OF TITLE.

By abandonment. See Abandonment, § 26.

DEVIATION.

In performance of contract. See Contracts, § 222.
In construction of drain. See Drains, § 32.

DEVICES.

See Trademarks and Trade Names.

Taking by device or trick as larceny. See Larceny, § 8.

DEVISE.

See Perpetuities; Wills.

Acceptance of devise as waiver of probate homestead. See Homesteads, § 122.
Property acquired by devise as wife's separate property. See Husband and Wife, § 59.
Right to recover in quantum meruit for services rendered in expectation of. See Work and Labor, § 7.

DEVISEES.

Rights and liabilities of. See Wills, VII.

DEVOLUTION OF TITLE OR INTEREST.

Pending suit, as ground for abatement. See Abatement and Revival, §§ 60-65.
Pending appeal. See Appeal and Error, § 230.
In firm property. See Partnership, §§ 89-93.
Transfer of partner's interest as dissolving firm. See Partnership, § 101.

DICTUM.

As authority. See Courts, § 79.
In former opinion as law of the case. See Appeal and Error, § 1338.

DILATORY PLEAS.

Nature and office of. See Pleading, § 57.

DILIGENCE.

Required to charge indorsers. See Bills and Notes, § 218.
In procuring absent witness as prerequisite to grant for continuance. See Continuance, § 13.
In procuring witness as prerequisite to grant of continuance. See Criminal Law, § 300.
Defined. See Negligence, § 3.
Required to avoid injury from negligence of another. See Negligence, §§ 28, 30.
Required in prosecuting motion for new trial. See New Trial, § 108.
Averments as to due diligence in affidavit for order for publication of summons. See Process, § 30.

DIMINUTION OF FLOW.

Of percolating water. See Waters and Watercourses, § 93.

DIPLOMATIC OFFICERS.

See Ambassadors and Consuls.

DIRECT CAUSE.

Of negligent injury. See Negligence, § 26.

DIRECT DAMAGES.

See Damages, III, A.

DIRECTING JUDGMENT.

On reversal. See Criminal Law, § 803.

DIRECTION OF VERDICT.

In criminal cases. See Criminal Law, § 390.
In civil actions. See Trial, §§ 70-75.

DIRECTIONS.

In writ of execution. See Execution, § 40.

DIRECTNESS.

Of allegations in criminal pleading. See Indictment and Information, § 49.

DIRECTORS.

Validity of loan to director of savings bank. See Banks and Banking, § 108.
Liability of directors of savings bank for misappropriation. See Banks and Banking, §§ 111, 112.
Authority of. See Corporations, § 278.
Compensation of. See Corporations, § 287.
As mind and soul of corporation. See Corporations, § 337.
Necessity for action of board to exercise corporate powers. See Corporations, § 329.
Right of same directors to represent different corporations. See Corporations, § 338.

DIRECTORS' MEETINGS.

See Corporations, §§ 280-282.

DIRECTORY PROVISIONS.

Of constitution. See Constitutional Law, § 22.

DISABILITY.

Suspending running of statute of limitations. See Limitation of Actions, § 58.
Of judges. See Judges, § 16.

DISABILITY OF COUNSEL.

As ground for continuance. See Continuance, § 18.
As ground for vacating judgment. See Judgment, § 254.

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DISABILITY OF PARTY.

As ground for continuance. See Continuance, § 10.
As grounds for involuntary dismissal. See Dismissal and Nonsuit, § 31.
As ground for vacating judgment. See Judgment, § 253.

DISAFFIRMANCE.

See Avoidance.

Of transfer or encumbrance of homestead. See Homesteads, §§ 102-104.
Of contracts by infants. See Infants, § 31.
Of property transactions by infants. See Infants, §§ 17-21.

DISALLOWANCE.

See Rejection.

Of claims against counties. See County, § 159.

DISAPPOINTMENT.

Disappointment of wedding guests as element of damages for breach of promise to marry. See Breach of Marriage Promise, § 8.

DISASTER.

Presumption of survivorship of persons perishing in common disaster. See Death, § 2.

DISAVOWAL.

Estoppel by disavowal of rights. See Estoppel, § 57.
Of relation of landlord and tenant. See Landlord and Tenant, § 4.

DISBARMENT OF ATTORNEYS.

See Attorney and Client, §§ 19-52.

DISCHARGE.

Of insane person from asylum. See Asylums, § 11.
Of attachment on security. See Attachment, § 139.
Of sureties on attachment bonds. See Attachment, §§ 170-173.
Of bankrupts. See Bankruptcy, § 25.
Of indorser. See Bills and Notes, § 152.
Of chattel mortgage. See Chattel Mortgages, § 76.
From imprisonment for contempt. See Contempt, § 74.
Of sureties on county officers' bonds. See Counties, § 93.
At preliminary examination. See Criminal Law, § 59.
Admissibility of parol evidence to show discharge without performance. See Evidence, § 453.
Of executor or administrator. See Executors and Administrators, §§ 119-122.
Of sureties on administration bonds. See Executors and Administrators, § 577.
Of person imprisoned for nonpayment of fine. See Fines, § 8.
Of garnishee. See Garnishment, §§ 31, 32.
Of guarantor. See Guaranty, § 23 et seq.
Of principal without payment as discharging guarantor. See Guaranty, § 28.
Of sureties on injunction bonds. See Injunction, § 152.
Of insane persons from asylum. See Insane Persons, § 20.
Of assignee of insolvent. See Insolvency, § 92.
Of insolvents. See Insolvency, §§ 98-105.
Of judgment lien. See Judgment, § 538.
Of attachment in justice court. See Justices of the Peace, § 73.
Of lien. See Liens, § 5.
Of servant. See Master and Servant, § 8.
Of mechanic's lien. See Mechanics' Lien, §§ 64-70.
Of existing obligation by new contract. See Novation, § 2.
Of debt by payment. See Payment, § 23.
Of surety. See Principal and Surety, §§ 22-40.
Of principal as discharge of surety. See Principal and Surety, § 34.
Of receivers. See Receivers, § 28.
Of school teachers. See Schools and School Districts, § 31.

DISCHARGE OF BANKRUPT.

See Bankruptcy, §§ 25-29.

DISCHARGE OF INDORSER.

See Bills and Notes, § 152.

DISCHARGE OF JURY.

In criminal cases. See Criminal Law, §§ 480-484.
Effect of discharge of jury without verdict on plea of former jeopardy. See Criminal Law, § 50.

DISCHARGE OF SURETIES.

On appeal bonds. See Appeal and Error, § 1499.
On bail bonds. See Bail, §§ 2, 29.
On note by extension of time. See Bills and Notes, § 153.

DISCHARGING JURORS.

Grand jurors. See Grand Jury, § 9.
Petit jurors. See Jury, §§ 63, 67.

DISCHARGING PASSENGERS.

Liability of carrier for injuries to passengers while leaving train or street-car. See Carriers, §§ 104-106.

DISCIPLINE.

Of public schools. See Schools and School Districts, § 36.

DISCLAIMER.

Effect on liability for costs. See Costs, § 19.
Of easement. See Easements, § 23.
Estoppel by. See Estoppel, § 57.
Of relation of landlord and tenant. See Landlord and Tenant, § 4.

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DISCLOSURE OF GARNISHEE.

See Garnishment, § 26.

DISCONTINUANCE.

Of criminal case. See Criminal Law, § 74.
Of civil case. See Dismissal and Nonsuit,

DISCOUNTS.

Liability of bank officer to bank for negligence in making. See Banks and Banking, § 35.

DISCOVERY.

Include obtaining disclosures of facts, writings, or other things, within the knowledge, possession, or control of a defendant in a civil action or other person, as being part of a cause of action or evidence to sustain an action brought or about to be brought by or against the party seeking disclosure, by compelling answers to bills in equity for such discovery or to interrogatories, or by oral examination of parties, or by inspection of documents, books, or other matters; nature and scope of the remedy in general; in what cases and to and against whom and as to what matters it is allowed; grounds of discovery and jurisdiction over and proceedings to obtain discovery, examination, inspection, etc., either by bill of discovery in equity or under statutory provisions; defenses and objections to such proceedings; and use of facts and evidence discovered.

Of mineral lode or vein. See Mines and Minerals, §§ 16-18.

§ 1. Pendency and Condition of Cause.

[a] A judgment was had in the district court in favor of the appellant and against the respondent. Held, that after judgment against him, it is too late for plaintiff to file his bill for discovery in aid of his defense on the ground that it was meritorious, and lies entirely within the knowledge of the judgment creditor.—Norris v. Denton, 2 Cal. 378.

[b] At common law it was generally necessary to maintain discovery that action should be already commenced in another court.—People v. German Savings etc. Soc., 72 Cal. 25.

For Authorities from Other States:
See 14 Cyc. 301, 382; 16 Cent. Dig., cols. 1952-2019, §§ 1-40.

DISCOVERY OF ASSETS.

By assignee for creditors. See Assignments for Benefit of Creditors, § 40.

DISCOVERY OF FRAUD.

Effect of, as starting running of statute of limitations. See Limitations of Actions, § 68.

DISCOVERY OF MINE.

Of lode or vein. See Mines and Minerals, §§ 16-18.

DISCRETION.

Mandamus to control exercise of. See Mandamus, § 23.
Rights of party working for remuneration at discretion of employer. See Work and Labor, § 8.

DISCRETION OF COURT.

Review of—in civil cases. See Appeal and Error, § 1175 et seq.
—— In criminal cases. See Criminal Law, § 748.
To grant writ of certiorari. See Certiorari, § 7.
Review of, on certiorari. See Certiorari, § 16.
To punish for contempt. See Contempt, § 36.
To grant continuance—in civil cases. See Continuance, § 3.
—— In criminal cases. See Criminal Law, § 293.
As to costs. See Costs, §§ 3-6.
As to exercise of jurisdiction. See Courts, §§ 31, 32.
To change venue—in criminal cases. See Criminal Law, § 36.
—— In civil cases. See Venue, § 22.
To grant continuance—in criminal cases. See Criminal Law, § 293.
—— In civil cases. See Continuance, § 3.
To grant new trial—in criminal cases. See Criminal Law, § 510.
—— In civil cases. See New Trial, § 7.
As to number of counsel arguing case. See Criminal Law, § 349.
Review of—in criminal cases. See Criminal Law, §§ 748-767.
—— In civil cases. See Appeal and Error, § 1175.
As to taking and use of depositions. See Depositions, § 5.
To award alimony. See Divorce, §§ 93, 103, 112.
To award custody of children on decreeing divorce. See Divorce, § 151.
In equity trials. See Equity, § 100.
In determining right to administer. See Executors and Administrators, § 22.
To grant preliminary injunction. See Injunction, § 91.
To continue, modify or vacate preliminary injunction. See Injunction, § 104.
To open default judgment. See Judgment, §§ 87-90.
As to attendance and discharge of jurors. See Jury, § 52.
In determining competency of jurors. See Jury, § 70.
To grant new trial in civil cases. See New Trial, § 7.
To allow amendments to civil pleadings. See Pleading, § 138.
To grant writ of prohibition. See Prohibition, § 5.
To specifically enforce performance of contract. See Specific Performance, § 6.
To change venue of civil case. See Venue, § 22.
As to attendance of witnesses and production of documents. See Witnesses, § 1½.
As to competency and examination of witnesses. See Witnesses, §§ 14, 102, 114.

DISCRETION OF GOVERNOR.

See Constitutional Law, § 92.

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DISCRETION OF JURY.

As to amount of damages for injury to person. See Damages, § 64.
As to amount of damages for wrongful death. See Death, § 50.

DISCRIMINATION.

In freight rates. See Carriers, § 59.
In issuing liquor licenses. See Intoxicating Liquors, § 9.
Between taxation of national bank shares and other moneyed capital. See Taxation, § 9.

DISCRIMINATORY LEGISLATION.

Constitutional protection from. See Constitutional Law, IX, X.

DISEASE.

Liability for damages resulting from aggravation of. See Damages, § 24.
As affecting testamentary capacity. See Wills, II.

DISGRACE.

Privilege of witness to refuse to give answer tending to disgrace him. See Witnesses, § 164.

DISHONOR.

Notice of nonpayment or dishonor of commercial paper. See Bills and Notes, § 236, et seq.

DISINHERITANCE.

See Omitted Heirs.

DISINTERMENT.

Criminal responsibility for. See Dead Bodies, §§ 3, 4.

DISJUNCTIVE ALLEGATIONS.

In affidavit for attachment. See Attachment, § 59.
In criminal pleading. See Indictment and Information, § 51.

DISMISSAL AND NONSUIT.

Include termination of civil actions before trial of the issues therein, by voluntary act of the plaintiff in discontinuing or withdrawing from the suit, becoming nonsuit, etc., or by order of the court entered on consent of the parties, or made because of delay, defect, or fault in the proceedings; nature and grounds of such disposition of actions, proceedings therefor, and operation and effect thereof in general; and setting aside discontinuance, dismissal, or nonsuit, and reinstating cause.

I. VOLUNTARY, §§ 1-25.

II. INVOLUNTARY, §§ 26-50.

Effect of dismissal on plea of other action pending. See Abatement and Revival, § 24.
Power of amicus curiae to move to dismiss. See Amicus Curiae, § 3.
Dismissal of appeal. See Appeal and Error, XII.
Grounds for dismissal of appeal. See Appeal and Error, XII, B.
Appealability of judgment on motion for. See Appeal and Error, § 138.
Consent to nonsuit as waiver of right to appeal. See Appeal and Error, § 213.
Necessity for exception in lower court to obtain review of order granting nonsuit. See Appeal and Error, § 323.
Necessity for motion for new trial to obtain review of. See Appeal and Error, § 340.
Time to appeal from order of dismissal. See Appeal and Error, § 490.
Necessity for assignment or specification of error to review order granting nonsuit. See Appeal and Error, § 941.
Power of appellate court to review facts on which dismissal or nonsuit is based. See Appeal and Error, § 1222.
Submission of case to arbitration as discontinuance. See Arbitration and Award, § 20.
Dismissal of disbarment proceeding. See Attorney and Client, § 41.
Dismissal of pending suit as consideration for note or draft. See Bills and Notes,
Costs on granting nonsuit. See Costs, § 21.
Costs on dismissal of appeal. See Costs, § 74.
Dismissal of appeal in criminal case. See Criminal Law, §§ 714-718.
Nonsuit in proceedings to determine heirship. See Descent and Distribution, § 39.
Dismissal of divorce suit. See Divorce, § 57.
In ejectment. See Ejectment, §§ 163-165.
Dismissal of election contest. See Elections, §§ 117-119, 125.
Dismissal of eminent domain proceedings. See Eminent Domain, §§ 132, 140.
Dismissal of writ of habeas corpus. See Habeas Corpus, § 30.
Voluntary dismissal of injunction suit. See Injunction, § 86.
Dismissal of involuntary insolvent proceedings. See Insolvency, § 33.
Judgment of dismissal or nonsuit as bar. See Judgment, §§ 399-403.
Conclusiveness of judgment of dismissal. See Judgment, § 451.
Of actions in justice courts. See Justices of the Peace, §§ 81-83.
Dismissal of appeal from justice court. See Justices of the Peace, §§ 121-123, 132.
Mandamus to compel. See Mandamus, § 28.
Dismissal of mandamus proceeding. See Mandamus, § 73.
Dismissal of foreclosure suit. See Mortgages, § 244.
Dismissal of suit by city to recover assessments. See Municipal Corporations, § 240.
Dismissal of motion for new trial. See New Trial, § 112.
Dismissal of partition suit. See Partition, § 29.
Dismissal of actions against firms. See Partnership, § 79.
Motion to dismiss writ of prohibition. See Prohibition.
Dismissal or nonsuit on failure of proof at trial. See Trial, § 68.

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I. VOLUNTARY.

RETRAXIT OR NOLLE PROSEQUI, § 1.
WHAT CONSTITUTES DISMISSAL, § 1½.
NECESSITY THAT RENUNCIATION BE MADE BY ATTORNEY OF RECORD, § 2.
CONDITION OF CAUSE, § 3.
—— SUBMISSION TO REFERENCE, § 4.
—— EVIDENCE CLOSED, § 5.
—— SUBMISSION TO COURT OR JURY, § 6.
RIGHT TO WITHDRAW OR DISCONTINUE, § 7.
ESTOPPEL OR WAIVER OF RIGHT, § 8.
GROUNDS FOR OBJECTION—DEFENDANT'S RIGHT TO AFFIRMATIVE RELIEF DEMANDED GENERALLY, § 9.
—— RIGHTS AS TO SETOFF OR COUNTERCLAIM, § 10.
—— RIGHTS AS TO CROSS-COMPLAINT, § 11.
—— RIGHTS OF INTERVENERS, § 12.
PARTIES ENTITLED TO DISMISS, § 13.
DISMISSAL AS TO ONE OR MORE CODEFENDANTS, § 14.
—— DEFENDANTS NOT SERVED, § 15.
—— DEFENDANT APPEARING OR PLEADING, § 16
—— JOINT DEFENDANTS SUED AS COPARTNERS, § 17.
APPLICATION AND PROCEEDINGS THEREON, § 18.
—— PAYMENT OR TENDER OF COSTS, § 19.
ORDER OR JUDGMENT, § 20.
—— ENTRY OF ORDER OR JUDGMENT, § 21.
OPERATION AND EFFECT—RIGHTS AND LIABILITIES OF DISMISSED DEFENDANT GENERALLY, § 22.
—— JURISDICTION AFTER DISMISSAL, § 23.
SETTING ASIDE AND REINSTATEMENT OF CAUSE, § 24.
—— TIME FOR SETTING ASIDE NONSUIT AND REINSTATING CAUSE, § 25.

§ 1. Retraxit or Nolle Prosequi.

[a] A judgment of dismissal, rendered on the application of either party, with the written consent of the other, amounts to an open and voluntary renunciation of the plaintiff's suit, which amounts to a retraxit. Merritt v. Campbell, 47 Cal. 542.

[b] A dismissal of a prior contest before citation was served on defendant is not a retraxit.—Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

[c] An order of dismissal, to operate as a retraxit, must be made on motion of one party on the written consent of the other.—Stoutenborough v. Board of Education of City and County of San Francisco, 104 Cal. 664, 38 Pac. 449.

§ 1½. What Constitutes Dismissal.

[a] Where plaintiff made an ineffectual attempt to dismiss before trial under Code of Civil Procedure, section 581, subdivision 1, the mere making of a subsequent motion for a dismissal by plaintiff's attorneys in open court held not a dismissal under such section. Boca etc. R. Co. v. Superior Court of Lassen County (Cal. Sup.), 88 Pac. 718.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 393; 17 Cent. Dig., cols. 7, 8, § 2.

§ 2. Necessity that Renunciation be Made by Attorney of Record.

[a] Under our practice, the plaintiff in person cannot make a renunciation of his suit in court, but such renunciation must be made by his attorney of record.—Merritt v. Campbell, 47 Cal. 542.

[b] Where a party appeared by attorney and had an attorney of record representing him, such party, acting in his own proper person, was not entitled to dismiss the action without the attorney's consent, under Code of Civil Procedure, section 581, subdivision 1.—Boca etc. R. Co. v. Superior Court of Lassen County (Cal. Sup.), 88 Pac. 718.

§ 3. Condition of Cause.

[a] Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counterclaim.—Hancock Ditch Co. v. Bradford, 13 Cal. 637.

[b] The right of the plaintiff to dismiss the action of his own motion with legal form and effect cannot be impaired by the fact that a judgment of dismissal had been before improvidently, irregularly, and illegally entered by the clerk.—Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 400, 406; 17 Cent. Dig., cols. 11-26, §§ 6-26.

§ 4. —— Submission to Reference.

[a] A plaintiff can voluntarily submit to a nonsuit before a referee in a case where no counterclaim is set up by the defendant.—Plant v. Fleming, 20 Cal. 92.

§ 5. —— Evidence Closed.

[a] A nonsuit may be granted after the evidence on both sides is closed.—Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146.

§ 6. —— Submission to Court or Jury.

[a] Plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such right does exist at any time before such final submission and retirement.—Brown v. Harter, 18 Cal. 76.

[b] Under the practice act, a plaintiff can dismiss his action "at any time before trial," but not after the action has been tried and submitted, without a written consent of the defendants; and a dismissal granted upon the ex parte motion of the plaintiff will be overruled upon appeal.—Heinlin v. Castro, 22 Cal. 100.

[c] After cause is regularly tried and submitted for decision, it cannot be dismissed on plaintiff's motion.—Casey v. Jordan, 68 Cal. 247, 9 Pac. 92, 305.

[d] Where cause has been tried and submitted, but submission is set aside, plaintiff

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has right, with leave of court, to dismiss action.—Westbay v. Gray, 116 Cal. 667, 48 Pac. 800.

[e] Where a complaint contains three alleged causes of action, and defendant demurs thereto, and the demurrer is sustained as to two of the cases and overruled as to the third, and defendant answers the third cause of action, and plaintiff dismisses as to it, and does not amend his complaint, there is a trial, and he cannot afterward dismiss the entire action, but judgment may be rendered for defendants as to the issues raised by demurrer.—Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 402, 403; 17 Cent. Dig., cols. 16-19, §§ 15, 16.

§ 7. Right to Withdraw or Discontinue.

[a] Under section 581 of the Civil Code, any action, including an action of interpleader, may be dismissed by the plaintiff at any time before trial, upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by cross-complaint or answer of either of the defendants.—Kaufman v. Superior Court, 115 Cal. 52, 46 Pac. 904.

[b] Under Code of Civil Procedure, section 581, authorizing a dismissal of a suit by the plaintiff before trial, on payment of costs, unless affirmative relief is sought, or with defendant's consent, where a defendant, on mortgage foreclosure, seeks by a cross-complaint a foreclosure of a mortgage held by him, as a prior one, it is proper not to allow such defendant to dismiss his cross-complaint without plaintiff's consent.—Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975.

[c] Where the answer consists of a mere denial of the allegations of the complaint, and no affirmative relief is sought by the defendant, by the way of answer or cross-complaint, and a petition in intervention is merely for the purpose of resisting the plaintiff's claim, the plaintiff has the right to dismiss the action, both as against the defendant and the intervener.—Henry v. Vineland etc. Dist., 140 Cal. 376, 73 Pac. 1061.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 394, 397; 17 Cent. Dig., cols. 26-31, §§ 27-31.

8. Estoppel or Waiver of Right.

[a] Right to dismiss is not precluded by stipulation for judgment containing conditions which never occurred and cannot occur. Southern etc. Water Co. v. Cameron, 141 Cal. 286, 287, 74 Pac. 838.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 397; 17 Cent. Dig., col. 27, § 28.

§ 9. Grounds for Objection—Defendant's Right to Affirmative Relief Demanded Generally.

[a] In an action to acquire title, defendant's answer set up matter which, if properly pleaded, would have entitled him to relief, but such matters were not pleaded as a counterclaim, but as a defense. In 1865, plaintiff's motion to dismiss the complaint was denied because the answer contained a counterclaim; but in 1876 the motion was again renewed and granted. Held, that the former order refusing to dismiss the action was conclusive on the parties, for the court could not, after such lapse of time, so change the interpretation of the answer as to prevent the defendants from being heard.—Brannan v. Paty, 58 Cal. 330.

[b] When a defendant avers matters growing out of the matters set forth in the complaint upon which he seeks affirmative relief, the plaintiff cannot dismiss the action upon his own motion, and without the consent of the defendant.—Clark v. Hundley, 65 Cal. 96.

[c] A plaintiff will not be permitted to dismiss his action after the filing of an answer claiming affirmative relief.—Robinson v. Placerville etc. V. R. Co., 65 Cal. 263, 3 Pac. 878; Thompson v. Spray, 4 Pac. 418.

[d] Where affirmative relief is sought by defendant plaintiff cannot dismiss.—Mott v. Mott, 82 Cal. 415, 22 Pac. 1140, 1142.

[e] In an action for possession of personal property, which is thereupon taken possession of by plaintiff after giving an undertaking for its redelivery, an answer asking for the return and redelivery of the property to defendants, or in case a redelivery cannot be had, then for the value of the property, and for damages and costs, asks affirmative relief, so that, after such answer is filed, plaintiff cannot dismiss the action.—Acock v. Halsey, 90 Cal. 215, 27 Pac. 193.

[f] Code of Civil Procedure, section 581, providing that an action may be dismissed by plaintiff, provided a counterclaim has not been made or affirmative relief sought by defendant, does not prevent such dismissal of action to quiet title, though the answer asserts title in defendant, denies plaintiff's right of possession, alleges an ouster by plaintiff and prays for a decree establishing defendant's title and enjoining plaintiff from asserting any claim to the land or interfering with the possession.—Wood v. Jordan, 125 Cal. 263, 57 Pac. 998.

[g] Under Code of Civil Procedure, section 581, authorizing a dismissal of a suit by the plaintiff before trial on the payment of costs unless a counterclaim has been made, or affirmative relief sought by cross-complaint or answer, it is not error to refuse to allow plaintiff in a suit to quiet title to dismiss his suit after the filing of an answer denying the material allegations in the complaint, and alleging facts entitling defendant to a decree to quiet title against plaintiff, and asking such relief.—Islais etc. Water Co. v. Allen, 132 Cal. 432, 64 Pac. 713.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 406; 17 Cent. Dig., cols. 33, 34, § 33.

§ 10. —— Rights as to Setoff or Counterclaim.

[a] After plea of setoff or counterclaim filed by defendant, plaintiff cannot dismiss the action of his own accord.—Hancock Ditch Co. v. Branford, 13 Cal. 637; (1865) People v. Piatt, 28 Cal. 166.

[b] An answer to a complaint to quiet title, setting up title in defendant and praying that possession of the premises may be awarded to him, does not contain a counterclaim, in such a sense that it prevents plaintiff from dismissing the action.—Moyle v. Porter, 51 Cal. 639.

[c] In a suit by an executrix for a reconveyance of certain land, the use of which she claimed, had satisfied the debt for security of which it had been conveyed, defendants answered by setting up further advances and payments by themselves, and claiming a balance due. Held, that plaintiff could not dismiss the action on her own motion without defendants' consent.—Clark v. Hundley, 65 Cal. 96, 3 Pac. 131.

[d] Under Code of Civil Procedure, section 581, which provides that an action may be dismissed by plaintiff at any time before trial on payment of costs, provided no counterclaim has been made, or affirmative relief sought, by cross-complaint or answer, defendant cannot file such pleadings after an order of dismissal has been filed by plaintiff with the clerk who is authorized to enter the same, though it was not entered at the date of its filing.—Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 407; 17 Cent. Dig., cols. 34-43, §§ 34-36.

§ 11. —— Rights as to Cross-complaint.

[a] A judgment for dismissal may be entered, notwithstanding the filing of a cross-complaint, where it does not set up a counterclaim.—James v. Center, 53 Cal. 31.

[b] A cross-complaint having been stricken from the answer, plaintiff may dismiss before trial on payment of costs.—Thompson v. Spraig, 66 Cal. 350, 5 Pac. 506.

§ 12. —— Rights of Interveners.

[a] Under Code of Civil Procedure, section 581, providing that an action may be dismissed by plaintiff, provided a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer, plaintiff in an action to have tax assessments against his land to raise money to pay bonds, and sales of the land thereon, and the bonds, declared void, and to have the issuing of certificates of sale enjoined, may dismiss the action as against intervener as well as defendant, who merely denied the allegations of the complaint; intervener, a holder of the bonds, who prayed that plaintiff take nothing by the complaint, that the bonds held by him and the assessment be declared valid, and that the purchaser at the sales be held entitled to deeds, getting by the dismissal all the relief that could be properly awarded if the litigation proceeded.—Henry v. Vineland Irr. Dist., 140 Cal. 376, 73 Pac. 1061.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 410; 17 Cent. Dig., col. 43, § 37.

§ 13. Parties Entitled to Dismiss.

[a] A stranger to an action cannot move to dismiss it.—Soule v. Billings, 42 Cal. 285.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 397, 400; 17 Cent. Dig., cols. 44-48, §§ 38-43.

§ 14. Dismissal as to One or More Codefendants.

[a] Plaintiff, before trial, may dismiss as to some defendants and proceed as to others. Reed v. Calderwood, 22 Cal. 464.

[b] In an action for injuries on a defective sidewalk, the board of public works held not entitled to object to the dismissal of adjoining owners from the case.—Heath v. Manoa, 147 Cal. 694, 82 Pac. 331.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 411-415; 17 Cent. Dig., cols. 49-66, §§ 44-59.

§ 15. —— Defendants not Served.

[a] Plaintiff has a right to dismiss as to parties named as defendants, but not served with process.—Harney v. Corcoran, 60 Cal. 314.

§ 16. Defendant Appearing or Pleading.

[a] A and B, tenants, and C, landlord, were jointly sued in an action of ejectment. A and B were defaulted, and C answered. Held, that the plaintiff, before trial, could dismiss the action as to C, and take judgment against A and B.—Dimick v. Deringer, 32 Cal. 488.

§ 17. —— Joint Defendants Sued as Copartners.

[a] Where several are sued as copartners, the plaintiff may discontinue at any time as to such, if any, as are not partners.—Stoddart v. Van Dyke, 12 Cal. 437.

§ 18. Application and Proceedings Thereon.

[a] The provision for the dismissal of an action under subdivision 1 of section 581 of the Code of Civil Procedure by request of the plaintiff to the clerk is not mandatory or exclusive of the power of the court to grant an order of dismissal, which, when pro-

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cured by the plaintiff, should be noted by the clerk in the register of actions.—Richards v. Bradley, 129 Cal. 670, 62 Pac. 316.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 416, 417; 17 Cent. Dig., cols. 67-71, §§ 60-69.

§ 19. —— Payment or Tender of Costs.

[a] Under the one hundred and forty-eighth section of the Practice Act plaintiff is not bound to tender costs before the nonsuit. The provision as to costs is simply that, by the nonsuit, plaintiff becomes subject to costs.—Hancock Ditch Co. v. Bradford, 13 Cal. 637.

[b] Under Code of Civil Procedure, section 581, providing that an action may be dismissed by the plaintiff himself at any time before trial "upon payment of costs," the only costs which a plaintiff is required to pay before dismissing his action are the clerk's costs for entering the order, and the court has no jurisdiction to require that he also pay the costs embraced in the defendant's cost bill.—Hopkins v. Superior Court of City and County of San Francisco, 136 Cal. 552, 69 Pac. 299.

§ 20. Order or Judgment.

[a] Under Code of Civil Procedure, section 581, which provides that the dismissal of an action by plaintiff "is made by entry in the clerk's register," and that "judgment may thereupon be entered accordingly," the filing by plaintiff of a written statement of abandonment of the action, and an entry thereof by the clerk in the register, does not operate as a dismissal, where no judgment of dismissal is entered, nor any order of the court made in relation to the matter of abandonment.—Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; Somers v. Somers, 91 Cal. 355, 27 Pac. 670.

[b] Where plaintiff in an action of interpleader has taken every step required on his part to have the action dismissed, the failure of the clerk to perform his ministerial duties entering the dismissal in the register, and to cause a proper judgment of dismissal to be entered in his judgment-book, cannot affect the substantial rights of the parties, nor is the right of the plaintiff to a dismissal impaired or lost by the subsequent filing of a cross-complaint by one or both of the defendants; and a judgment of dismissal thereafter entered by the clerk will relate to the date of the legal demand for dismissal of the action.—Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904.

[c] The entry of an order of voluntary dismissal by the clerk of the trial court in the form of a final judgment of dismissal, as directed by an order of plaintiff's counsel, is not judgment of dismissal, and is unauthorized. Judgment (1899) 57 Pac. 73, reversed.—Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143.

[d] A direction by plaintiff to the clerk, though sufficient to authorize him to enter a judgment of dismissal in a pending action, did not effect a dismissal, where such judgment was never entered; and the court therefore retained jurisdiction over the cause and the parties.—Truett v. Onderdonk, 50 Pac. 394.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 417; 17 Cent. Dig., cols. 68-70, §§ 66, 67.

§ 21. —— Entry of Order or Judgment.

[a] In an action in ejectment, a stipulation was filed, and an entry made in the register, dismissing it as to certain defendants and as to a part of the property, but no judgment was entered by the clerk. Held, that, if it was necessary for formal judgment to be entered, the law would consider that it was done.—McLeran v. McNamara, 55 Cal. 508.

[b] The court does not lose jurisdiction of a case by plaintiff's filing a written statement that "the above-entitled action is hereby dismissed," where no judgment of dismissal is entered.—Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

[c] An action may be dismissed by the plaintiff upon the payment of costs by entry in the clerk's register; but, until a judgment of dismissal is entered, the action is still pending against the defendant.—Brady v. Times-Mirror Co., 106 Cal. 56, 36 Pac. 209.

[d] An action held not obnoxious to a plea of another action pending.—McIntosh v. Robb (Cal. App.), 88 Pac. 517.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 417; 17 Cent. Dig., cols. 70, § 67.

§ 22. Operation and Effect—Rights and Liabilities of Dismissed Defendant Generally.

[a] Where an action against several defendants has been dismissed against some, and a judgment by default rendered against others, one of the defendants, against whom the action was dismissed, cannot move to transfer the cause.—Reed v. Calderwood, 22 Cal. 463.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 420, 421; 17 Cent. Dig., cols. 76-80, §§ 75-83.

§ 23. —— Jurisdiction After Dismissal.

[a] A dismissal of an action is, in effect, a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action.—Leese v. Sherwood, 21 Cal. 151.

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[b] A dismissal of an action as to a plaintiff, pursuant to his request, precludes the court from proceeding further to determine the rights of several defendants as between themselves.—Ryan v. Tomlinson, 31 Cal. 11.

[c] The entry of an order of dismissal as to one of the parties ousts the jurisdiction of the court as to such person, and judgment subsequently rendered against him, without vacating the order of dismissal, is void.—Sere v. McGovern, 65 Cal. 244, 3 Pac. 859.

§ 24. Setting Aside and Reinstatement of Cause.

[a] Where an action is improperly dismissed by the plaintiff, the remedy of the defendant is by appeal from the judgment, and not by motion to set aside the judgment of dismissal. Higgins v. Mahoney, 50 Cal. 444.

[b] Where consent to the dismissal of an action is filed, but no judgment of dismissal has been entered, the action is still pending; and on a subsequent motion for plaintiff to set the case for trial, supported by an affidavit in which plaintiff asks to be relieved from the obligation of his consent to a dismissal, the case may be set for trial.—Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26.

[c] An order vacating an order of dismissal, unappealed from, operates to annul the entry in the clerk's register showing dismissal, as well as the judgment of dismissal. Judgment (1899) 57 Pac. 73, reversed.—Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143.

[d] On entry of a judgment of dismissal, the court retains jurisdiction, so as to entitle it to vacate the judgment on a showing of mistake.—Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474.

[e] Relief will be granted a plaintiff whose attorney entered a judgment of dismissal under the mistaken belief that the sum paid by defendant was the whole amount demanded in the complaint.—Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474.

[f] The mistake of fact under which a judgment of dismissal is entered need not be mutual in order to warrant the granting of relief.—Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474.

[g] Where consent to the dismissal of an action is filed, but no judgment of dismissal has been entered, the action is still pending; and on a subsequent motion for plaintiff to set the case for trial, supported by an affidavit in which plaintiff asks to be relieved from the obligation of his consent to a dismissal, the case may be set for trial.—(1897) Truett v. Onderdonk, 50 Pac. 394.

[h] An order dismissing a suit to set aside a judgment adjudging an assessment void, and enjoining the county tax collector from proceeding under it, though entered by the plaintiff tax collector's attorney with his consent, will be opened for mistake on showing that he gave his consent in ignorance of his obligation to other parties interested, and that their interests would be prejudiced. Sheehan v. Osborne, 69 Pac. 842.

§ 25. —— Time for Setting Aside Nonsuit and Reinstating Cause.

[a] Upon the calling of a case for trial, the plaintiff moved for a continuance, which was refused, whereupon he took a voluntary nonsuit, with leave to move to set aside the same upon affidavits. Two days after, he gave notice of his intention so to move as soon as the affidavits could be prepared, but the term expired twenty-six days later without any further steps having been taken. Held, that plaintiff's right of motion in legal effect amounted only to permission to move for a new trial, and that, by his failure to comply with the provisions of the statute concerning new trials, the court lost jurisdiction.—Whipley v. Dewey, 17 Cal. 314.

II. INVOLUNTARY.

NATURE AND FORM OF PROCEEDING, § 26.
ENFORCEMENT OF STIPULATIONS, § 27.
RIGHT AND AUTHORITY TO DISMISS—PARTIES ENTITLED TO DISMISSAL, § 28.
—— PARTIES ENTITLED TO OPPOSE DISMISSAL, § 29.
GROUNDS FOR DISMISSAL — NEGLECT TO ENTER JUDGMENT, § 30.
—— DISABILITY OF PARTY PENDING PROCEEDINGS, § 31.
—— WANT OF AUTHORITY TO BRING SUIT, § 32.
—— DEFECTS AND OBJECTIONS AS TO PARTIES, § 33.
—— DEFECTS AND OBJECTIONS AS TO PROCESS, § 34.
—— DEFECTS AND OBJECTIONS AS TO PLEADINGS, § 35.
—— WANT OF PROSECUTION, § 36.
DISMISSAL AFTER CONTINUANCE BY CONSENT, § 37.
DISMISSAL BY COURT ON ITS OWN MOTION, § 38.
PROCEDURE TO EFFECT DISMISSAL—MOTION IN GENERAL, § 39.
—— FORM AND REQUISITES OF MOTION, § 40.
—— AFFIDAVITS TO SUPPORT MOTION OR IN OPPOSITION THERETO, § 41.
—— HEARING AND DETERMINATION, § 42.
—— CONDITIONAL DISMISSAL, § 43.
—— NATURE OF QUESTION PRESENTED BY MOTION, § 44.
—— ORDER OR JUDGMENT OF DISMISSAL, § 45.
—— NECESSITY FOR FINDINGS, § 46.
—— CURING DISCONTINUANCE, § 47.
OPERATION AND EFFECT OF DISMISSAL, § 48.
—— EFFECT OF COUNTERCLAIM, OR CROSS-COMPLAINT, § 49.
SETTING ASIDE AND REINSTATEMENT OF CAUSE, § 50.

§ 26. Nature and Form of Proceeding.

[a] A court has authority to grant a judgment of nonsuit only in the cases specified in Code of Civil Procedure, section 581.—Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 393; 17 Cent. Dig., col. 87, § 92.

§ 27. Enforcement of Stipulations.

[a] Where the plaintiff moves to dismiss an action, it is the duty of the counsel for the defendant, if he relies on a stipulation of the plaintiff as precluding a motion to dismiss, to bring forward the stipulation, or ask for delay to produce it. He cannot remain silent, and afterward attack the judgment of dismissal.—Higgins v. Mahoney, 50 Cal. 444.

§ 28. Right and Authority to Dismiss—Parties Entitled to Dismissal.

[a] Where several parties conspire to obtain the land of another, a disclaimer by some of the defendants of all interest therein in an action against them to recover the property is no ground for dismissing the suit as to them, as they are the proper parties and are liable for costs.—Dupuy v. Leavenworth, 17 Cal. 262.

[b] Where, in an action no summons is served, and part of the defendants appear by demurrer, the court has no jurisdiction, under section 581, Code of Civil Procedure, providing that, if appearance has been made by defendants within three years, such action may be prosecuted as if summons had been issued and served, to dismiss such action, on motion of defendants, as to those defendants who demurred.—Peck v. Agnew, 126 Cal. 607, 59 Pac. 125.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 425; 17 Cent. Dig., cols. 99-101, § 103.

§ 29. —— Parties Entitled to Oppose Dismissal.

[a] Where action is brought against the owner of a building and an independent contractor for damages alleged to have been caused by the negligence of the latter in doing some work on the building at the instance of the owner, the contractor cannot complain of the granting of a nonsuit to the owner.—Ahern v. McGeary, 79 Cal. 44, 21 Pac. 540.

§ 30. Grounds for Dismissal—Neglect to Enter Judgment.

[a] Negligence of clerk in entering judgment after party pays fee and requests him to make entry is not ground for dismissal under section 581, Code of Civil Procedure. Gardner v. Tatum, 77 Cal. 450, 19 Pac. 879.

[b] Amendment of 1885 to section 581, Code of Civil Procedure, did not apply to existing verdicts, unless there was six months' neglect after it took effect.—Gardner v. Tatum, 77 Cal. 459, 19 Pac. 879.

[c] Section 581 of the Code of Civil Procedure, providing that an action may be dismissed if judgment is not entered within six months after its rendition, is not mandatory, and does not confer an absolute right to the dismissal where the neglect to enter the judgment is shown to be excusable when the order of dismissal is applied for.—Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121.

[d] A motion to dismiss an action tried to the court, on the ground that plaintiff has neglected to have judgment entered for more than six months after decision, is not authorized by Code of Civil Procedure, section 581, where neither party is entitled to judgment at the time, because written findings have not been prepared and approved by the judge, or waived by the parties.—Neihaus v. Morgan, 45 Pac. 255.

§ 31. —— Disability of Party Pending Proceedings.

[a] Where an action was properly brought in the name of one who became insane while it was pending, an erroneous order, substituting the guardian of his person and estate as plaintiff, is not cause for dismissal.—Dixon v. Cardozo, 106 Cal. 506, 39 Pac. 857.

§ 32. —— Want of Authority to Bring Suit.

[a] A motion to dismiss is the proper method of raising the question whether the attorney appearing in the suit has been authorized by plaintiffs to prosecute.—Turner v. Caruthers, 17 Cal. 431.

[b] Where an action is brought by an attorney for a corporation as plaintiff, it is presumed to have been instituted by the consent of plaintiff, and until the want of authority on the part of the attorney to appear for his client is shown the defendant will not be permitted to have a dismissal by showing that plaintiff does not desire to maintain the action.—Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22.

[c] Motion to dismiss is proper procedure when authority of attorney is challenged.—Ventura v. Clay, 119 Cal. 215, 51 Pac. 189.

[d] Right of defendant to move to dismiss action for lack of authority of plaintiff's attorney to institute it is based on the ground that he might be twice compelled to litigate same cause of action; but this reason ceases, and with it the rule, if the act of the attorney is subsequently ratified by the plaintiff.—People v. Madden, 133 Cal. 347, 65 Pac. 741.

[e] Where the evidence warrants a finding that the attorney who brings a suit for a corporation against one of the stockholders was not authorized by the corporation to do so, it is proper for the court, on motion of defendant, to enter a judgment dismissing the action.—Magnolia & H. Fruit Cannery v. Guerne, 31 Pac. 363.

§ 33. —— Defects and Objections as to Parties.

[a] A party not named as defendant was served as a party designated by a fictitious

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name, under Practice Act, section 69, providing that, when plaintiff is ignorant of defendant's name, he may be designated by any name, and when his true name is discovered it may be inserted. He moved to set aside the service and dismiss the action. There was no averment in the complaint that plaintiff was ignorant of the true name of the person intended to be made a defendant, and the true name could have been ascertained by inquiry, and no offer was made by plaintiff in response to the motion to insert the true name in the complaint. Held, that the motion to dismiss the complaint was properly granted.—Rosencrantz v. Rogers, 40 Cal. 489.

[b] Code of Civil Procedure, section 1597, authorizes the probate court to compel specific performance by an executor of a contract of his decedent to convey realty. Held, that where, in an action in the probate court for specific performance of such a contract, third parties are interested who, if the proceeding were in equity, would be necessary parties, the petition should be dismissed, for it is not the intention of the statute to vest in the probate court more extensive power than is administered in such cases by courts of equity.—Corwin's Estate, In re, 61 Cal. 160.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 438, 439; 17 Cent. Dig., cols. 120-123, §§ 124-128.

§ 34. —— Defects and Objections as to Process.

[a] A summons is not issued within one year after filing the complaint, within the meaning of the twenty-third section of the Practice Act, unless, within one year after filing the complaint, both a summons and a certified copy of the complaint, properly prepared and certified, are placed at the disposal of the party for service.—Reynolds v. Page, 35 Cal. 296.

[b] A neglect to serve a summons, two years and eight months after the issue, will justify a dismissal of the action for want of prosecution.—Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

[c] Where a complaint was filed and summons issued more than eight years before service, a motion by defendant to set aside the summons, and strike the complaint from the files was held to have been properly granted.—Carpentier v. Minturn, 39 Cal. 450.

[d] Where a summons is not served until three years after the complaint is filed, and it is issued, and there is no reasonable excuse for the delay, the suit, on motion, may be dismissed.—Eldridge v. Kay, 45 Cal. 49.

[e] Where a complaint is filed and summons issued in October, 1870, and the summons is not served until January, 1872, the court will dismiss the action for lack of diligence in prosecuting it, unless plaintiff presents sufficient excuse for his negligence. Lander v. Flemming, 47 Cal. 614.

[f] Motion to dismiss for failure to issue summons within one year after filing complaint, is proper.—Linden G. M. Co. v. Sheplar, 53 Cal. 245.

[g] Action may be dismissed for unreasonable delay in service of process or other want of prosecution.—Cowell v. Stuart, 69 Cal. 527, 11 Pac. 57.

[h] Where delay in issuing summons is at request of defendants, and occasioned by their promises to pay money sued for, case should not be dismissed for want of prosecution.—Cowell v. Stuart, 69 Cal. 527, 11 Pac. 57.

[i] Where a summons is served nine years after the complaint is filed, the delay is grossly unreasonable, and, in the absence of a showing of the proper exercise of diligence, a motion to quash and dismiss the action should be granted.—Diggins v. Thornton, 96 Cal. 417, 31 Pac. 289.

[j] Court has discretion to dismiss a cause for delay of nearly two years in the service of the summons upon the defendant.—Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125.

[k] Only limitation upon the exercise of the discretionary power of the court to dismiss a cause for delay in the service of summons is that it must not be abused; and it is for the court, in the exercise of its discretion, after hearing the statement of the parties, to determine whether the plaintiff was or was not acting in good faith and in the exercise of reasonable diligence.—Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125.

[l] Code of Civil Procedure, section 581, as amended in 1889, which provides that any action shall be dismissed unless summons be issued within one year, and served within three years, after commencement of the action, or unless defendant has appeared within said three years, is not a legislative declaration that three years is a reasonable time for serving summons.—Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125.

[m] Under Code of Civil Procedure, section 581, subdivision 7, which provides that an action shall be dismissed "unless summons shall have been issued within one year, and served and return thereon made within three years," it is error to dismiss an action because the summons was not served within one year after suit brought.—Murray v. Gleeson, 100 Cal. 511, 35 Pac. 88.

[n] A defendant, by taking from the plaintiff and filing a stipulation extending his time to answer, and by accepting and acting upon an agreement contained therein to grant successive extensions in consideration of certain payments made, does not appear in the action, within the meaning of said section 581; and such facts will not operate to prevent a dismissal of the action for a failure to return the summons within the time limited by the section.—Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470.

[o] Where summons was not issued for nearly a year after the filing of the com-

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plaint, and not served for nearly another year, though defendant was a resident of the county, and after issue joined the case stood for a year and a half without any effort to bring it to trial, a judgment dismissing the action for want of prosecution will not be reversed, because defendant had threatened to take advantage of the insolvency laws if judgment was obtained.—First Nat. Bank of San Diego v. Nason, 115 Cal. 626, 47 Pac. 595.

[p] Where summons is not issued within one year, or not served within three years court must dismiss; it has no discretion.—Stanley v. Gillen, 119 Cal. 178, 51 Pac. 183.

[q] Court may in its discretion dismiss for want of prosecution though summons be issued and served within the time. Plaintiff is not entitled to full time in all cases.—Stanley v. Gillen, 119 Cal. 178, 51 Pac. 183.

[r] An action commenced in April, 1883, in which summons was never issued, was dismissed in 1896, under Code of Civil Procedure, section 581, subdivision 7, authorizing dismissal on failure to make appearance within three years. On motion to vacate such judgment, it appeared that defendant had entered into a written stipulation that plaintiff could enter judgment at any time, and was granted a stay of execution on certain payments being made. This stipulation was thereafter renewed with due credits allowed therein for payments made. Held, that the stipulation was sufficient appearance on the part of defendant to render judgment of dismissal unauthorized.—Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006.

[s] Under Code of Civil Procedure, section 581, providing that all actions, wherein summons is not served within three years after commencement of the action, shall be dismissed, and no further proceedings shall be had therein, the failure of plaintiff to make service of summons for three years and eleven days after commencement of an action deprives the court of all jurisdiction to do other than dismiss the action.—Modoc etc. Livestock Co. v. Superior Court of Modoc County, 128 Cal. 255, 60 Pac. 848.

[t] Code of Civil Procedure, section 581, subdivision 7, providing that all actions shall be dismissed unless the summons shall be served, and return thereon made, within three years after the commencement of the action, is mandatory; and where the summons is not so served and returned, the defendant is entitled to dismissal, though his motion therefor was not made until after his default was entered.—Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080.

[u] Code of Civil Procedure, section 581, subdivision 7, as enacted in March, 1889, provided that all actions shall be dismissed unless summons shall be issued within one year, and served and return made thereon within three years, after the commencement of the action. In March, 1895, such subdivision was amended to read, "That all actions shall be dismissed unless summons shall be 'issued within one year and all such actions shall be in like manner dismissed unless the summons shall be' served and return thereon made within three years." Held, that the amendment was merely to free the statute from ambiguity, and not made in order to oust the court of jurisdiction in those cases only in which the summons had not been issued within the year; and the statute therefore applied to all cases in which the summons had not been served and returned within three years from the beginning of the action.—Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080.

[v] Code of Civil Procedure, section 581, subdivision 7, as amended in 1897, declares that an action shall be dismissed unless the summons be served within three years from the commencement of the action, but that an appearance within three years shall waive the failure to serve the summons. Held, that where, in a suit to foreclose a mortgage, there was no service of summons nor appearance by the mortgagor for three years, the fact that a junior mortgagee appeared by demurring to the complaint within the three years did not prevent the dismissal of the action; the mortgagee not being prejudiced by the dismissal of the action as to said defendant, and not complaining.—Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118.

[w] Code of Civil Procedure, section 581, subdivision 7, as amended in 1897, declares that an action shall be dismissed unless the summons be served within three years from the commencement of the action, but that all actions may be prosecuted if appearance be made by defendant within three years, the same as if summons had been served; and section 1014 declares that a defendant appears when he answers, demurs or gives written notice of his appearance. Held, that, where a summons was not served within three years from the commencement of the action, the suit was properly dismissed, though before the expiration of the three years defendant had stated plaintiff need not serve any papers, as it could take judgment in the case at any time.—Siskiyou County Bank v. Hoyt, 132 Cal. 81, 64 Pac. 118.

[x] Code of Civil Procedure, section 582, provides that all actions shall be dismissed unless the summons is served and return made within three years of commencement, unless there be an appearance by defendant within such time. Held, that where there was no appearance within the time limited, and no return of summons, but within the time an affidavit of service on one of defendants was filed, and also a copy of the summons, the action was dismissable.—Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

[y] On a motion to dismiss under the statute, that the summons was for a time lost is of no avail to plaintiff; the remedy being provided for by Code of Civil Procedure, section 1045, providing that, if a paper be lost, the court may authorize a copy to be used

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in lieu of the original.—Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

[z] Subdivision 7, section 581, Code of Civil Procedure, is mandatory and court is bound to dismiss suit when summons is not returned or appearance made within three years.—Swortfiguer v. White, 141 Cal. 579, 75 Pac. 172.

[aa] A stipulation signed by attorneys for both parties, extending time to answer, held an appearance within the exception to Code of Civil Procedure, section 581, subdivision 7, as to dismissal of actions for failure to serve and return the summons.—Roth v. Superior Court of Los Angeles County, 146 Cal. 323, 82 Pac. 246.

[bb] Where the summons was not issued till nearly a year after the action was begun, and had not been served at the time of a motion to dismiss, three years and eight months after its issuance, plaintiff explaining that he forbore to serve the summons for the reason that certain persons represented that defendant would abide the event of a test case, but not showing the authority to make the representations, and defendant denying it, held, that there was no abuse of discretion in granting the motion to dismiss.—Pacific Bridge Co. v. Jacobus, 13 Pac. 493.

[cc] It is within the sound discretion of the lower court to dismiss an action for inexcusable delay in failing, for two years after the commencement of the action, to serve defendant with process.—Castro v. City and County of San Francisco, 35 Pac. 1035.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 436, 437; 17 Cent. Dig., cols. 124-128, §§ 129-133.

§ 35. —— Defects and Objections as to Pleadings.

[a] Where plaintiff's complaint does not state a cause of action, and he declines to amend, the action may be dismissed on defendant's motion.—King v. Montgomery, 50 Cal. 115.

[b] Where the complaint is, by consent of both parties, after answer denying all the allegations therein, stricken out, the court should dismiss the action.—Smith v. Ling, 73 Cal. 72, 14 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 440, 443; 17 Cent. Dig., cols. 129-136, §§ 134-139.

§ 36. —— Want of Prosecution.

[a] Where the plaintiff fails to appear and prosecute his suit, and defendant moves a nonsuit, the court has no alternative but to grant it.—Peralta v. Mariea, 3 Cal. 185.

[b] Where plaintiff, after bringing an action, but without serving a summons, absents himself, leaving no attorney to represent him, he cannot complain that some of the defendants voluntarily appear and have the case dismissed for want of prosecution, unless he shows that he was acting under some mistake of law, or was misled by some action of defendants.—Pickett v. Hastings, 39 Cal. 105.

[c] Rule of court for ex parte dismissal for failure to bring a cause to hearing does not apply if cause is continued by consent.—Poole v. Caulfield, 45 Cal. 107.

[d] A court does not disabuse its discretion in dismissing an action for want of prosecution, where, after a reversal, plaintiff neglects for fourteen years to file a remittitur in the trial court.—Chipman v. Hibberd, 47 Cal. 638.

[e] Where a plaintiff neglects for more than two years to bring his case to trial, the court may, on motion of defendant and notice to plaintiff, dismiss the action.—Simmons v. Keller, 50 Cal. 38.

[f] A judgment dismissing an action for want of prosecution is not void, although made after the death of the plaintiff, and without the substitution of his personal representative.—Wallace v. Center, 67 Cal. 133, 7 Pac. 441.

[g] Delay of twelve years in introducing evidence before referee warrants dismissal for want of prosecution.—Saville v. Frisbie, 70 Cal. 87, 88, 11 Pac. 502.

[h] Superior court has power to dismiss an action for want of prosecution.—Pardy v. Montgomery, 77 Cal. 327, 19 Pac. 530; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Hasser v. South San Francisco Homestead etc. Association, 102 Cal. 611, 36 Pac. 945; McLaughlin v. Clausen, 116 Cal. 489, 48 Pac. 487.

[i] It is error to dismiss an action because the plaintiff did not appear to give her deposition, continued by consent to a time of which she had no notice; her attorney having told her that he would let her know when to come.—Clifford v. Allman, 84 Cal. 528, 24 Pac. 292.

[j] It is not an abuse of discretion to dismiss a cause for want of prosecution where a demurrer to the complaint had been on file for nearly three and one-half years, without being called up for determination by the plaintiff, and the evidence as to a stipulation for delay is conflicting, and by the neglect of plaintiff's counsel the attention of the court was not called to an order, previously entered by consent, continuing the cause for trial at a time to be agreed between counsel.—Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57.

[k] The dismissal of an action by the superior court for want of prosecution will not be disturbed upon appeal where it appears that the action had been commenced more than twenty years before a motion to dismiss was made, and that the motion stood over two years without being brought to a hearing, although it is admitted that the de-

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lay in bringing the case to a hearing was, during the first ten years, by the consent of, or at the request of, the defendant's attorney.—Hassey v. South San Francisco Homestead etc. Association, 102 Cal. 611, 36 Pac. 945.

[l] Where the delay in the prosecution has been had at the instance or request of the defendant, the court will properly refuse to dismiss; but a mere threat of the defendant to take advantage of the insolvent laws, not coupled with any request for delay, or promise of payment in the event of such delay, is not a valid excuse for postponement on the part of the plaintiff in prosecuting the action. First Nat. Bank of San Diego v. Nason, 115 Cal. 626, 47 Pac. 595.

[m] It is not an abuse of discretion for a court to dismiss an action for want of prosecution where it was dropped from the calendar nearly three years before by a verbal agreement between the attorneys, not authorized by the defendant, to await the determination of another action; there being no agreement filed as provided by Code of Civil Procedure, section 283.—McLaughlin v. Clausen, 116 Cal. 487, 48 Pac. 487.

[n] Where a stipulation, in an action in which defendant was not served, provides for entry of judgment by plaintiff whenever he might choose so to do for a certain amount, defendant is estopped from urging that plaintiff has declined to prosecute the action with due diligence, so as to authorize dismissal, after the lapse of three years, as limited by Code of Civil Procedure, section 581.—Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006.

[o] In an action by the state, on the relation of an individual, against an irrigation district, formed under the statutes of the state, to have such district declared to have no legal existence, laches may be imputed to plaintiff for failure to prosecute with due diligence, so as to authorize dismissal.—People v. Jefferds, 126 Cal. 296, 58 Pac. 704.

[p] Code of Civil Procedure, section 581, subdivisions 3, 4, prescribing the circumstances under which an action may be dismissed, is not the sole source of power to dismiss an action for failure to prosecute, but such power exists independent of the Code.—People v. Jefferds, 126 Cal. 296, 58 Pac. 704.

[q] Facts found sufficient to warrant a dismissal for want of prosecution.—Davis v. Clark, 126 Cal. 232, 58 Pac. 542.

[r] Where an order sustaining a demurrer to a complaint was entered, and a court rule allowed ten days to amend, but no notice of the entry of the order was given, and plaintiff did not move for leave to amend for over three years, an order dismissing the action for lack of prosecution is not in conflict with Code of Civil Procedure, section 476, providing that, where leave to amend within a stated time is given on sustaining a demurrer, the time runs from service of a notice of the order, since such section only affects the right to plead anew, and not the right to move to dismiss for failure to prosecute.—San Jose Land etc. Co. v. Allen, 129 Cal. 247, 61 Pac. 1083.

[s] Where plaintiff commenced an action in 1890, and failed to bring on a demurrer for hearing for over three years, and further failed to move for leave to amend till June, 1897, the demurrer having been sustained in January, 1894, an order dismissing the action for want of prosecution is not an abuse of the discretion of the court.—San Jose Land etc. Co. v. Allen, 129 Cal. 247, 61 Pac. 1083.

[t] Leave to plaintiff to amend is no bar to granting defendant's motion to dismiss for lack of prosecution, made shortly thereafter. San Jose Land etc. Co. v. Allen, 129 Cal. 247, 61 Pac. 1083.

[u] Though Code of Civil Procedure, section 286, provides that, when an attorney dies, a party to an action, for whom he was acting, must be required by the adverse party, by written notice, to appoint another attorney, or appear in person, before any further proceedings are had against him, failure of a defendant to give such notice to a plaintiff whose attorney had died will not deprive the court of jurisdiction to dismiss an action for want of prosecution where plaintiff appointed another attorney before the commencement of the proceedings.—Nicol v. City and County of San Francisco, 130 Cal. 288, 62 Pac. 513.

[v] Evidence showing that the plaintiff in an action for damages to real property, on the death of his attorney, appointed another, with whom he did not speak concerning the case for five years, claiming that his time was otherwise occupied, and that he left the case entirely in his attorney's hands, will not justify disturbing the trial court's judgment dismissing the case for lack of prosecution, on the ground of abuse of the court's discretion, since the negligence of the attorney is his client's negligence.—Nicol v. City and County of San Francisco, 130 Cal. 288, 62 Pac. 513.

[w] Where an affidavit of plaintiff shows that the defendant has admitted having no defense to the suit, and that the answer on file is a sham, and false, and was filed for the purpose of delay, and no counter affidavit is filed, it is error to dismiss the case for plaintiff's laches in failing to prosecute the action.—Herman v. Pacific Jute M. Co., 131 Cal. 210, 63 Pac. 344.

[x] Refusal to set aside and vacate the service of a summons and to dismiss the action for want of diligence in its prosecution was not an abuse of discretion where the action itself was commenced May 29, 1896, summons issued May 22, 1897, and served March 24, 1898, and no injury was shown to have resulted to defendant.—Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291.

[y] An action in which the burden of proof is not on defendant may be dismissed for want of prosecution by plaintiff, though it

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stands on demurrer to the complaint.—Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971.

[z] It cannot be said there was any abuse of discretion in dismissing an action for want of prosecution, where demurrer was filed to complaint, and set for hearing in 1890, but hearing was continued for plaintiff to employ an attorney in place of one who had died, and one was not employed till 1896, and after a motion to dismiss, which was denied, and no steps to have demurrer disposed of were taken till 1899, when notice was given that demurrer would be heard on a certain day, and on the next day the motion to dismiss was made, and this, though from 1896 to 1899 the department in which the case was pending was engaged in trial of criminal cases, and the law and motion calendar of civil cases there pending was not called; it not appearing that the judge was requested to hear the demurrer, or that effort to have the case transferred was made. Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971.

[aa] Defendant, though personally served with summons, did not personally appear until several years later, but there was placed on file on his behalf, within ten days after service of summons on him, what purported to be an appearance for him by a demurrer to the complaint, signed by attorneys of the court; and defendant never intimated that such attorneys had not in fact been authorized to appear. Held, that under Code of Civil Procedure, section 1014, providing that the defendant appears when he answers, demurs, or gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for him, the court was not warranted in finding that there was no appearance made by the defendant, on a motion to dismiss, under Code of Civil Procedure, section 581, subdivision 7, for failure to return the summons within three years if appearance has not been made by the defendant.—Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352.

[bb] Where defendant, in whose favor the court announced that he should give judgment, failed to file findings or have them ordered, or to give any notice of decision, and plaintiff was ready to try the case, it was error to dismiss for want of prosecution. Pardy v. Montgomery, 18 Pac. 330.

[cc] Action of court in dismissing action for want of prosecution held not an abuse of discretion.—Marks v. Keenan (Cal. Sup.), 82 Pac. 772.

[dd] An action should not be dismissed under Code of Civil Procedure, section 581, subdivision 3, for plaintiff's failure to appear on the trial, except on proof of five days' notice of trial required by section 594.—Dean's Estate, In re, 87 Pac. 13.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 443, 448; 17 Cent. Dig., cols. 136-150, §§ 140-152.

§ 37. Dismissal After Continuance by Consent.

[a] An order of dismissal, made during the term, after it is understood by the attorneys of both parties that the cause has been continued for the term, is irregular, and must be set aside on a proper showing.—Bensley v. Ellis, 39 Cal. 309.

§ 38. Dismissal by Court on Its Own Motion.

[a] A court will, on its own motion, dismiss an action which contravenes public policy, whether or not the parties make objection to it.—Valentine v. Stewart, 15 Cal. 387.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 458; 17 Cent. Dig., cols. 158-159, § 160.

§ 39. Procedure to Effect Dismissal—Motion in General.

[a] A judgment by default against one of the defendants cannot be set aside on the ground that it was entered pending a motion by him to dismiss the action for want of prosecution: a motion to dismiss not extending the time to answer.—McDonald v. Swett, 76 Cal. 257, 18 Pac. 324.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 449, 452; 17 Cent. Dig., cols. 159-168, §§ 161-168; cols. 176, 177, § 176.

§ 40. —— Form and Requisites of Motion.

[a] Where a motion to dismiss omits to state the grounds upon which it is based, it will not be entertained.—Kiler v. Kimbal, 19 Cal. 267; People v. Banvard, 27 Cal. 479; Poehlmann v. Kennedy, 48 Cal. 201; Coffey v. Greenfield, 62 Cal. 602; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Palmer v. Marysville Democrat Pub. Co., 90 Cal. 168, 27 Pac. 21; Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230.

[b] Motion for a nonsuit must distinctly point out the grounds on which it is asked, and it is not error to refuse it, even if there is ground for it, and it is not asked on such ground.—Gardiner v. Schmaelzle, 47 Cal. 588.

[c] Motion for nonsuit must state grounds on which it is made.—Loring v. Stuart, 79 Cal. 201, 21 Pac. 651.

[d] A motion for nonsuit on the ground that "plaintiffs had failed to prove a sufficient case" is properly denied, as not stating the grounds relied on sufficiently.—Miller v. Luco, 80 Cal. 257, 22 Pac. 195.

[e] No other grounds than those stated in motion can be considered by court.—Shain v. Forbes, 82 Cal. 582, 23 Pac. 198.

[f] One who moves for a nonsuit must state the particular grounds upon which the

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motion is based; and if he fails to do so, the motion is properly denied.—Durfee v. Seale, 139 Cal. 603, 73 Pac. 435.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 449; 17 Cent. Dig., cols. 160-162, § 162.

§ 41. —— Affidavits to Support Motion or in Opposition Thereto.

[a] Where, to defeat a motion for dismissal, an affidavit is offered, which shows that affiant made, at a time not mentioned, unsuccessful efforts to locate defendant, and about nine years after filing the complaint certain other efforts, which were successful, it will be assumed, in the absence of a showing to the contrary, that both efforts were made at about the same time, and such affidavit will be held insufficient.—Diggins v. Thornton, 96 Cal. 417, 31 Pac. 289.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 452; 17 Cent. Dig., cols. 165-167, §§ 165, 166.

§ 42. —— Hearing and Determination.

[a] In an action on a note by an indorsee, the question whether plaintiff is the holder as an agent or for value cannot be considered on motion for nonsuit; for in either case he has the title, and can maintain an action in his own name.—Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90.

[b] One of the defendants served notice of motion on plaintiff to dismiss the action, as to him, for want of prosecution; he not having been served with summons until about two years after the summons was issued. At request of plaintiff's attorney the hearing of the motion was continued to a certain date. A few days before the hearing, plaintiff's attorney entered judgment by default against said defendant, and on the hearing the motion to dismiss was denied. Held, that there was no abuse of the discretion of the court in denying the motion.—McDonald v. Swett, 76 Cal. 257, 18 Pac. 324.

[c] A motion by defendant for nonsuit is properly denied if made, not on the ground that the evidence admitted did not support plaintiff's cause of action, but only on the grounds on which portions of the admitted evidence were objected to when offered, to the admission of which evidence he excepted, since errors in admitting evidence cannot be reviewed on a motion for nonsuit.—O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939.

[d] Objection that complaint does not state cause of action is not available on motion to dismiss action.—Pacific Paving Co. v. Vizelich, 141 Cal. 10, 74 Pac. 352.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 451, 452; 17 Cent. Dig., cols. 167, 168, §§ 167, 168.

§ 43. —— Conditional Dismissal.

[a] In an action on a note given by a decedent and to foreclose a mortgage securing its payment, the summons was served on the executrix by publication ten years after the commencement of the action. Executrix moved to vacate the summons and dismiss the action, as to her, for want of diligence in its prosecution. Decedent had conveyed the mortgaged property to a third person, and was not the owner at his death. A claim for the payment of the debt had been presented to the executrix, and rejected. Held, that a judgment denying the motion, on condition that the plaintiff file a stipulation waiving judgment for any deficiency arising on the sale of the mortgaged property, was proper.—Clark v. Smith, 63 Cal. 385.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 453; 17 Cent. Dig., cols. 170-174, §§ 170-173.

§ 44. —— Nature of Question Presented by Motion.

[a] Question presented on motion for nonsuit is question of law.—Donahue v. Gallavan, 43 Cal. 573.

§ 45. —— Order or Judgment of Dismissal.

[a] Until judgment of dismissal is entered action is not dismissed.—Page v. Superior Court, 76 Cal. 374, 19 Pac. 183.

[b] Action is not dismissed until entry of judgment; entry on clerk's register is insufficient.—Page v. Page, 77 Cal. 84, 85, 19 Pac. 183.

[c] The date of the dismissal of an action is when the judgment of dismissal is entered, and not when the entry is made in the register of actions by the clerk that the action is dismissed by order of the plaintiff.—Acock v. Halsey, 90 Cal. 215, 27 Pac. 193.

[d] Where a case was, on motion of plaintiff, dismissed in open court, but no order of dismissal was entered at the time, and an order of dismissal was afterward entered, without notice to plaintiff, which recited that the case had been settled, and a judgment of dismissal was entered on such order, the court will, eleven years after the entry of the order, set aside the order and judgment, and enter an order nunc pro tunc, as of the date of dismissal, showing that the case was dismissed in open court on plaintiff's motion.—Stoutenborough v. Board of Education of City and County of San Francisco, 104 Cal. 664, 38 Pac. 449.

[e] Under the amended section 581 of the Code of Civil Procedure the entry of a judgment of dismissal is not required, and it is sufficient that the dismissal be entered in the clerk's register.—Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 229.

§ 46. —— Necessity for Findings.

[a] Findings of fact and conclusions of law are not required nor proper in case of nonsuit.—Gilson Quartz Min. Co. v. Gilson, 47 Cal. 597.

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[b] Where a plaintiff is nonsuited written findings are not required.—Harney v. McLeran, 66 Cal. 34, 4 Pac. 884.

[c] Where nonsuit is granted there is no occasion for findings on issues made by complaint.—Kennedy etc. Co. v. Dusenbery, 116 Cal. 125, 47 Pac. 1008.

[d] Findings are not required in cases of nonsuit.—Jewell v. Pierce, 120 Cal. 85, 52 Pac. 132.

§ 47. —— Curing Discontinuance.

[a] A plaintiff, next day after being served with notice of a motion to dismiss for want of prosecution, caused the summons, issued more than two years before, to be served; and, the defendant having failed to answer within ten days, default was noted, but no assessment was made or judgment entered by the court, and on the day specified in the notice the defendant moved, notwithstanding the default, to dismiss the action for want of prosecution. Held, that the court did not err in so dismissing the suit, by relating back to the time of service of the motion.—Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

For Authorities from Other States:

See 17 Cent. Dig., cols. 176, 177, § 176.

§ 48. Operation and Effect of Dismissal.

[a] The dismissal of a suit for want of prosecution determines everything involved in it, and, so far as the particular action is concerned, is the same as a judgment for defendant on the merits.—Dowling v. Polack, 18 Cal. 625.

[b] If the district court acquired jurisdiction its order dismissing the cause is final and conclusive in the proceeding.—Eldridge v. Stockton, 39 Cal. 693.

[c] Jurisdiction of person is lost by dismissal, and judgment thereafter without vacating dismissal is void.—Sere v. McGovern, 65 Cal. 244, 3 Pac. 859.

[d] Where an action was brought against a ward, and she appeared and answered by general guardian, but no cause of action was stated against him individually, a dismissal as to such ward was a dismissal of the entire action.—O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

[e] Mere filing of the dismissal of an action with the clerk, or the entry of an order of dismissal upon the minutes, does not, of itself, constitute a bar to another action against the party as to whom the former action was dismissed.—Allin v. Williams, 97 Cal. 403, 32 Pac. 441.

[f] Order dismissing action for want of prosecution under subdivision 7, section 581, Code of Civil Procedure, ousts court of jurisdiction and it has no power to enter amended judgment of dismissal thereafter limiting its effect.—Swortfiguer v. White, 141 Cal. 579, 75 Pac. 172.

For Authorities from Other States:

See 14 Cyc. 458, 459, 465; 17 Cent. Dig., cols. 177-180, §§ 178-181.

§ 49. —— Effect of Counterclaim or Cross-Complaint.

[a] If there is an intervener who claims an interest in the matter in dispute adverse to both plaintiff and defendant, and they answer the intervention, raising material issues, and, on motion of the defendant, the court nonsuits the plaintiff, the action is still pending as to the issues raised on the intervention, and the court should proceed and try them. The intervention should not be dismissed on the ground that there is no action pending.—Poehlmann v. Kennedy, 48 Cal. 201.

[b] Where the defendant in an action filed a cross-complaint seeking affirmative relief, and the plaintiff filed an answer thereto, the nonsuit of the plaintiff, upon motion of the defendant, does not operate as a dismissal of the action, so as to deprive the defendant of the right to a trial of the issues raised by the cross-complaint and answer thereto.—Warner v. Darrow, 91 Cal. 309, 27 Pac. 737.

§ 50. Setting Aside and Reinstatement of Cause.

[a] The district court cannot review an order granting a nonsuit upon a motion to set aside the nonsuit.—Levy v. Getleson, 27 Cal. 685.

[b] Reinstatement of dismissed case is discretionary.—Lodtman v. Schulter, 71 Cal. 97, 16 Pac. 540.

[c] Judgment dismissing case for want of prosecution may be set aside on showing good cause.—Lodtman v. Schulter, 71 Cal. 97, 16 Pac. 540.

[d] It is not an abuse of discretion to refuse to set aside a dismissal for failure to file an amended complaint within the required time, where the affidavits of the attorneys, as to the existence of an oral stipulation for the extension of the time to file the complaint, are contradictory.—Rauer v. Wolf, 115 Cal. 100, 46 Pac. 902.

[e] After a substitution of attorneys by plaintiff, defendant's motion to dismiss for want of prosecution was granted. Plaintiff's attorney moved to vacate such order, alleging failure to find the former attorney, and consequent inability to procure an affidavit contradicting the allegations in support of the motion. Held that, if the plaintiff's affidavits were sufficient to satisfy the court that the attorney had made a reasonable effort to find the former attorney, it was justified in holding that the neglect was excusable.—Moore v. Thompson, 138 Cal. 23, 70 Pac. 930.

[f] A motion to vacate an order dismissing a cause for want of prosecution is not only ad-

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dressed to the discretion of the court, but this discretion may be controlled by facts not before the court on the hearing of the motion to dismiss, if there was an excusable neglect in the failure to present them.—Moore v. Thompson, 138 Cal. 23, 70 Pac. 930.

[g] Where an attorney appears in court five minutes after the dismissal of the cause and rendition of judgment against his client because of the absence of both attorney and client when the case was called for trial, it is not an abuse of discretion for the court, on motion supported by a sufficient affidavit, to vacate the order of dismissal and judgment, and restore the cause to the calendar.—Ashton v. Dashaway Assn., 33 Pac. 446.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 459, 465; 17 Cent. Dig., cols. 180-194, §§ 182-192.

DISMISSAL OF APPEAL.

Civil appeal. See Appeal and Error, XII.
Criminal appeal. See Criminal Law, § 714.

DISOBEDIENCE.

Of order of court as contempt of court. See Contempt, §§ 25-32.
Of order or subpoena in proceedings supplementary to execution as contempt. See Execution, § 213.
What constitutes disobedience of injunction and punishment therefor. See Injunction, VII.

DISORDERLY CONDUCT.

Include misconduct prejudicial to safety, comfort, or welfare of others, not constituting a breach of the peace or other distinct offense; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such misconduct as a public offense.

§ 1. Nature and Elements of Offenses—Place Where Committed.

[a] Code, section 415, making it an offense to use vulgar, profane, or indecent language within the hearing of children, etc., does not make the offense such only when committed in the streets of an incorporated town.—Foley, Ex parte, 62 Cal. 508.

FOR AUTHORITIES FROM OTHER STATES:

Eavesdropping: 75 Am. Dec. 773, note. See, also, 14 Cyc. 467-471; 17 Cent. Dig., cols. 196-201, §§ 1-8.

§ 2. Indictment or Information.

[a] Penal Code, section 415, prohibits the use by any person of "vulgar, profane, or indecent language in the presence or hearing of women or children, in a loud or boisterous manner." Held, that an information for the violation of this section need not set out the language complained of, nor allege that the offense was committed on the streets of an incorporated town.—Foley, Ex parte, 62 Cal. 508.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 472-474, 476; 17 Cent. Dig., cols. 201-205, §§ 12-15.

DISORDERLY HOUSE.

Include owning, letting, keeping, or frequenting a building or portion of a building used as a bawdy-house or for any other lewd or indecent purpose, or as a gaming-house, or place for smoking opium, or other place of public resort by which the peace, comfort, or decency of the neighborhood is habitually disturbed, and keeping a house, the conduct of the inmates of which constitutes a public nuisance; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

STATUTORY PROVISIONS, § 1.
HOUSE OF ILL-FAME DEFINED, § 2.
PLACING OR PERMITTING WIFE TO LIVE IN HOUSE OF PROSTITUTION, § 3.
LETTING APARTMENTS FOR PURPOSE OF PROSTITUTION OR ASSIGNATION, § 4.
SENTENCE AND PUNISHMENT, § 5.

Placing abducted female in. See Abduction, § 8.
Use of insured premises for bawdy-house as avoiding insurance. See Insurance, § 91.

DISPATCHES.

Telegraphic dispatches. See Telegraphs and Telephones.

§ 1. Statutory Provisions.

[a] An ordinance of the city of Stockton declaring it to be unlawful for any person to visit, for the purpose of prostitution, any place maintained for the purpose of prostitution, and providing a penalty of a fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both, is valid, and not in conflict with the general laws of the state.—Johnson, Ex parte, 73 Cal. 228, 15 Pac. 43.

§ 2. House of Ill-fame Defined.

[a] House kept by one woman to which others resort for purpose of prostitution is house of ill-fame.—People v. Slater, 119 Cal. 622, 51 Pac. 957.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 484-488; 17 Cent. Dig., cols. 210, 211, § 3; cols. 218-223, §§ 9-13.

§ 3. Placing or Permitting Wife to Live in House of Prostitution.

[a] Act of 1891 punishing husband for placing or leaving wife in house of prostitution is constitutional.—People v. Bosquet, 116 Cal. 77, 78, 58 Am. St. Rep. 133, 47 Pac. 879.

[b] Consent of husband to wife's being in house of prostitution may be inferred from his omission to object when he knows all

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facts.—People v. Bosquet, 116 Cal. 78, 58 Am. St. Rep. 133, 47 Pac. 879.

[c] Evidence held sufficient to sustain conviction of husband for consenting to his wife's being in house of prostitution.—People v. Bosquet, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 879.

§ 4. Letting Apartments for Purpose of Prostitution or Assignation.

[a] Under section 316, Penal Code, every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.—Chateau v. Singla, 114 Cal. 91, 55 Am. St. Rep. 63, 45 Pac. 1015.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 490; 17 Cent. Dig., cols. 214-223, §§ 6, 9-13.

§ 5. Sentence and Punishment.

[a] Statutes of 1861, page 552, giving the board of supervisors of the city and county of San Francisco power to determine the penalties for breach of its regulations, with the maximum limit of one thousand dollars, or six months' imprisonment, or both, does not authorize the maximum penalty for violation of every regulation. The penalty must be reasonable, with reference to the offense, and section 33 of order 1587, as amended by order 1955, of the board of supervisors, leaving it to the discretion of the judge to fix the punishment for visiting a house of ill-fame, with a maximum limit of one thousand dollars fine, or imprisonment not exceeding six months, or both, since it gives the judge power to fix an unreasonable punishment for the offense, is void.—Ah You, In re, 88 Cal. 99, 22 Am. St. Rep. 280, 25 Pac. 974, 11 L. R. A. 408.

DISPOSITION OF BALLOTS.

See Elections, § 88.

DISPOSITION OF PERSON.

On application for release on habeas corpus. See Habeas Corpus, § 45.

DISPOSITION OF PROCEEDS.

Of sale of attached perishable property. See Attachment, § 117.
Of execution sale. See Execution, §§ 178-182.
Of fines collected. See Fines, § 11.
Of highway taxes. See Highways, § 72.
Of sale of land under power in mortgage. See Mortgages, § 173.
Of sale of mortgaged land on foreclosure by action. See Mortgages, §§ 312-316.
Of state school lands. See Public Lands, § 63.
Disposition of taxes collected. See Taxation, §§ 207-210.

DISPOSITION OF PROPERTY.

Pending divorce suit. See Divorce, § 88.
On granting divorce. See Divorce, §§ 122-131.

DISPOSITION OF PUBLIC MONEY.

Right to restrain. See Injunction, § 62.
On sale of property fraudulently conveyed by debtor. See Fraudulent Conveyances, § 151.

DISPUTE.

See Amount in Controversy.
Necessary to valid accord and satisfaction. See Accord and Satisfaction, § 2.
Necessary to valid boundary agreement. See Boundaries, § 53.

DISPUTED CLAIMS.

Allowance or rejection of disputed claims against estates of decedents. See Executors and Administrators, § 319.

DISQUALIFICATION OF JUDGE.

See Judges, II.
Effect on judgment. See Judgment, § 5.
As ground for change of venue in civil cases. See Venue, § 25.

DISQUALIFICATION OF JUROR.

As ground for new trial. See Criminal Law, § 515; New Trial, § 25.

DISQUALIFICATION OF OFFICER.

See Officers, § 11.

DISREGARD OF EVIDENCE.

Discharge of jury for. See Criminal Law, § 461.

DISRESPECTFUL LANGUAGE.

See Abusive Language.
In argument to jury. See Criminal Law, § 367.

DISSEISIN.

Of tenant in common. See Tenancy in Common, §§ 9-11.

DISSEMBLANCE.

Admissibility and competency of evidence procured by. See Criminal Law, § 137.

DISSOLUTION.

Of unincorporated associations. See Associations, § 18.
Of attachment. See Attachment, § 130.
Of law firm. See Attorney and Client, § 17.
Of beneficial associations. See Benefical Associations, § 28.

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Of colleges and universities. See Colleges and Universities, § 5.
Of corporations. See Corporations, X.
Of drainage districts. See Drains, § 31.
Of temporary injunction. See Injunction, §§ 104-115.
Of insurance companies. See Insurance, § 9.
Of joint stock companies. See Joint Stock Companies, §§ 9-11.
Of attachment in justice court. See Justices of the Peace, § 73.
Of municipal corporations. See Municipal Corporations, § 17.
Of partnership. See Partnership, §§ 100-143.
Of church organization. See Religious Societies, § 10.
Of irrigation districts. See Waters and Watercourses, § 276.

DISSOLUTION OF COMMUNITY.

See Husband and Wife, §§ 154-156.

DISSOLVED FIRM.

Rights, powers and liabilities of. See Partnership, §§ 105-111.

DISTANCE.

Description of boundary by course and distance. See Boundaries, §§ 16-22.
Opinion evidence to establish. See Criminal Law, § 227.
Judicial notice of distance between places. See Evidence, § 7.

DISTILLING COMPANY.

Liability of company or stockholders for internal tax. See Internal Revenue, § 2.

DISTINCTION BETWEEN LAW AND EQUITY.

Abolition of. See Equity, § 3.
Distinction between legal and equitable estates. See Estates, § 2.

DISTINGUISHING MARKS.

On election ballots. See Elections, § 64.

DISTRAINING ANIMALS.

Distraining trespass animals. See Animals, § 32.

DISTRIBUTION.

Of charitable trusts. See Charities, § 28.
Of property of dissolved firm. See Partnership, §§ 115-121.

DISTRIBUTION OF ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators, VII.

DISTRIBUTION OF POWERS OF GOVERNMENT.

See Constitutional Law, III.

DISTRICT AND PROSECUTING ATTORNEYS.

Include public prosecutors for particular districts or counties in civil as well as criminal cases; their eligibility for the office, appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of public prosecutors and their assistants and associate counsel in general.

CONSTITUTIONAL AND STATUTORY PROVISIONS, § 1.
APPOINTMENT, QUALIFICATION AND TENURE—APPOINTMENT, § 2.
—— ELIGIBILITY, § 3.
ASSISTANTS, § 4.
COMPENSATION AND FEES—FEES AND COSTS IN GENERAL, § 5.
—— DEPUTIES AND ASSISTANTS, § 5½.
—— COMMISSION ON FINES AND COLLECTIONS, § 6.
—— SALARY AND EXTRA ALLOWANCE, § 7.
—— ALLOWANCE AND COLLECTION, § 8.
—— CONFLICTING CLAIMS, § 9.
POWERS AND DUTIES IN GENERAL, § 10.
—— PROSECUTION AND CONDUCT OF CRIMINAL PROCEEDINGS, § 11.
—— DISMISSAL OF CRIMINAL PROSECUTION, § 12.
—— DUTY TO SEE THAT DEFENDANT IN CRIMINAL PROCEEDINGS HAS FAIR TRIAL, § 13.
—— PROSECUTION OR DEFENSE OF CIVIL ACTIONS, § 14.
—— OUTSIDE OF COUNTY OR DISTRICT, § 15.
—— POWER TO ALLOW ENTRY OF TAX JUDGMENT FOR AMOUNT LESS THAN FIXED BY STATE BOARD, § 16.
—— AUTHORITY TO WIND UP UNFINISHED BUSINESS AFTER EXPIRATION OF OFFICE, § 17.
PRESUMPTION OF AUTHORITY TO INSTITUTE PROCEEDINGS, § 18.
VALIDITY OF ACTS OF DE FACTO DISTRICT ATTORNEYS, § 19.

Right to retain additional private counsel in criminal cases. See Criminal Law, § 322.

§ 1. Constitutional and Statutory Provisions.

[a] The policy of the act of 1851, providing for the election of a district attorney in each county at the general election for that year, and at the general election every two years thereafter, was to create uniformity in the official terms of district attorneys by filling those terms at fixed periods.—People v. Brown, 16 Cal. 441.

[b] Constitution does not fix term of office of district attorney, but merely directs (article 6, sec. 7) that the legislature shall provide for his election by the people, and shall fix by law his duties and compensation.—People v. Brown, 16 Cal. 441.

[c] Section 4330 of the Political Code, as amended by the act of March 28, 1872, was in-

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tended to regulate the salaries of district attorneys, as contradistinguished from fees to which they were entitled under existing laws, and does not repeal prior statutes allowing fees in addition to salaries.—Pillsbury v. Brown, 45 Cal. 46.

§ 2. Appointment, Qualification, and Tenure —Appointment.

[a] Act of 1851 (Wood's Digest, p. 64), providing for the election of a district attorney in each county in that year and every two years thereafter, and act of 1855 (Wood's Digest, p. 561, secs. 46, 49), empowering the supervisors in each county to fill vacancies in such office by appointment, the appointee to serve until the next general election, and the person then elected to serve out the balance of the term of the original incumbent of the office, are not impliedly repealed by consolidation act of 1856, section 9, as to San Francisco, providing a different mode of filling vacancies, "where provision is not otherwise made in this or some other act."—People v. Brown, 16 Cal. 441.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 256-262, §§ 2-9.

§ 3. —— Eligibility.

[a] There is nothing in the constitution or laws of this state, nor is there any usage or custom which requires that a license to practice law from the supreme or any other court must be obtained before a person can become eligible to the office of district attorney.—People v. Dorsey, 32 Cal. 296.

§ 4. Assistants.

[a] An assistant prosecuting district attorney, appointed by the board of supervisors of the city and county of San Francisco, under the act of April 3, 1858 (238), is not limited in his official action to any particular class of cases. The true construction of the statute is, that he shall be prosecuting attorney in the police court, and shall assist the district attorney in the discharge of his various legal duties.—People v. Magallones, 15 Cal. 426.

[b] In absence of objection by attorney general, appeal by county from judgment rendered against it will be dismissed on motion of district attorney, in pursuance of resolution of board of supervisors, although an attorney claiming to act as special counsel for the appellant opposes the motion.—Allen v. County of San Bernardino, 72 Cal. 450, 14 Pac. 18.

[c] County Government Act of 1893, (Stats. 1893, p. 359), section 25, subdivision 36, declaring that the county board of supervisors shall have authority to authorize the district attorney to appoint an assistant district attorney, which office was thereby created, was not unconstitutional, since the assistant district attorney was but a deputy, and by section 61 of the same act the district attorney could appoint as many deputies as he saw fit, and, if not a deputy, the board had power to authorize the district attorney to fill the office when in their judgment the public interest required it.—Freman v. Barnum, 131 Cal. 396, 63 Pac. 691.

[d] Under Political Code, section 472, providing that, when a district attorney shall become disqualified from conducting a criminal prosecution, the attorney general may employ special counsel at the expense of the state, the attorney general must appoint special counsel in case of permanent disqualification of the district attorney, due to the latter having been defendant's attorney at a former trial of the case.—Toland v. Ventura County, 135 Cal. 412, 67 Pac. 498.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 262-272, §§ 10-17.

§ 5. Compensation and Fees—Fees and Costs in General.

[a] A district attorney is not entitled to fees for prosecuting an offender convicted of violating a city ordinance.—Pillsbury v. Brown, 47 Cal. 477.

[b] A contract by a board of supervisors to retain the county district attorney to attend to county litigation in another county, after the term of his office has expired, is not a contract for the increase of his salary, nor is it void because made with him during his term of office, if made in good faith.—Jones v. Morgan, 67 Cal. 308, 7 Pac. 734.

[c] Acts of 1869-70, page 170, provides for a salary for the district attorney of Fresno county, and for a fee of fifteen dollars for all district attorneys for each conviction in cases of misdemeanor, to be a county charge in Fresno county if the defendant therein is unable to pay it. Political Code, sections 4256-4258, prescribe the duties of district attorneys, and that, when not engaged, they shall attend before magistrates when required in cases of arrest. The attorney for Fresno county sued for fees for convictions in cases that he did not prosecute, nor attempt to collect the fees from the defendants therein by execution or otherwise. Held, that the county was not liable.—Edwards v. Fresno County, 74 Cal. 421, 16 Pac. 239.

[d] Political Code, section 4046, gives boards of supervisors the management and control of suits to which the county is a party, and act of April 23, 1880, empowers any county to sue in its own name for delinquent taxes, but district attorneys are not expressly authorized to sue for delinquent taxes; and one who does bring such action without the direction or ratification of the supervisors can recover no attorneys' fees of defendant, nor costs against the county.—San Diego Co. v. California Southern R. Co., 1 Pac. 897.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 273-291, §§ 18-25.

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§ 5½. —— Deputies and Assistants.

[a] Under acts of 1893, section 173, and acts of 1897, sections 59, 215, 233, the deputy district attorneys of Tulare county who were holding office at the time of the enactment of the law of 1897 are entitled to the salary provided by the law of 1893.—McPhail v. Jefferds, 130 Cal. 480, 62 Pac. 735; Clark v. Jefferds, 130 Cal. 480, 62 Pac. 735; De Witt v. Jefferds, 130 Cal. 480, 62 Pac. 735; Bliss v. Jefferds, 130 Cal. 480, 62 Pac. 735.

[b] The provision of the county government act of 1893, that the district attorney may appoint one assistant, at a salary of two thousand dollars, and two deputies, at a salary of fifteen hundred dollars, per annum, does not mean fifteen hundred dollars for the two deputies, but for each.—Freman v. Marshall, 137 Cal. 159, 69 Pac. 986.

§ 6. —— Commissions on Fines and Collections.

[a] Under the statute giving a district attorney a commission on money collected by him for the county, it is immaterial whether he recovers the money by action of debt or proceeds by mandamus to procure a warrant which is obtained and subsequently converted into money by the county. In either case, he is entitled to his commission.—Higby v. Calaveras County, 18 Cal. 176.

[b] In an action prosecuted by the district attorney to recover a swamp-land assessment, delinquent before the adoption of the code, he is entitled to fifteen per cent of the recovery, to be assessed as costs.—People v. Hagar, 52 Cal. 190.

[c] The district attorney of Lake county, in an action to recover a tax, is entitled to the percentage provided for in the act of March 5, 1870.—Lake County v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876.

[d] If section 3553 of the Political Code were impliedly repealed, the district attorney could not be heard to say that costs and fees collected thereunder in his official capacity were paid to him illegally, and that he therefore has the right to retain them.—County of Kern v. Fay, 131 Cal. 547, 67 Pac. 857.

§ 7. —— Salary and Extra Allowance.

[a] Political Code, section 4330, as amended by act of March 28, 1872 (Stats 1871-72, p. 553), which fixes the salary of the district attorney of San Joaquin county at two thousand five hundred dollars in lieu of all the fees, was intended to regulate the salaries of district attorneys as distinguished from fees to which they were entitled under existing laws, and was not intended, and did not have the effect, to repeal prior statutes allowing fees in addition to salaries.—Pillsbury v. Brown, 45 Cal. 46.

[b] Under Statutes of 1893, page 346, section 197, providing that the district attorney of K. county shall receive, as compensation for his services, a fixed annual salary; and section 216, prescribing that such salary shall be in full compensation for all services of every kind rendered by him as such officer—such attorney, holding office from 1895 to 1899, was not entitled to the fee of ten dollars for each suit of foreclosure against delinquent purchasers of school lands, authorized by Political Code, section 3553, passed in 1873, in addition to his salary, since the money was collected by him in his official capacity.—Kern County v. Fay, 131 Cal. 547, 63 Pac. 857.

[c] Under sections 132 and 133 of the county government act of 1897 (Stats. 1897, p. 488, c. 277), which make it the duty of the district attorney to prosecute all persons charged with crime, and sue for the recovery of penalties and forfeitures accruing to the state or county, and to defend suits against the county, and to give, without fee, his opinion in writing to county officers and the board of supervisors, and prohibiting him from presenting any claim for allowance against the county, except for his own services, and under section 215 of the same act (page 572), which declares that the salaries and fees provided therein shall be in full compensation for all services rendered by the county officers or their deputies, and requiring deputies to be paid by their principals out of their salaries, unless otherwise provided, the district attorney cannot claim any extra compensation for his services, or for the services of any deputy or assistant, such as a stenographer employed in writing letters, pleadings, judgments, opinions, etc.—Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651.

[d] Constitution, article 11, section 9, prohibits the increase of the compensation of county or municipal officers after their election, or during their term of office. The County Government Act of 1897, sections 132, 133, define the duties of the district attorney, and section 215 of the act declares that the salaries and fees provided therein shall be in full compensation for all services rendered by the officers therein named, or by their deputies, and provides for the payment of deputies by their principals out of their salaries. Held, that the county board of supervisors cannot appoint a salaried stenographer, for the district attorney, either directly or indirectly, by allowing a claim against the county for work done by such stenographer.—Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651.

[e] Nor are the services rendered by such a stenographer personal expenses of the district attorney, within the meaning of section 228 of the same act (page 575), which makes the traveling and other personal expenses of the district attorney incurred in criminal and civil cases, and other matters in which the county is interested, a county charge.—Humiston v. Shaffer, 145 Cal. 195, 78 Pac. 651.

§ 8. —— Allowance and Collection.

[a] Claim of district attorney for his commission on debts recovered for the county

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comes within that clause of section 17 of the limitation act of 1850, which bars "an action upon a liability created by statute, other than a penalty or forfeiture," in three years. Such claim is exclusively the creature of the statute.—Higby v. Calaveras County, 18 Cal. 176.

[b] The statute does not allow the district attorney commissions on sums paid into the county treasury by the debtor, on a compromise made by the board of supervisors in good faith, pending an action brought by the county to collect an amount claimed due. Where he is entitled to commissions, and a compromise is effected, attributable solely to the litigation, and the money is paid into the county treasury for the purpose of depriving him of his commissions, such averments must be made in the complaint to recover these commissions as will show such facts to have existed. In such case, an averment that a certain sum was collected by means of said action, which amount was paid into the county treasury in pursuance of a compromise made by the board of supervisors while the action was pending, is not sufficient.—Herrington v. Santa Clara County, 44 Cal. 496.

§ 9. —— Conflicting Claims.

[a] An out-going district attorney must surrender to his successor the prosecution of all tax suits pending at the time of the change of incumbents; but semble that he should receive a ratable proportion of the percentage collected from the same by his successor.—Cole v. McKune, 19 Cal. 422.

[b] The salary of the office of district attorney for a period when it is occupied by a person without right belongs to the party entitled to the office.—Dorsey v. Smith, 28 Cal. 21.

§ 10. Powers and Duties in General.

[a] District attorney is mere ministerial officer.—Sternes, Ex parte, 82 Cal. 248, 23 Pac. 38, 40.

[b] District attorney is the officer authorized by law to take charge of and conduct county litigation.—Merced County v. Cook, 120 Cal. 277, 52 Pac. 721.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cent. Dig., cols. 302-310, §§ 34-37.

§ 11. —— Prosecution and Conduct of Criminal Proceedings.

[a] It was error to withdraw from the consideration of the jury an admission by the district attorney, at the trial, that one of his witnesses was then under indictment for receiving stolen property; such admission being material, as affecting the witness' credibility, and the district attorney being competent to make it.—People v. Robles, 34 Cal. 591.

[b] In the filing of informations the functions of the district attorney are ministerial only, and not appellate over those of the committing magistrate. He has no power to file an information for any greater or other offense than that specified in the commitment by the magistrate, though in accordance with the complaint made before the magistrate.—People v. Nogiri, 142 Cal. 596, 76 Pac. 490.

§ 12. —— Dismissal of Criminal Prosecution.

[a] District attorney has no power to order judge to dismiss criminal case.—People v. Ward, 85 Cal. 590, 24 Pac. 785.

§ 13. —— Duty to See that Defendant in Criminal Proceedings has Fair Trial.

[a] It is the sworn duty of prosecuting attorneys to see that defendant has a fair and impartial trial and that he is not convicted except by competent and legitimate evidence. It is not his sole duty to convict.—People v. Lee Chuck, 78 Cal. 329, 20 Pac. 719.

§ 14. —— Prosecution or Defense of Civil Actions.

[a] A district attorney has authority to bring an action of his own volition in the name of the people, upon the bond of the tax collector of his county.—People v. Love, 25 Cal. 520.

[b] In all cases saving those embraced in section 8, County Government Act, district attorney can institute suit only under direction of supervisors.—Ventura v. Clay, 119 Cal. 214, 51 Pac. 189.

[c] Subdivison 3 of section 136 gives district attorney no right to institute proceedings at will. It merely imposes duty to do so when directed by competent authority.—Ventura v. Clay, 119 Cal. 215, 51 Pac. 189.

[d] As a general rule all actions brought by or prosecuted on behalf of a county must be brought by authority of the board of supervisors, and where money has been collected for supervisors under contract with them for a percentage, the district attorney has no authority to prosecute an action in the name of the county to recover the amount of such percentage, without a previous order of the board of supervisors. The district attorney has only the limited power given him under section 8, where the board has ordered money paid without authority of law.—County of Contra Costa v. Soto, 133 Cal. 57, 70 Pac. 1019.

§ 15. —— Outside of County or District.

[a] A county attorney is not required to go beyond the limits of his county to prosecute or defend litigation for the county.—(Cal. 1872) Herrington v. Santa Clara County, 44 Cal. 496.

§ 16. —— Power to Allow Entry of Tax Judgment for Amount Less than Fixed by State Board.

[a] District attorney has no authority to allow judgment for less than amount of tax

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fixed by state board.—Sacramento County v. Central etc. R. R., 61 Cal. 255.

§ 17. —— Authority to Wind Up Unfinished Business After Expiration of Office.

[a] Suits brought by the district attorney of the city and county of Sacramento to collect delinquent taxes under the acts of 1860 and 1861 (Stats. 1860, p. 159; Stats. 1861, p. 119), and pending when his successor in office was qualified, must be turned over to such successor.—Cole v. McKune, 19 Cal. 422.

[b] The fact that a portion of the business in the hands of a district attorney is unfinished, on the assumption of office by his successor, does not give such attorney any authority to conclude it.—Cole v. McKune, 19 Cal. 422.

§ 18. Presumption of Authority to Institute Proceedings.

[a] Rule of presumption of authority of attorney has no application to district attorney whose powers and duties are defined by law.—Sacramento County v. Central etc. R. R., 61 Cal. 255.

[b] The district attorney, being an attorney at law, is presumed to be authorized by the proper party to institute the actions he may bring, in the absence of evidence to the contrary.—County of San Luis Obispo v. Hendricks, 71 Cal. 242, 11 Pac. 682.

§ 19. Validity of Acts of De Facto District Attorneys.

[a] Acts of de facto assistant district attorney are valid.—People v. Turner, 85 Cal. 433, 24 Pac. 857.

DISTRICT COURT OF APPEALS.

See Courts, § 114.

Number of judges necessary to adjudication in. See Courts, § 91.

Transfer of causes from supreme court to district court of appeals. See Courts, § 179.

DISTRICT COURT OF UNITED STATES.

Jurisdiction of. See Courts, § 160.

DISTRICTS.

Drainage districts. See Drains, §§ 7-53.

Election districts. See Elections, § 19.

Highway districts. See Highways, § 55.

Levee districts. See Levees, §§ 2-6.

School districts. See Schools and School Districts.

Irrigation districts. See Waters and Watercourses, §§ 262-286.

DISTURBANCE.

Of possession of tenant. See Landlord and Tenant, § 71.

DITCHES.

See Drains.

Right to enjoin maintenance of ditch. See Injunction, § 47.

Irrigation ditches, flumes and conduits. See Waters and Watercourses, § 238.

DIVERSION OF WATER.

Of non-navigable streams. See Waters and Watercourses, § 47.

Of subterranean waters. See Waters and Watercourses, § 91.

DIVERSITY OF CITIZENSHIP.

As ground for removal of cause from state to federal court. See Removal of Causes, § 2.

DIVESTITURE OF JURISDICTION.

See Courts, § 33; Criminal Law, § 29.

DIVIDENDS.

Of state savings banks. See Banks and Banking, § 114.

On corporate stock. See Corporations, §§ 170-175.

DIVIDING FENCES.

See Fences.

DIVIDING LANDS.

See Adjoining Land Owners; Boundaries.

DIVIDING PROPERTY.

See Descent and Distribution; Partition.

DIVIDING WALLS.

See Adjoining Land Owners; Party-walls.

DIVISION.

Of drainage districts. See Drains, § 14.

DIVISION FENCES.

As boundaries. See Boundaries, § 33.

DIVISION LINES.

Location of. See Boundaries, § 26.

DIVISION OF CAPITAL STOCK.

Among shareholders of private corporations. See Corporations, § 83.

DIVISION OF CHURCH.

Apportionment of property on division of church. See Religious Societies, § 9.

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DIVISION OF COUNTIES.

To form new county. See Counties, § 11.
Adjustment of rights, and liabilities on division of counties. See Counties, § 12.

DIVISION OF COURT.

Affirmance or dismissal of appeal by. See Appeal and Error, §§ 1364, 1365.

DIVISION OF CROPS.

Between landlord and tenant renting on shares. See Landlord and Tenant, § 132.

DIVISION OF OPINION.

Effect of. See Courts, § 93.

DIVISION OF PROFITS.

Corporate profits. See Corporations, §§ 170-173.

DIVISION OF PROPERTY.

See Partition.

On granting divorce. See Divorce, §§ 122-132.
Of dissolved firm. See Partnership, § 119.

DIVORCE.

Include dissolution of the relation of marriage, total or partial, by legislative or judicial action, and judicial separation of husband and wife; nature and scope of the remedy in general; grounds of actions for divorce or separation and defenses thereto; jurisdiction to grant divorces or separations, and proceedings therefor; incidental relief as to alimony, disposition of property, custody and support of children, etc.; judgments or decrees and operation and effect thereof; review of proceedings; costs in actions for divorce or separation; and status, rights, and liabilities of divorced persons.

I. NATURE AND FORM OF REMEDY, § 1-6.

II. GROUNDS, §§ 7-15.

III. DEFENSES, §§ 16-25.

IV. JURISDICTION, PROCEEDINGS AND RELIEF, §§ 26-82.
- A. Jurisdiction, Venue and Limitations, §§ 26-30.
- B. Parties, Process and Proceedings, §§ 31-33.
- C. Pleading, §§ 34-43.
- D. Evidence, §§ 44-55.
- E. Dismissal, Trial and New Trial, §§ 56-62.
- F. Judgment, §§ 63-73.
- G. Appeal, §§ 74-79.
- H. Fees and Costs, §§ 80-82.

V. ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY, §§ 83-144.
- A. In General, §§ 83-91.
- B. Temporary Alimony, §§ 92-98.
- C. Allowance for Counsel Fees and Expenses, §§ 99-110.
- D. Permanent Alimony, §§ 111-121.
- E. Disposition of Property, §§ 122-132.
- F. Enforcement of Order, Judgment or Decree, §§ 133-139.
- G. Appeal, §§ 140-144.

VI. CUSTODY AND SUPPORT OF CHILDREN, §§ 145-162.

VII. OPERATION AND EFFECT OF DIVORCE AND RIGHTS OF DIVORCED PERSONS, §§ 163-165.

Right to sue for divorce pending suit to annul marriage. See Abatement and Revival, § 19.
Divorce and remarriage pending suit as ground for abatement. See Abatement and Revival, § 52.
Death of party pending suit as abating action. See Abatement and Revival, § 69.
Judgments and orders in divorce cases which are appealable. See Appeal and Error, § 45.
Appealability of decisions relating to alimony. See Appeal and Error, § 185.
Preference to appeal from alimony decree. See Appeal and Error, § 1029.
Review of allowance of alimony. See Appeal and Error, § 1212.
Right of attorneys to take divorce case on contingent fee. See Attorney and Client, § 127.
Validity of contract to marry made with person divorced within a year. See Breach of Marriage Promise, § 4.
Validity of contracts for divorce or separation. See Contracts, § 68.
Effect of divorce of parents on rights of children to probate homestead. See Homesteads, § 127.
As terminating family relation. See Homesteads, § 173.
Property acquired after divorce as community property. See Husband and Wife, § 130.
Actions for separate maintenance. See Husband and Wife, §§ 180-184.
Right to jury trial in divorce suit. See Jury, § 9.
Proceedings to annul marriage. See Marriage, §§ 23-26.

I. NATURE AND FORM OF REMEDY.

NATURE OF SUIT, § 1.
CONSTRUCTION AND VALIDITY OF ACT OF 1903, § 2.
CONSTRUCTION AND OPERATION OF HAWAIIAN STATUTE, § 3.
DIVORCE FROM BED AND BOARD, § 4.
JOINDER OF CAUSES FOR DIVORCE AND PROPERTY RIGHTS, § 5.
PUBLIC INTEREST IN SUIT, § 6.

For Authorities from Other States:
Divorce by the legislature: 48 Am. Dec. 437, note.

§ 1. Nature of Suit.

[a] Suit for divorce is a suit in equity.—Lyons v. Lyons, 18 Cal. 447; Sharon v. Sharon, 67 Cal. 193, 7 Pac. 456, 635, 8 Pac. 709; Wadsworth v. Wadsworth, 81 Cal. 187, 15 Am. St. Rep. 38, 22 Pac. 648.

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[b] Divorce suit is action on contract.—Mott v. Mott, 82 Cal. 417, 22 Pac. 1140, 1142.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 573; 17 Cent. Dig., cols. 359-361, §§ 1, 2.

§ 2. Construction and Validity of Act of 1903.

[a] Statutes of 1903, page 75, chapter 67, declaring that a final judgment of divorce shall not be entered until the expiration of one year after the rendition of an interlocutory decree of divorce, is not invalid because it only affected a decree awarding a divorce, and authorized the rendition of a final judgment denying a divorce without an interlocutory decree.—Deyoe v. Superior Court of Mendocino County, 140 Cal. 476, 74 Pac. 28.

[b] The right to divorce is statutory and subject to regulation by the legislature, which may impose restrictions or delays in regard to the time for beginning the action, or the method and order of procedure after the same is begun; and hence the legislation of 1903 (Stats. 1903, pp. 75, 76, c. 67), adding to the Civil Code sections 131, 132, prohibiting the granting of absolute divorces until the expiration of a year from the entry of an interlocutory decree, is constitutional.—Grannis v. Superior Court of City and County of San Francisco, 146 Cal. 245, 79 Pac. 891.

§ 3. Construction and Operation of Hawaiian Statute.

[a] A statute of the Republic of Hawaii, declaring that where a divorce is decreed for the adultery of the wife, the husband shall hold her personal estate forever, can have no operation pending suit for such divorce, and can have no applicability until the entry of judgment.—McGrew v. Mutual Life Insurance Co. of New York, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103.

§ 4. Divorce from Bed and Board.

[a] Court has discretion to limit divorce to bed and board.—Conant v. Conant, 10 Cal. 250, 70 Am. Dec. 717.

[b] Courts of California have no authority to grant divorce a mensa et thoro, or to compel a husband to support his wife while she is living separate and apart from him, against his will and consent, without any statutory ground for an absolute divorce, or any statutory excuse for her absence from his home.—Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., col. 364, § 6.

§ 5. Joinder of Causes for Divorce and Property Rights.

[a] Under Statutes of 1850, as to husband and wife, a petition for the partition of common property is well joined with an application for a divorce.—Kashaw v. Kashaw, 3 Cal. 312.

[b] A petition in divorce, uniting a cause of action for recovery of community property, is demurrable for misjoinder of causes of action.—Cummings v. Cummings, 14 Pac. 562.

§ 6. Public Interest in Suit.

[a] Public has an interest in result of every divorce suit.—McBlain v. McBlain, 77 Cal. 509, 20 Pac. 61.

[b] Public has an interest in every divorce suit and court should afford fullest possible hearing in such cases.—Cottrell v. Cottrell, 83 Cal. 460, 23 Pac. 531.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 578; 17 Cent. Dig., col. 368, § 13.

II. GROUNDS.

IN GENERAL, § 7.
ANTENUPTIAL INCONTINENCE, § 8.
CONCEALMENT OF PREGNANCY, § 9.
HABITUAL DRUNKENNESS, § 10.
CRUELTY, § 11.
WILLFUL NEGLECT OR NONSUPPORT, § 12.
—— ABILITY TO PROVIDE, § 13.
—— EFFECT OF WIFE'S SELF-SUPPORTING ABILITY, § 14.
DESERTION, § 15.

§ 7. In General.

[a] The policy of the law is against severing the marriage relation on slight ground or for trivial causes.—Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

FOR AUTHORITIES FROM OTHER STATES:

Statutory causes for divorce in the different states: 65 Am. Dec. 708, note.

Impotence as a ground for divorce: 28 Am. Dec. 447, note. See, also, 17 Cent. Dig., cols. 377, 378, §§ 27, 28.

§ 8. Antenuptial Incontinence.

[a] Antenuptial incontinence is not a ground for a divorce.—Baker v. Baker, 13 Cal. 87.

§ 9. Concealment of Pregnancy.

[a] If a woman be with child by a stranger at the time of marriage, and her intended husband be ignorant thereof, he shall have a divorce, for the fraud upon him vitiates the contract.—Baker v. Baker, 13 Cal. 87.

§ 10. Habitual Drunkenness.

[a] To constitute "habitual intemperance," within our divorce statute, it is not necessary that the habit of drinking intoxicating liquors to excess be of such a character as to render the party at all times incapable of attending to business; but if there be a habit of drinking to excess to such a degree as to

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disqualify the party from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance, although at intervals he may be in a condition to attend to his business.—Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91.

FOR AUTHORITIES FROM OTHER STATES:

34 L. R. A. 449, note. See, also, 14 Cyc. 662, 623; 17 Cent. Dig., cols. 383-386. §§ 41-45.

§ 11. Cruelty.

[a] Cruelty may be defined, generally, to be any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other.—Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615-n.

[b] Extreme cruelty, in our divorce act, means the same thing as the saevitia or cruelty of the English ecclesiastical courts.—Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615-n.

[c] If there has been actual violence it must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of future danger in order to entitle plaintiff to a divorce.—Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615-n.

[d] Courts grant divorces, not to punish offense already committed, but to relieve the complaining party of apprehended danger. And the divorce may follow, even in the absence of any actual violence.—Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615-n.

[e] The acts of cruelty which are made a cause of divorce need not be persistent nor a fixed habit.—Mahone v. Mahone, 19 Cal. 627, 81 Am. Dec. 91.

[f] A husband's extreme cruelty, to justify a divorce, need not be such as to furnish an apprehension that the continuance of cohabitation would be attended with bodily harm to the wife.—Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91.

[g] Cruelty, as the ground of a divorce, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehensions of bodily harm as naturally interferes with the discharge of marital duty.—Powelson v. Powelson, 22 Cal. 358.

[h] Any conduct sufficiently aggravated to produce ill-health, or bodily pain, though operating primarily upon the mind only, is legal cruelty.—Powelson v. Powelson, 22 Cal. 358.

[i] A husband's sending his children to an academy in another state, while his wife is living away from him with her parents, is not cruel and inhuman treatment justifying a divorce.—Christie v. Christie, 53 Cal. 26.

[j] Extreme cruelty is distinct from every other ground.—Haskell v. Haskell, 54 Cal. 262.

[h] Adultery does not, in a legal sense, constitute extreme cruelty.—Haskell v. Haskill, 54 Cal. 262.

[i] Habitual intemperance does not, in a legal sense, constitute extreme cruelty, but is something different from any other cause of divorce, and constitutes a separate and distinct cause of action.—Haskell v. Haskell, 54 Cal. 262.

[j] A wife deserted her husband and children for three months, while she went to Germany to learn painting. Held, that this was not such cruelty as entitled the husband to a divorce.—Smith v. Smith, 62 Cal. 466.

[k] Cruelty does not include acts of insane wife.—Cohen v. Cohen, 85 Cal. 109, 24 Pac. 659.

[l] Section 94, Civil Code, does not give proper definition of extreme cruelty as it omits essential element of wrong or injustice. Waldron v. Waldron, 85 Cal. 255, 24 Pac. 649-858.

[m] Infliction of grievous mental suffering alone, without reasonably apprehended injurious effect upon body or health of complaining party, is not cruelty.—Waldron v. Waldron, 85 Cal. 256, 259, 24 Pac. 640, 858, overruled in Barnes v. Barnes, 95 Cal. 175, 177, 24 Pac. 649, 858.

[n] Institution and dismissal of suit for divorce, complaint in which contained extremely cruel and unjust charges, is act of cruelty justifying divorce.—Cooper v. Cooper, 88 Cal. 48, 25 Pac. 1062.

[o] Any unjustifiable conduct upon the part of either of the spouses, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.—Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298.

[p] What acts of a spouse will constitute extreme cruelty, within the meaning of the statute providing for a divorce upon that ground, cannot be defined with precision; but each case is to be determined, according to its own peculiar circumstances, by the good sense and judgment of the court or jury, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.—Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566.

[q] A finding that defendant was chargeable with extreme cruelty to his wife (plaintiff) is sustained by evidence that without sufficient provocation, and without grounds he called her a whore, a hog, and a hypocrite; charged her with infidelity; and accused her, when she was ill, of having contracted her disease by illicit intercourse, though such illness was not of a character indicating such origin.—Smith v. Smith, 119 Cal. 183, 48 Pac. 730.

[r] It is not necessary to constitute extreme cruelty that it result in impairment of health. Smith v. Smith, 119 Cal. 187, 48 Pac. 730.

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[s] To justify a divorce because of abusive anguage and charges of unchastity and immorality and insanity, it is not necessary that uch conduct should have occurred in the resence of other than the children of the arties.—Andrews v. Andrews, 120 Cal. 184, 2 Pac. 298.

[t] A husband called his wife vile names harged her with being insane, unchaste, and rith having tried to poison him. Held, that uch conduct constituted extreme cruelty nder the statute describing it as the iniction of grievous bodily injury or mental uffering.—Andrews v. Andrews, 120 Cal. 184, 2 Pac. 298.

[u] Infliction of grievous mental suffering, ay constitute extreme cruelty, independent f physical injury.—Andrews v. Andrews, 20 Cal. 187, 52 Pac. 298.

[v] Extreme cruelty is infliction of grievus bodily injury or grievous mental sufferng.—Andrews v. Andrews, 120 Cal. 187, 52 ac. 298.

[w] Evidence that after a husband, without cause, had deserted his wife, who was t the time sick, she missed her diamonds nd her sealskin sacque, and reported to riends of his that she thought he had taken hem, is insufficient to entitle him to divorce n the ground of extreme cruelty.—Kuhl v. uhl, 124 Cal. 57, 56 Pac. 629.

[x] A charge by a husband, in a cross-bill led by him for divorce, that his wife was regnant from some one other than himself hen he married her, and that she concealed he fact from him, tends to cause the wife grievous mental suffering," and is a sufficint ground to sustain a subsequent bill by the ife, where it appears that the charge was lse and malicious, and that the husband's ill was dismissed.—Haley v. Haley, 14 Pac. 2.

OR AUTHORITIES FROM OTHER STATES:

Cruelty as a ground: 29 Am. Dec. 674, 73 Am. Dec. 619, notes.

Cruelty, extreme, what amounts to: 51 Am. Rep. 736, note.

Cruelty which justifies the granting: 40 Am. Rep. 463, note.

Cruelty as a ground for divorce: 65 Am. St. Rep. 69, note. See, also, 14 Cyc. 598-611; 17 Cent. Dig., cols. 391-420, §§ 62-83.

12. Willful Neglect or Nonsupport.

a] Willful neglect, whether accompanied ith desertion or otherwise, is a distinct ound of divorce.—Washburn v. Washburn, Cal. 475.

b] Support of wife is a continuing obligaon on part of husband, and his failure to eet it is a continuing cause for a divorce, less there has been an unreasonable lapse time before the action is commenced; and is not released from this obligation by a dgment in his favor in an action for a divorce upon this ground.—Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 624, 625; 17 Cent. Dig., cols. 427, 428, §§ 95, 96.

§ 13. —— Ability to Provide.

[a] An application for a divorce on the ground of neglect must fail, where it does not affirmatively appear, on the part of the applicant, that the husband was the owner of property sufficient to provide support for the wife, and neglected to do so.—Washburn v. Washburn, 9 Cal. 475.

[b] When a husband is in constant employment for which he receives the ordinary wages of his labor, and refuses or neglects for years to make any provision for the wants of his wife, a court is justified in finding him guilty of willful neglect.—Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

§ 14. —— Effect of Wife's Self-supporting Ability.

[a] Where the earnings of the wife are sufficient for her support, and are applied to such purpose by the husband, or with his assent, there is no basis for a divorce on the ground of neglect, as the earnings of both husband and wife go into a common fund, the control of which belongs to the husband. Washburn v. Washburn, 9 Cal. 475.

[b] Where the wife's earnings are sufficient for her support, and they are not interfered with by the husband, the neglect of the husband to provide the common necessaries of life for the wife is not sufficient ground for a divorce, although the husband be a good workman, and able to earn enough to support the wife.—Rycraft v. Rycraft, 42 Cal. 444.

§ 15. Desertion.

[a] Willful desertion of the other, by either party, for the period of two years, is ground for a divorce under the statute.—Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

[b] Desertion must be for full period of statute, to sustain or bar a divorce.—Conant v. Conant, 10 Cal. 250, 70 Am. Dec. 717.

[c] Though a refusal on the part of the wife to accompany the husband in a reasonable change of domicile probably amounts to a desertion, yet it must appear that the proposition for removal was peremptory, and could not reasonably have been regarded as addressed to her discretion whether to accompany her husband or not.—Hardenbergh v. Hardenbergh, 14 Cal. 654.

[d] Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with the intent to desert, in the mind of the offending party.—Hardenbergh v. Hardenbergh, 14 Cal. 654; Morrison v. Morrison, 20 Cal. 431.

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[e] "Willful desertion," as used in the statute in regard to divorces, signifies an intentional desertion. It does not imply malice towards the other party.—Benkert v. Benkert, 32 Cal. 467.

[f] A desertion is made out when it is shown that the absence has commenced, and has continued during the prescribed period without the consent and against the objections of the other party.—Benkert v. Benkert, 32 Cal. 467.

[g] In an action for divorce for willful desertion, the evidence showed that the plaintiff, after the desertion, had requested the defendant, by letter, to return, and that, although they had met several times on the street, defendant had not spoken to plaintiff, nor in any way signified a willingness to live with him until more than a year after such request, when defendant, by letter, stated that she was ready to live in a fit and proper place with plaintiff, but refused to condone any offense which he might have committed against her or his marriage obligations. Held to constitute willful desertion.—Carey v. Carey, 73 Cal. 630, 15 Pac. 313.

[h] A wife is not guilty of desertion, within Civil Code, section, 103, providing that "the husband may choose any reasonable place or mode of living, and, if the wife does not conform thereto, it is desertion," though she refuses to agree with her husband as to the selection of a new home, and though he may be satisfied, if he does choose a new home, she will refuse to go to it, until he actually acquires the home, offers it to her, and she, without sufficient cause, refuses to comply with his selection.—Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

[i] Civil Code, section 96, provides that persistent refusal to have reasonable matrimonial intercourse as husband or wife, when physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion. Held, that the qualifying clause, "when there is no just cause for such refusal," applies equally to the first refusal mentioned and to the latter.—Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

[j] Desertion continues only so long as there is a want of consent to the separation on the part of the deserted party.—McMullin v. McMullin, 140 Cal. 117, 73 Pac. 808.

[k] Refusal of reconciliation after separation by consent constitutes desertion.—McMullin v. McMullin, 140 Cal. 115, 117, 73 Pac. 808.

[l] An action by a wife for divorce held required to be in good faith to prevent her separation from him amounting to desertion.—Kusel v. Kusel, 147 Cal. 297, 81 Pac. 297.

[m] A wife's maintenance of suit for separate maintenance held not to prevent her absence from him amounting to desertion.—Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

[n] Civil Code, section 101, provides that consent to a separation between husband and wife is a revocable act, and that, if one of the parties afterwards in good faith seeks a reconciliation, but the other refuses it, such refusal is desertion; and section 102 declares that, if one party to a marriage deserts the other, and before the expiration of the year required to make the desertion a cause of divorce, returns, and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. Held, that where a husband deserted his wife against her consent, he could not, 18 years thereafter, cure such desertion by an offer to return, so as to entitle him to a divorce for desertion on the wife's refusal of his offer.—McMullin v. McMullin, 71 Pac. 108.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 611-620; 17 Cent. Dig., cols. 433-460, §§ 107-138.

III. DEFENSES.

IN GENERAL, § 16.
PENDENCY OF ACTION TO ANNUL MARRIAGE, § 17.
AGREEMENT FOR OR CONSENT TO SEPARATION, § 18.
INSANITY, § 19.
CONNIVANCE AND COLLUSION, § 20.
PROVOCATION OR EXCUSE, § 21.
CONDONATION, § 22.
—— ACTS CONSTITUTING, § 23.
—— REVIVAL OF CONDONED OFFENSE, § 24.
RECRIMINATION, § 25.

§ 16. In General.

[a] Cause of action for divorce barred by statute is no defense.—McMullin v. McMullin, 140 Cal. 117, 73 Pac. 808.

FOR AUTHORITIES FROM OTHER STATES:

Loss of right to divorce after it is perfected: 84 Am. St. Rep. 136, note. See, also, 14 Cyc. 628-652; 17 Cent. Dig., cols. 462-501, §§ 140-197.

§ 17. —— Pendency of Action to Annul Marriage.

[a] The pendency of an action by the husband to annul the marriage on the ground that it was contracted under duress does not prevent an action by the wife for divorce on the ground of nonsupport.—Simpson v. Simpson, 41 Pac. 804.

§ 18. Agreement for, or Consent to, Separation.

[a] Consent to separation after desertion for time essential to give right to divorce does not bar right.—McMullin v. McMullin, 140 Cal. 117, 73 Pac. 808.

[b] The consent of a husband and wife to a separation is a revocable act; and if one of the parties thereafter in good faith seeks a reconciliation and restoration, which the

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other refuses, such refusal is desertion, which, if continued for a year, constitutes ground for divorce.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

[c] The consent of the parties to the separation need not be expressed in words, but it may be implied from the acts of the parties, and may be tacit as when the parties are willing and make no objection.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

[d] It is for the court trying the case to determine from all the facts and circumstances appearing therein whether or not there was consent or the absence of consent to the separation; and the acts, statements, and admissions of the parties are competent and material evidence in determining that question.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

[e] The character of the separation is not forever established by the status at the time when the parties ceased to live together; but what was originally a separation without consent may become a separation by consent; and that status may again be changed by the refusal to accept a reconciliation proffered in good faith.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 635, 636; 17 Cent. Dig., cols. 475, 476, § 161.

§ 19. Insanity.

[a] Marriage being a civil contract, and Civil Code, sections 92, 107, providing that it may be annulled for willful desertion for one year, a suit for divorce may be maintained against an insane person for desertion, where such desertion continued for a year before he became insane, provided there is no reasonable probability of his recovery. Harrigan v. Harrigan, 135 Cal. 397, 67 Pac. 506.

FOR AUTHORITIES FROM OTHER STATES:

Adultery of insane wife as a ground for divorce: 47 Am. Dec. 469. See, also, 14 Cyc. 628; 17 Cent. Dig., cols. 463, 464, §§ 142, 143.

§ 20. Connivance and Collusion.

[a] When the court, in an action for divorce, is informed, before the issues are tried, of the existence of a collusive agreement between the parties, by one of the parties, who then repudiated the agreement and disclosed all the facts to the court, and the pleadings are not changed, but the issues are rigorously contested, the fact of such agreement does not render void the decree granting the divorce, so as to authorize its reversal on appeal.—Loveren v. Loveren, 106 Cal. 509, 40 Pac. 801.

[b] Connivance and collusion imply consent to act complained of.—Thompson v. Thompson, 121 Cal. 12, 53 Pac. 403.

[c] Acquiescence is consent by silence (Civil Code, section 121.)—Thompson v. Thompson, 121 Cal. 12, 53 Pac. 403.

FOR AUTHORITIES FROM OTHER STATES:

Adultery, connivance in, what is not: 54 Am. Rep. 492, note; 12 L. R. A. 524, note. See, also, 14 Cyc. 644, 645; 17 Cent. Dig., cols. 477-479, §§ 162-165.

§ 21. Provocation or Excuse.

[a] Divorce for extreme cruelty will not be granted, when such cruelty is caused by the misconduct of the wife, who applies.—Johnson v. Johnson, 14 Cal. 459.

[b] Sufficient excuse obviates the wrong of desertion.—Benkert v. Benkert, 32 Cal. 471.

[c] Acts of violence to the person of the wife sufficient to authorize a divorce on the ground of extreme cruelty held not excused by the fact that the wife had an irascible temper and conducted herself improperly towards the husband.—Eidenmuller v. Eidenmuller, 37 Cal. 364.

[d] Though Civil Code, section 94, defines "extreme cruelty" as "the affliction of grievous bodily injury or grievous mental suffering upon the other by one party of the marriage," a divorce should not be granted the wife on the ground of extreme cruelty because the husband, when intoxicated and in the presence of others, called her a "whore," and other vile names, where the evidence shows that she was not uniformly kind to him, and that the mental suffering endured by her did not injure her health.—Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487.

[e] Extreme cruelty may be a just cause for refusal of the wife to have matrimonial intercourse with her husband.—Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

FOR AUTHORITIES FROM OTHER STATES:

25 L. R. A. 564, note. See, also, 14 Cyc. 629-635; 17 Cent. Dig., cols. 465-474, §§ 145-159.

§ 22. Condonation.

[a] Acts tending to condone must be accompanied by express agreement to condone (construing Civil Code, section 118.)—Smith v. Smith, 119 Cal. 189, 192, 48 Pac. 730.

[b] Condonation is forgiveness.—Thompson v. Thompson, 121 Cal. 12, 53 Pac. 403.

FOR AUTHORITIES FROM OTHER STATES:

Condoned adultery as recriminative bar for divorce for adultery on part of condoning party: 90 Am. Dec. 611, note. See, also, 14 Cyc. 637-643; 17 Cent. Dig., cols. 481-493, §§ 169-187.

§ 23. —— Acts Constituting.

[a] Where the desertion of a husband or wife has continued for more than two years,

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an offer made by the offending party to return and live and cohabit with the other will not defeat the action for a divorce, unless accepted and acted upon. An offer to receive the offending party may, until cohabitation, be withdrawn.—Benkert v. Benkert, 32 Cal. 467.

[b] A single act of sexual intercourse between husband and wife, after commencement of suit for divorce on the ground of adultery, is not alone sufficient to show "restoration of the offending party to all marital rights," as required by Civil Code, section 116, to constitute condonation.—Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590.

[c] A voluntary promise by the wife, after separation from the husband on account of his extreme cruelty, to return to, and live with him does not alone constitute condonation, if such promise is not kept, and it has not the effect to remit his offenses nor to restore him to marital rights.—Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

[d] Civil Code, section 118, provides that in actions for divorce conjugal kindness shall not be evidence of condonation of any of the acts authorizing divorce, unless accompanied by an express agreement to condone. Held, that where defendant had been guilty of inhuman and cruel treatment toward plaintiff, affectionate letters written to him thereafter by plaintiff were not sufficient to condone the offense.—Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772.

[e] The original offense is not condoned by mere subsequent acquiescence of both parties in a separation, but it must be prosecuted with reasonable diligence, and if so prosecuted may be made a defense to an action for divorce by the one who has proffered a reconciliation and been refused. But if the cause of action for the original offense is not then subsisting, and is barred by the statute, it cannot be made a defense to such action.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

[f] Under Civil Code, sections 115, 116, a finding that plaintiff had not condoned her husband's matrimonial offense by subsequent cohabitation held not error.—Andros v. Andros, 32 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

14 Cyc. 638, 641; 17 Cent. Dig., cols. 481-488, §§ 171-179.

§ 24. —— Revival of Condoned Offense.

[a] Where on condonation husband renews his former ill-treatment, the condonation is revoked and constitutes no bar to suit.—Andrews v. Andrews, 120 Cal. 188, 189, 52 Pac. 298.

[b] Condonation is revoked when condonee commits offense anew.—Thompson v. Thompson, 121 Cal. 12, 53 Pac. 403.

FOR AUTHORITIES FROM OTHER STATES:

14 Cyc. 641-643; 17 Cent. Dig., cols. 490-493, §§ 185-187.

§ 25. Recrimination.

[a] Doctrine of recrimination, or compensatio criminum, applicable to suits for divorce, and the several offenses which, by the statute, constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine.—Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

[b] Any proper ground of divorce is pleadable in bar.—Conant v. Conant, 10 Cal. 250, 70 Am. Dec. 717.

[c] To sustain recrimination, defendant must show proper ground of divorce from plaintiff.—Conant v. Conant, 10 Cal. 250, 70 Am. Dec. 717.

[d] Though desertion for a less period than two years is not sufficient, under the statute, to bar a decree where defendant's adultery is established, it may be considered by the court, in the exercise of its discretion, whether to decree an absolute divorce, or a separation from bed and board.—Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

[e] Under Civil Code, section 122, declaring that "recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce," a defendant in a divorce action may allege and prove facts constituting a cause of divorce against plaintiff in bar of plaintiff's cause of divorce.—Cassidy v. Cassidy, 63 Cal. 352.

[f] Where defendant denies allegations of complaint, and files cross-complaint charging a ground of divorce against the plaintiff, if the court upon hearing the evidence finds the charges of both parties to be true, it may deny all relief to either party, and dismiss the action.—Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

[g] A recriminatory plea by the husband, alleging desertion by the wife for not conforming to his choice of a reasonable place and mode of living, is not sustained where it appears that they had lived for years in a suitable home belonging to the wife, among her friends, and that his choice of a different home was not made in good faith, and that his offer of another suitable home elsewhere was not made until after her cause of action against him for a divorce became perfected.—Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

FOR AUTHORITIES FROM OTHER STATES:

Recriminatory defenses in suits for divorce: 15 Am. Dec. 211, note.

Recrimination as a defense in proceedings for divorce: 86 Am. St. Rep. 333. See, also, 14 Cyc. 648-651; 17 Cent. Dig., cols. 494-501, §§ 188-197.

IV. JURISDICTION PROCEEDINGS AND RELIEF.

A. Jurisdiction, Venue and Limitations, §§ 26-30.

B. Parties, Process and Proceedings, §§ 31-33.

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C. Pleading, §§ 34-43.

D. Evidence, §§ 44-55.

E. Dismissal, Trial and New Trial, §§ 56-62.

F. Judgment, §§ 63-73.

G. Appeal, §§ 74-79.

H. Fees and Costs, §§ 80-82.

A. JURISDICTION, VENUE AND LIMITATIONS.

IN GENERAL, § 26.
CIVIL JURISDICTION UNDER MEXICAN LAW, § 27.
DOMICILE OR RESIDENCE OF PARTIES, § 28.
VENUE AND CHANGE THEREOF, § 29.
LIMITATIONS AND LACHES, § 30.

§ 26. In General.

[a] Historical review of jurisdiction in divorce cases.—Sharon v. Sharon, 67 Cal. 187-194, 7 Pac. 456, 635, 8 Pac. 709.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 581-593; 17 Cent. Dig., cols. 502-537, §§ 198-236.

§ 27. Civil Jurisdiction Under Mexican Law.

[a] By the Mexican law, marriage lawfully contracted in the face of the Catholic church, and between members thereof, cannot be dissolved by the civil tribunals. But the union of man and wife without the sanction of the church is regarded as a mere civil contract, and, as such, falls within the legitimate sphere of the ordinary jurisdiction of the court of first instance.—Harman v. Harman, 1 Cal. 215.

§ 28. Domicile or Residence of Parties.

[a] Under the act concerning divorce (Laws, p. 371), declaring that an applicant must have resided in the state "six months immediately preceding the application," the wife's residence is of no importance, provided her husband has resided within the state the requisite time, for her domicile follows her husband's.—Kashaw v. Kashaw, 3 Cal. 312.

[b] The desertion of the husband for a time sufficient to afford the wife a reason for an application of divorce entitles the wife to sue in her own domicile.—Moffat v. Moffat, 5 Cal. 280.

[c] Coming to the state to procure a divorce, with intention of returning when it is procured, is not a bona fide residence.—Bennett v. Bennett, 28 Cal. 600.

[d] When the husband begins a suit for divorce, the domicile of the wife ceases to be the domicile of the husband, and she may acquire a separate actual domicile by change of residence from one country to another, pending suit.—McGrew v. Mutual Life Insurance Company of New York, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103.

[e] Where, in an action for divorce, plaintiff alleged residence in the state for more than ten years then last past, which defendant specifically denied, plaintiff's admission in the complaint that during a considerable part of that time she had lived on a yacht, and was sailing the high seas, going from port to port, was not inconsistent with her residence in the state.—De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

FOR AUTHORITIES FROM OTHER STATES:

16 L. R. A. 497, note.

Jurisdiction over absent citizens in suits for divorce: 53 Am. St. Rep. 182, note. See, also, 14 Cyc. 584-589; 17 Cent. Dig., cols. 513, 514, §§ 208, 209.

§ 29. Venue and Change Thereof.

[a] Civil Code, section 128, as amended by act of March 10, 1891, providing that a divorce must not be granted unless plaintiff has been a resident of the county "in which the action is brought three months next preceding the commencement of the action," does not prevent a change of the place of trial of an action for divorce to the county in which defendant resides, since Code of Civil Procedure, section 395, provides that "in all other cases (excepting actions relating to real property, for the recovery of penalties, and those against municipal corporations and public officers, etc.) the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action."—Warner v. Warner, 100 Cal. 11, 34 Pac. 523.

[b] A motion by defendant in divorce to change the place of trial to a county other than that in which the action was brought, on the ground that defendant resides in the former county, should be granted, where the affidavit of plaintiff creates no substantial conflict with defendant's as to his residence. Usher v. Usher, 36 Pac. 8.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 591-593; 17 Cent. Dig., cols. 531-535, §§ 227-231.

§ 30. Limitations and Laches.

[a] Cause of action on ground of desertion is not barred by "unreasonable lapse of time," where it appears that defendant deserted plaintiff and continues such desertion without cause and against will and without consent of plaintiff.—Thompson v. Thompson, 121 Cal. 12, 53 Pac. 403.

[b] Civil Code, section 101, provides that consent to a separation is a revocable act, and that where one of the parties in good faith seeks reconciliation and restoration, but the other refuses it, such refusal is desertion. Held, that the limitation of an action for divorce for desertion begins to run

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from the first solicitation or endeavor to bring about a reconciliation.—Howard v. Howard, 134 Cal. 346, 66 Pac. 367.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., col. 535, § 232.

B. PARTIES, PROCESS AND PROCEEDINGS.

PARTIES, § 31.
PROCESS—SERVICE BY PUBLICATION, § 32.
DEATH OF PARTIES AND REVIVAL OF SUIT, § 33.

§ 31. Parties.

[a] Wife, in a suit for divorce, may make a party of any one claiming an interest in the common property.—Kashaw v. Kashaw, 3 Cal. 312.

[b] Whether mortgagee of community property is proper defendant in divorce suit doubted. (McFarland, J., concurring.)—Cummings v. Cummings, 75 Cal. 442, 17 Pac. 442.

[c] A petition in divorce, improperly uniting a cause of action for recovery of community property, and joining as defendants the purchaser of such property from the husband defendant, said purchaser's mortgagee and another claiming interest in the premises is demurrable for misjoinder of parties.—Cummings v. Cummings, 14 Pac. 562.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 653-655; 17 Cent. Dig., cols. 538-541, §§ 237-246.

§ 32. Process—Service by Publication.

[a] Divorce suit, so far as it affects status of parties and custody of children, is a proceeding in rem and service by publication is good.—Newman's Estate, 75 Cal. 219, 220, 7 Am. St. Rep. 146, 16 Pac. 887.

FOR AUTHORITIES FROM OTHER STATES:

19 L. R. A. 814, note. See, also, 14 Cyc. 659; 17 Cent. Dig., cols. 547-552, §§ 258-263.

§ 33. Death of Parties and Revival of Suit.

[a] After the death of a husband against whom a decree of divorce has been granted, a supplemental decree partitioning the common property will not affect interests of the husband's heirs, unless a revivor is had as to them.—Ewald v. Corbett, 32 Cal. 493.

[b] As an action for divorce does not survive upon the death of either party, Code of Civil Procedure, section 473, providing that, in case of service of summons by publication, defendant may, by leave of court, answer to the merits of the original action within a year after judgment therein, cannot be invoked on the death of plaintiff after the entry of a judgment, having no reference to the subject of property.—Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 555-557, §§ 269-272.

C. PLEADING.

COMPLAINT OR BILL, § 34.
—— MARRIAGE AND RESIDENCE, § 35.
—— GROUNDS AND ELEMENTS THEREOF, § 36.
ANSWER, § 37.
—— AMENDMENT, § 38.
CROSS-COMPLAINT, § 39.
DEMURRER, § 40.
SUPPLEMENTAL PLEADINGS, § 41.
ISSUES AND PROOF, § 42.
WAIVER OF OBJECTIONS, § 43.

§ 34. Complaint or Bill.

[a] In a bill for divorce it is proper to declare, for the information of the court, in what the common property consists, its nature, and value.—Kashaw v. Kashaw, 3 Cal. 312.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 662-670; 17 Cent. Dig., cols. 560-583, §§ 283-309.

§ 35. —— Marriage and Residence.

[a] Marriage and residence must be averred in each count of complaint.—Haskell v. Haskell, 54 Cal. 265.

[b] Marriage must be averred and if denied it must be proved.—Sharon v. Sharon, 75 Cal. 44, 16 Pac. 345.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 663; 17 Cent. Dig., cols. 562-564, §§ 287-289.

§ 36. —— Grounds and Elements Thereof.

[a] Charge of adultery should be stated with reasonable certainty as to time and place, so as to enable the defendant to prepare to meet it on the trial.—Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

[b] Under Code, section 105, authorizing a divorce for a husband's neglect to support his wife while he is able to do so, or for his neglect to do so while he is unable to do so because of his idleness, profligacy, or dissipation, a divorce cannot be granted under a petition charging merely willful neglect without stating the kind of neglect.—Devoe v. Devoe, 51 Cal. 543.

[c] A wife sued for divorce on the ground of cruelty, alleging that the husband, in another action between them, filed a "false and malicious" affidavit charging her with unchastity, but did not aver that such action

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had been terminated in her favor, or at all. Held, that a demurrer should have been sustained.—Haley v. Haley, 74 Cal. 489, 16 Pac. 248.

[d] In pleading habitual intemperance as a ground for a divorce, it is not necessary that the complaint should allege the particular acts and conduct of the defendant, showing that he was intoxicated to the extent required by section 106 of the Civil Code. An allegation that the defendant had been habitually intemperate to such a degree as to reasonably inflict a course of great mental anguish upon the plaintiff is sufficient.—Forney v. Forney, 80 Cal. 528, 22 Pac. 294.

[e] Mental suffering produced by drunkenness, merely, cannot be considered under allegation of cruelty; it must be specially alleged. Waldron v. Waldron, 85 Cal. 264, 24 Pac. 649-858.

[f] As a ground for divorce, Civil Code, section 94, defines extreme cruelty as "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." Held that, where the complaint shows that the acts complained of caused grievous mental suffering, it is sufficient without showing that such acts had an injurious effect on plaintiff's health.—Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, overruling Waldron v. Waldron (1890) 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487.

[g] Each count of complaint setting forth cause of action must be complete, in an action for a divorce, though it is sufficient to adopt in one count the allegations made in another.—Reading v. Reading, 96 Cal. 4, 30 Pac. 803.

[h] Under Civil Code, section 94, declaring that extreme cruelty, as a ground for divorce, may consist either of the infliction of grievous bodily injury, or grievous mental suffering, an allegation that "during the last two years defendant has treated plaintiff in a cruel and inhuman manner," that defendant has applied the coarsest epithets to her (naming them), and has accused her of a want of chastity, states no cause of action.—Smith v. Smith, 124 Cal. 651, 57 Pac. 573.

[i] A complaint in an action of divorce alleging that on March 8, 1898, the defendant voluntarily separated himself from the plaintiff without any fault of plaintiff, with intent to desert her, and has continued to desert her, sufficiently states a cause of action under Civil Code, section 95, providing that willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.—Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73.

[j] A complaint for divorce, averring that defendant deserted the marriage bed, "and ever since said time has refused to have reasonable or any matrimonial intercourse with plaintiff, and has ever since occupied a separate room," etc., sufficiently charges a "persistent refusal," within Civil Code, section 96, declaring that "persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, ... when there is no just cause for such refusal, is desertion."—Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

[k] A complaint alleging extreme cruelty, in that "about three years ago" defendant, without cause, struck plaintiff, and since has continually, whenever they have been together, used vile language to her, is not demurrable as failing to specify the acts relied on.—Johnson v. Johnson, 35 Pac. 637.

[l] In an action for divorce, name of person with whom adultery was committed should be stated, if known.—Wilkerson v. Wilkerson (Cal. App.), 84 Pac. 784.

[m] Complaint in action for divorce held to sufficiently allege places where acts of adultery were committed.—Wilkerson v. Wilkerson (Cal. App.), 84 Pac. 784.

[n] In action for divorce on ground of adultery, time and place of offense should be alleged.—Wilkerson v. Wilkerson (Cal. App.), 84 Pac. 784.

§ 37. Answer.

[a] To defeat plaintiff's cause, recriminatory answer must allege facts which, if proved, would authorize decree of divorce in defendant's favor.—Smith v. Smith, 119 Cal. 189, 48 Pac. 730.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 584-588, §§ 310-318.

§ 38. —— Amendment.

[a] To allow defendant, in an action for divorce and division of property, to amend his answer by making a denial of an allegation concerning the property more specific, is not an abuse of discretion.—Sharon v. Sharon, 77 Cal. 102, 19 Pac. 230.

§ 39. Cross-complaint.

[a] A cross-complaint filed under Code of Civil Procedure, section 442, for a divorce in defendant's favor, is insufficient, where it fails to allege the fact of marriage or of residence in the state for six years, as a cross-complaint cannot be helped out by the allegations of the other pleadings, but must state facts entitling the holder to affirmative relief.—Coulthurst v. Coulthurst, 58 Cal. 239.

[b] There may be cross-complaint in action for divorce.—Wadsworth v. Wadsworth, 81 Cal. 183-189, 15 Am. St. Rep. 38, 22 Pac. 648; Mott v. Mott, 82 Cal. 418, 22 Pac. 1140, 23 Pac. 1142.

[c] There may be a cross-complaint in an action for a divorce, upon which affirmative

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relief may be granted to the defendant upon a cause for divorce from the plaintiff.—Blakely v. Blakely, 89 Cal. 324, 26 Pac. 1072.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 672-674; 17 Cent. Dig., cols. 590-591, §§ 322-327.

§ 40. Demurrer.

[a] An objection, in proceedings for a divorce, that the complaint is insufficient in not properly stating the facts showing the property to be common, must be raised by demurrer.—Gimmy v. Gimmy, 22 Cal. 633; Gimmy v. Doane, 22 Cal. 635.

[b] If there is any uncertainty in either count as to residence of the plaintiff, or as to other allegations, the objection should be taken by demurrer, on the ground of uncertainty.—Reading v. Reading, 96 Cal. 4, 30 Pac. 103.

[c] Court cannot strike out or overrule demurrer in divorce suit and refuse defendant right to answer.—Foley v. Foley, 120 Cal. 42, 65 Am. St. Rep. 147, 52 Pac. 122.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 672; 17 Cent. Dig., col. 589, §§ 320, 321.

§ 41. Supplemental Pleadings.

[a] The rule requiring a supplemental complaint to refer to matter in aid of the case made by the original complaint, and occurring between the filing thereof and the judgment, applied, where the original action was brought to obtain a divorce and division of the common property, but the supplemental complaint sought to enforce an alleged trust arising out of an express contract between the parties while married, in performance of which the defendant, after the judgment, acquired title to property for the benefit of the plaintiff.—Gleason v. Gleason, 54 Cal. 135.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 674-677; 17 Cent. Dig., cols. 591-597, §§ 328-339.

§ 42. Issues and Proof.

[a] Marriage of the parties is sufficiently proved by defendant's admission or failure to traverse the allegation of it in the complaint.—Fox v. Fox, 25 Cal. 587.

[b] Residence of the applicant in state for the preceding six months must be alleged in the complaint and proved on the trial, although it is not denied in the answer.—Bennett v. Bennett, 28 Cal. 599.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 679, 680; 17 Cent. Dig., cols. 601-605, §§ 349-352.

§ 43. Waiver of Objections.

[a] Facts constituting a charge of adultery, with circumstances of time and place, should be averred specifically; but objection is waived by failure to demur.—Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

D. EVIDENCE.

PRESUMPTIONS AND BURDEN OF PROOF, § 44.
ADMISSIBILITY, § 45.
—— CONFESSIONS OR ADMISSIONS, § 46.
—— MARRIAGE, § 47.
WEIGHT AND SUFFICIENCY, § 48.
—— CORROBORATION, § 49.
—— MARRIAGE, § 50.
—— RESIDENCE OF PLAINTIFF, § 51.
—— ADULTERY, § 52.
—— CRUELTY, § 53.
—— DESERTION, § 54.
—— NONSUPPORT, § 55.

§ 44. Presumptions and Burden of Proof.

[a] The act of a husband in leaving the country three weeks after his marriage, and remaining absent for nine years without contributing to his wife's support, will raise a presumption of an intention to desert, justifying a divorce in favor of the wife on such ground, without any evidence of the circumstances and causes of the separation. Morrison v. Morrison, 20 Cal. 431.

[b] A plaintiff for divorce on the ground of desertion is not required to show negatively that no cause for the desertion existed.—Morrison v. Morrison, 20 Cal. 431.

[c] In an action for divorce on the ground of adultery, the fact that the husband enters a house of prostitution in the evening and remains all night, raises a presumption of adulterous intercourse, and casts on him the burden of showing that he is innocent.—Evans v. Evans, 41 Cal. 103.

[d] It will be presumed that charges made in complaint for divorce were untrue when action was voluntarily dismissed.—Cooper v. Cooper, 88 Cal. 48, 25 Pac. 1062.

[e] Though, in a suit for divorce, it appeared that prior to plaintiff's marriage to defendant she had been married to a third person, and that her former husband was living, it was not necessary for her to show that the former marriage had been dissolved, that fact being presumed from the solemnization of the second one.—McKibben v. McKibben, 139 Cal. 448, 73 Pac. 143.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 681; 17 Cent. Dig., cols. 607-611, §§ 354-364.

§ 45. Admissibility.

[a] A question asked a witness in a divorce case held under the pleadings and in its general form an immaterial inquiry.—Avery v. Avery (Cal. Sup.), 82 Pac. 967.

FOR AUTHORITIES FROM OTHER STATES:
Admission in suits for divorce, effect of: 30 Am. Dec. 544, note.

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FOR AUTHORITIES FROM OTHER STATES:

Physical examination of person, power of courts to require submission to in suits for divorce: 3 Am. St. Rep. 556, note. See, also, 14 Cyc. 682-686; 17 Cent. Dig., cols. 612-624, §§ 365-391.

§ 46. —— Confessions or Admissions.

[a] Confessions of defendant are admissible, but must be corroborated.—Baker v. Baker, 13 Cal. 88.

[b] The object of the rule requiring proof in corroboration of defendant's confessions is to guard against collusion; and when the entire testimony, confessions, and circumstances repel all suspicion of collusions, and leave no doubt of the truth of the confessions, the court should act upon them.—Baker v. Baker, 13 Cal. 87.

[c] Confessions or admissions of defendant can be given in evidence.—Evans v. Evans, 41 Cal. 103.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 612-614, §§ 365, 366, 368.

§ 47. —— Marriage.

[a] Evidence of cohabitation and repute is admissible to show marriage in action for divorce.—White v. White, 82 Cal. 450, 23 Pac. 276.

[b] In action on ground of adultery, where marriage between plaintiff and defendant is not sought to be proved by cohabitation, proof of defendant's marriage to co-respondent is inadmissible.—Kilburn v. Kilburn, 89 Cal. 51, 23 Am. St. Rep. 447, 26 Pac. 636.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., col. 614, § 367.

§ 48. Weight and Sufficiency.

[a] Where divorce is granted on grounds of extreme cruelty and willful neglect, failure of evidence to sustain charge of willful neglect is immaterial where finding as to extreme cruelty is supported by evidence.—Huellmantel v. Huellmantel, 117 Cal. 408, 49 Pac. 574.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 687-700; 17 Cent. Dig., cols. 624-674, §§ 392-456.

§ 49. —— Corroboration.

[a] Testimony of third persons that they witnessed a portion of the acts of cruelty of a husband as testified to by the wife is a sufficient corroboration thereof, as required by Civil Code, section 130.—Matthai v. Matthai, 49 Cal. 90.

[b] A divorce cannot be granted on the uncorroborated testimony of the parties. Held, that the wife's testimony as to her husband's cruelty in charging her with adultery was not sufficiently corroborated by an attorney's statements of communications which were made to him without cruel intent, and not shown to have produced any effect on the wife.—Haley v. Haley, 67 Cal. 24, 7 Pac. 3.

[c] In an action by the husband for divorce for desertion, the wife answered, charging that the husband's cruelty forced her to leave. There was no evidence to support plaintiff's testimony, except that defendant lived at some distance in a house owned by plaintiff, and had said she was not coming back to his farm, and also the record of a former suit by the wife for divorce for cruelty, where it was found he was not guilty of cruelty, and the divorce was denied, but the wife was allowed twenty-five dollars per month. Held not sufficient to warrant a divorce under Civil Code, section 130, providing that a divorce cannot be granted on the uncorroborated statements, admissions, or testimony of the parties.—Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518.

[d] Court may believe uncorroborated testimony of wife as against that of husband on issue as to whether her desertion was justified by his cruelty.—White v. White, 86 Cal. 221, 24 Pac. 996.

[e] Plaintiff's testimony need not be corroborated on every fact and circumstance testified to if there be corroboration on fact or facts sufficient to support judgment.—Cooper v. Cooper, 88 Cal. 48, 25 Pac. 1062.

[f] In an action for divorce on the ground of extreme cruelty, plaintiff's testimony that defendant charged her with infidelity, called her vile names, and communicated to her a loathsome disease, was sufficiently corroborated, as required by Civil Code, section 130, by a letter written by defendant to plaintiff, charging her with having committed adultery with a certain person; by the testimony of a witness that plaintiff came to his store crying, and saying that defendant had threatened her, and called her vile names; that he (witness) sent for defendant, and informed him of his wife's complaints and charges, and that defendant did not deny them; and by the testimony of a physician that he treated plaintiff for the disease which she claimed defendant communicated to her. Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499.

[g] Where the testimony of the plaintiff, in an action for divorce upon the ground of extreme cruelty, is sufficiently corroborated as to certain acts and declarations sufficient to constitute extreme cruelty, it is not material or necessary that her testimony should be corroborated as to all other distinct acts of cruelty alleged in the complaint.—Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

[h] Where the evidence of extreme cruelty, upon which a divorce is partly based, consists wholly of the uncorroborated evidence of the party seeking a divorce upon that ground, there is no sufficient evidence to sustain the divorce upon that ground.—Reid v. Reid, 112 Cal. 274, 44 Pac. 564.

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[i] Rule as to what constitutes corroboration laid down in Evans v. Evans, 41 Cal. 108, reaffirmed.—Smith v. Smith, 119 Cal. 191, 48 Pac. 730.

[j] Principal object of rule requiring corroboration of plaintiff's testimony is to prevent collusion and when evident that there is no collusion very little corroboration is sufficient.—Smith v. Smith, 119 Cal. 191.

[k] Section 130, Civil Code, does not require that there should be direct testimony of other witnesses to every act of cruelty sworn to by plaintiff.—Andrews v. Andrews, 120 Cal. 186, 52 Pac. 298.

[l] Main purpose of section 130, Civil Code, is to prevent collusion, and it is sufficient corroboration if considerable number of important facts are testified to by others or there is other evidence, circumstantial or direct, strongly tending to confirm plaintiff's testimony.—Andrews v. Andrews, 120 Cal. 186, 52 Pac. 298.

[m] Where plaintiff alone testifies as to personal abuse by his wife, and she explicitly denies the language alleged to have been used, no divorce can be granted under Civil Code, section 130, prohibiting the same on the uncorroborated statement of either party. Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629.

[n] Object of section 130, Civil Code, requiring corroboration of plaintiff's evidence is to prevent collusion.—McMullin v. McMullin, 140 Cal. 119, 73 Pac. 808.

[o] The attitude of the defendant in refusing a reconciliation, or to cohabit with the plaintiff under any circumstances, and the declarations of the defendant to third parties at the time of and subsequent to the offer of reconciliation, are a sufficient corroboration of the plaintiff's evidence.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

[p] Under the express provisions of Civil Code, section 130, a divorce may not be granted on the uncorroborated evidence of either party.—Berry v. Berry, 145 Cal. 784, 79 Pac. 531.

[q] The provision of Civil Code, section 130, that "no divorce can be granted upon the uncorroborated . . . . testimony of the parties," has no application to a case where the wife seeks a divorce on the ground of a false and malicious charge against her by the husband of concealed pregnancy by another man at marriage, although she is the only witness who gave testimony as to what her feelings about the charge were. Where the court finds that the charge was false, and there is nothing in the record to negative the fact that the wife is a pure and virtuous woman, the presumption is that such a charge had its natural effect on such a woman, and caused her "grievous mental suffering."—Haley v. Haley, 14 Pac. 92.

[r] Statement as to corroboration required under Civil Code, section 130, in a divorce case.—Avery v. Avery (Cal. Sup.), 83 Pac. 967.

§ 50. —— Marriage.

[a] In an action for divorce for adultery, the marriage will not be inferred from matrimonial cohabitation with the reputation of being married persons, where the result of such inference is to prove defendant guilty of bigamy; for in such cases actual marriage must be proved.—Case v. Case, 17 Cal. 598.

§ 51. —— Residence of Plaintiff.

[a] Evidence in action for divorce held sufficient to show that plaintiff was resident of state.—Wilkerson v. Wilkerson (Cal. App.), 84 Pac. 784.

§ 52. —— Adultery.

[a] In an action for divorce on the ground of adultery, the act of adultery, like any other fact, may be established by circumstantial proof.—Evans v. Evans, 41 Cal. 103.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 692-698; 17 Cent. Dig., cols. 636-658, §§ 411-441.

§ 53. —— Cruelty.

[a] If, in an action for a divorce, the wife testifies to acts of personal violence committed by the husband, evidence of the husband attempting to excuse or apologize for such acts will not regarded as substantially contradicting her.—Matthai v. Matthai, 49 Cal. 91.

[b] Evidence that a husband attempted to excuse or apologize for acts of personal violence does not contradict the wife's testimony as to the commission of such violence, in an action by her for divorce on the ground of extreme cruelty.—Matthai v. Matthai, 49 Cal. 90.

[c] Refusal of trial court to grant a divorce sought on the ground of extreme cruelty will not be disturbed where the only evidence of cruelty was a letter written by the husband to the wife, in which he charged that she had communicated a venereal disease to him, when neither party actually had the disease, as appeared from the testimony of physicians, and her own testimony that she was sick for three or four days after receiving the letter, but that she did not call a doctor.—Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

[d] In divorce plaintiff testified that defendant often, in the presence of others, accused her of being intimate with other men; that he had a venereal disease, and accused her of giving it to him; that he many times threatened to take the minor child away from plaintiff, and on one occasion took the child away for about two weeks, and would not tell plaintiff where it was; that he called her a prostitute, and left her often without means of support; that she had to support

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herself; and that the conduct of defendant caused her mental suffering and bodily injury. Held, that such testimony sustained a finding of extreme cruelty.—Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304.

[e] Plaintiff's physician testified, inter alia, that her nose had been flattened by a blow, that defendant admitted having struck her, but said he did not mean to, and seemed ashamed. Their son swore that he had heard his father call his mother insulting names as long as she lived with him. Since the assault, plaintiff had been generally sick in bed, and her husband's language seemed to make her worse. Held sufficient proof of "extreme cruelty," consisting of a blow and abusive language, to the injury of plaintiff's health.—Johnson v. Johnson, 35 Pac. 637.

[f] Evidence in a divorce case held sufficient to sustain a finding of extreme cruelty as defined by Civil Code, section 94.—Avery v. Avery (Cal. Sup.), 82 Pac. 967.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 699; 17 Cent. Dig., cols. 658-663, §§ 442-445.

§ 54. —— Desertion.

[a] A husband's abandonment of his wife, prolonged through many years, without provision for her support, is sufficient proof of an intent to desert.—Morrison v. Morrison, 20 Cal. 431.

[b] That parties have lived separate for years does not prove willful desertion.—Christie v. Christie, 53 Cal. 27.

[c] Evidence showing that the husband, without cause, separated himself from the marriage bed, and did not thereafter seek a renewal of matrimonial intercourse, for more than one year, is sufficient to show a persistent refusal thereof by him, and it is not required, in order to show such refusal, that the wife shall solicit his return to the marriage couch.—Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

[d] The character of the separation between a husband and wife is not forever established by the status at the time they ceased to live together, but what was originally a separation without consent may become a separation by consent, and whether it has become such is a question of fact. Judgment (1902) 71 Pac. 108, reversed.—McMullin v. McMullin, 140 Cal. 112, 73 Pac. 308.

[e] In an action for divorce for desertion evidence held insufficient to support a finding that the separation between plaintiff and defendant was voluntary, and with defendant's consent.—McMullin v. McMullin, 71 Pac. 108.

55. —— Nonsupport.

[a] A petition by a wife for a divorce on the ground of failure to support is not sustained by proof that she had lived with her parents for four years, and that he had supplied her with all the money and supplies for which she had made application.—Christie v. Christie, 53 Cal. 26.

[b] In divorce, evidence held insufficient to show that defendant had failed to support his wife to the best of his ability.—Berry v. Berry, 145 Cal. 784, 79 Pac. 531.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., col. 670, § 449.

E. DISMISSAL, TRIAL AND NEW TRIAL.

DISMISSAL, § 56.
TRIAL, § 57.
—— QUESTIONS FOR COURT AND JURY, § 58.
—— INSTRUCTIONS, § 59.
—— FINDINGS, § 60.
REFERENCE, § 61.
NEW TRIAL, § 62.

§ 56. Dismissal.

[a] Where cross-complaint entitling defendant to affirmative relief is filed, plaintiff cannot dismiss.—Mott v. Mott, 82 Cal. 415, 22 Pac. 1140, 1142.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 701, 702; 17 Cent. Dig., cols. 676-679, §§ 463-470.

§ 57. Trial.

[a] In a divorce suit, trial by jury is not a matter of right.—Cassidy v. Superior Court, 64 Cal. 266, 28 Pac. 234.

[b] Parties to divorce suit should be afforded fullest opportunity to be heard.—Wadsworth v. Wadsworth, 81 Cal. 183, 15 Am. St. Rep. 38, 22 Pac. 648.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 682-683, § 477.

§ 58. —— Questions for Court and Jury.

[a] Whether in any given case there has been inflicted grievous mental suffering upon one of the spouses is a pure question of fact, to be deduced from all the circumstances of each particular case.—Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 556.

[b] Whether an offense has been condoned is question of fact.—Smith v. Smith, 119 Cal. 188, 48 Pac. 730.

[c] Whether ill-treatment constitutes extreme cruelty is largely question of fact for trial court.—Andrews v. Andrews, 120 Cal. 187, 52 Pac. 298.

[d] Whether conduct alleged in the complaint causes such grievous mental anguish as to constitute a ground for divorce is a question of fact to be determined by the trial court from the testimony.—Curl v. Curl, 130 Cal. 638, 63 Pac. 65.

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[e] Desertion is question for court to determine from facts and circumstances of each case.—McMullin v. McMullin, 140 Cal. 116, 73 Pac. 808.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 705, 706; 17 Cent. Dig., col. 694, § 493.

§ 59. —— Instructions.

[a] What constitutes extreme cruelty, as a cause of divorce, is a matter of law; but whether the evidence shows such conduct is a question of fact. Ordinarily, what constitutes extreme cruelty is a mixed question of law and fact; and where the evidence, assuming it to be true, is not legally sufficient, the court may so decide as a question of law.—Kuhl v. Kuhl, 124 Cal. 57, 56 Pac. 629.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 706; 17 Cent. Dig., cols. 694-695, §§ 494-495.

§ 60. —— Findings.

[a] In an action for divorce, where there is a failure to traverse the allegation of marriage in the complaint, it is not necessary the fact of the marriage should be found.—Fox v. Fox, 25 Cal. 587.

[b] Under Code, section 105, authorizing a divorce for a husband's neglect to support his wife while he is able to do so, or for his neglect to do so while he is unable to do so because of his idleness, profligacy, or dissipation, a divorce should not be granted under a finding that defendant failed to support his wife while able to do so, where the petition alleges failure to support because of dissipation.—Devoe v. Devoe, 51 Cal. 543.

[c] Where the statute requires that habitual intemperance shall have continued for a year to afford ground for a divorce, the fact that it has continued for a year must be found, or a judgment of divorce cannot be sustained.—Dunn v. Dunn, 62 Cal. 176.

[d] The finding "that the repeated acts of cruelty, as established by the evidence, upon the part of said defendant towards her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering," is but a conclusion of law, and does not find any fact in issue in the case.—Smith v. Smith, 62 Cal. 466.

[e] A recriminatory defense, under Civil Code, section 122, consisting of a cause of divorce against plaintiff, creates a material issue on which a finding is essential to sustain a degree for plaintiff.—Cassidy v. Cassidy, 63 Cal. 352.

[f] Civil Code, section 130, provides that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties. A husband sought divorce for adultery and desertion, and the wife, by cross-complaint, sought it for adultery and extreme cruelty. The court found the wife innocent of both charges, and granted her a divorce for the adultery of her husband; but also found that the specific acts of extreme cruelty were mainly sustained by the wife's evidence, which was contradicted by the husband, and the corroborating circumstances were insufficient to establish them. Held that, while the court was restrained by the statute from finding cruelty as a ground of divorce, it was at liberty to find it as a justification for the desertion, and there was no conflict in the findings.—White v. White, 86 Cal. 219, 24 Pac. 996.

[g] Where, in an action for divorce, findings are made on issues raised by specific denials of allegations in the complaint of desertion and failure to support for a year prior to the action, a separate finding is unnecessary on an allegation in the answer of defendant's willingness and offer to support the plaintiff during the time.—Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137.

[h] Finding that acts complained of "have never been condoned" is sufficient finding of fact.—Smith v. Smith, 119 Cal. 188, 48 Pac. 730.

[i] Though defendant relies on a recriminatory answer, a failure to find on his charges is not reversible error, where, had the court found the several acts and things complained of in the language in which they were alleged by defendant, the findings would not have justified a decree of divorce; Civil Code, section 122, providing that "recrimination is a showing by defendant of any cause of divorce aginst plaintiff in bar of plaintiff's cause of divorce."—Smith v. Smith, 119 Cal. 183, 48 Pac. 730.

[j] In an action for divorce on the ground of extreme cruelty, where defendant has pleaded extreme cruelty by plaintiff, and condonation of defendant's offense, and there are findings of fact for plaintiff, a conclusion of law that plaintiff is entitled to a decree dissolving the bonds of matrimony, etc., is sufficient to support a judgment of divorce.—Smith v. Smith, 119 Cal. 183, 48 Pac. 730.

[k] A memorandum of decision in a divorce case which fails to show the jurisdictional fact of residence, or the facts constituting the grounds for divorce, and which does not contain a separate statement of facts and conclusions of law, and does not direct judgment, is insufficient, as a finding of fact, to sustain a judgment.—O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225.

[l] Where the evidence shows condonation of the acts for which a divorce is sought, it is the duty of the court to find to that effect, though condonation was not pleaded.—Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772.

[m] In an action for divorce for intemperance and cruelty, where the court found that the defendant was never habitually intemperate, nor so intemperate as to cause great mental anguish, and that defendant had

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not treated the plaintiff with extreme cruelty, and has not inflicted on her great mental suffering, nor inflicted on the plaintiff grievous bodily injury or mental suffering, it was unnecessary to make special findngs as to an allegation of abandonment and desertion in the complaint, merely intended to aid other allegations as to cruelty.—Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208.

[n] Though the allegation of the complaint showed desertion under Civil Code, section 98, which is occasioned by the cruelty of one of the spouses driving the other away from their home, the findings given negativing the charge of cruelty also negative the alleged desertion, and special findings as to the facts stated in such allegation are unnecessary.—Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208.

[o] Civil Code, section 101, relative to divorce, declares that consent to a separation is a revocable act, and if one of the parties afterward in good faith seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion. Held, in a suit for divorce, where there had been a previous separation, and there was a finding that defendant had willfully deserted and abandoned plaintiff, that a finding that plaintiff had sought a reconciliation and that defendant had refused the same was not necessary, such fact being a probative fact, while the finding made was of an ultimate fact.—Howard v. Howard, 134 Cal. 346, 66 Pac. 367.

[p] Plaintiff in divorce alleged residence in the state for more than ten years prior to the suit, which was begun in September, 1900, which allegation was specifically denied by defendant. The complaint admitted that prior to April, 1899, plaintiff had lived with defendant on board a yacht on the high seas. Held, that the admissions, relating as they did to a time prior to one year before suit, were immaterial, and did not remove the issue as to plaintiff's residence from the suit, so as to make a finding thereon outside the issues.—De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

[q] Where, in an action for divorce, plaintiff alleged desertion on a certain date, and defendant in his answer alleged that plaintiff deserted him on that date, defendant cannot complain that there was no finding on his affirmative defense, it not appearing that there was any evidence offered as to such defense.—De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

[r] The finding that the defendant did not willfully or otherwise desert the plaintiff, is a finding upon a matter of fact, and not upon a conclusion of law.—Greer v. Greer, 135 Cal. 121, 67 Pac. 20.

[s] A finding in divorce that plaintiff had been guilty of willful desertion is a conclusion of law, not a finding of fact.—Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

[t] In divorce the court found the allegations of the complaint as to extreme cruelty to be true, but that plaintiff had refused matrimonial intercourse and had been guilty of desertion, within Civil Code, section 96, and denied divorce, without finding that there was "no just cause for such refusal." Held, that the finding was insufficient to justify the conclusion, nor could the court on appeal say that the finding as to cruelty was a finding of cause for plaintiff's conduct.—Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

[u] In divorce the court found that the allegations of the complaint and cross-complaint as to the date of marriage were true, but that the allegations of the supplemental cross-complaint were untrue. The supplemental cross-complaint set up a charge of adultery, and "re-alleged every allegation in the cross-complaint." Defendant contended the findings were inconsistent. Held, that the contention was of no merit, there being no issue as to the date of marriage, nor necessity for finding thereon.—Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304.

[v] A finding "that the acts of the defendant, as alleged in the complaint, did not inflict upon the plaintiff grievous bodily injury or grievous mental suffering," is insufficient to support a judgment denying a wife a divorce, as the existence or nonexistence of facts is not thereby determined.—Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155.

[w] A finding held not one that a wife returned to her husband within a year of desertion, necessary, under Civil Code, section 102, to cure the desertion.—Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

[x] Under Civil Code, section 102, a finding to show cure of desertion by return held required to show a seeking of condonation in connection with the return.—Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

[y] Findings in an action by a husband for divorce held not to support an order requiring him to pay permanent alimony to his wife.—Volkmar v. Volkmar, 147 Cal. 175, 81 Pac. 413.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 703, 704, 708-710; 17 Cent. Dig., cols. 694-695, §§ 494-495.

§ 61. Reference.

[a] The whole issue in divorce cases cannot, even by stipulation of parties, be referred; and, where a reference is had, the referee cannot pass upon the testimony. If he make any statement or finding of facts the court is obliged to disregard it, and base its decree only upon the legal testimony taken.—Baker v. Baker, 10 Cal. 527.

[b] Under Statutes of 1858, section 240, providing that it shall not be lawful for the court to grant a divorce on any statement or finding of facts by a referee, but only on the legal testimony taken in the cause, where an action for divorce is referred to a court commissioner, the court should disregard the findings of fact filed by the commissioner, and

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determine the cause on the evidence reported by him.—Benkert v. Benkert, 32 Cal. 468.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 707-710; 17 Cent. Dig., cols. 683-686, §§ 478-483.

§ 62. New Trial.

[a] The rule authorizing the denial of a new trial for insufficiency of evidence, where the evidence of one party is directly contradicted by the other, applies in an action for divorce on the ground of cruelty.—Matthai v. Matthai, 49 Cal. 90.

[b] A motion for a new trial, made after an order for judgment and decree of divorce, but before a referee appointed to ascertain the amount of community property has made a report, is not premature, nor is the trial court without jurisdiction to hear the motion. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

[c] There can be no new trial where defendant has defaulted; remedy is under section 473, Code of Civil Procedure.—Foley v. Foley, 120 Cal. 37, 65 Am. St. Rep. 147, 52 Pac. 122.

[d] Motion for new trial is not appropriate proceeding to review action of court in case where there has been no trial upon issues of fact; e. g., default case.—Foley v. Foley, 120 Cal. 36, 37, 65 Am. St. Rep. 147, 52 Pac. 122.

[e] Defendant in a divorce proceeding against whom a judgment had been rendered is precluded from obtaining a new trial by the acceptance of the alimony paid in compliance with the judgment.—Storke v. Storke, 132 Cal. 349, 64 Pac. 578.

[f] Plaintiff secured a judgment of divorce, and a few weeks after defendant served notice of a motion for a new trial on a statement of the case, the court ordering plaintiff to pay defendant a certain sum to defray the cost of transcribing the testimony. Plaintiff failed to make the payment, and on the day for the settlement of the statement the order continuing the same recited that plaintiff had not complied with the previous order because of his inability to do so. No further proceedings were ever taken to settle the statement. Held, that the failure of plaintiff to make such payment did not excuse the laches of the defendant in prosecuting her motion, and it was error four years after to refuse to dismiss the motion for a new trial made on the ground of the laches of the defendant.—Storke v. Storke, 132 Cal. 349, 64 Pac. 578.

[g] The acceptance of money by defendant in a divorce case under a prior decree of maintenance does not prevent defendant from assailing the decree of divorce on motion for a new trial.—Smith v. Smith, 145 Cal. 615, 79 Pac. 275.

[h] It appeared on a motion for a new trial in a divorce case that defendant conducted the defense in person, without an attorney; that after the commencement of the trial an adjournment of several days was had; that during the adjournment defendant was sick, but expected to be able to proceed with the trial until the morning of the adjourned day, when she discovered that she was unable to do so; that she immediately sent a letter to the judge, stating her condition, and asked an adjournment; that after discovering her condition there was insufficient time to call a physician and obtain his certificate, or an officer to prepare an affidavit. Held, to disclose sufficient diligence to justify a new trial, at least in an action for divorce.—Smith v. Smith, 145 Cal. 615, 79 Pac. 275.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 730, 731; 17 Cent. Dig., cols. 704-706, §§ 509-513.

F. JUDGMENT.

SUFFICIENCY IN GENERAL, § 63.
ENTRY, § 64.
DEATH AFTER RENDITION, § 65.
RESERVING QUESTIONS AS TO PROPERTY, § 66.
AMENDMENTS, § 67.
OPENING OR VACATING, § 68.
SETTING ASIDE DEFAULT, § 69.
COLLATERAL ATTACK, § 70.
CONSTRUCTION AND OPERATION, § 71.
TIME OF TAKING EFFECT, § 72.
JUDGMENT AS BAR, § 73.

§ 63. Sufficiency in General.

[a] A decree declaring that "it appears that all the allegations of the complaint are sustained; that the matter so alleged and proved in behalf of plaintiff is sufficient in law to entitle the plaintiff to the relief as prayed for in the complaint"—sufficiently declares "that the party in whose favor the court decides is entitled to a divorce," within Civil Code, section 131, providing that if the court decides that a divorce ought to be granted it shall enter such an interlocutory decree.—Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

FOR AUTHORITIES FROM OTHER STATES:

57 L. R. A. 583; 60 L. R. A. 294, note. See, also, 14 Cyc. 710-730; 17 Cent. Dig., cols. 707-751, §§ 514-561.

§ 64. Entry.

[a] Divorce decree rendered in favor of party during her life may be entered after her death.—Cook, In re, 77 Cal. 230, 17 Pac. 923, 19 Pac. 431.

[b] An order that a decree of divorce be entered is not such final decree as to divorce the parties, and render legal a subsequent marriage of one of them where such decree was never entered.—Cook's Estate, In re, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567.

[c] Where an order for a decree was obtained, but the decree never entered, such decree cannot, after the death of the party who obtained it, be entered nunc pro tunc,

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and thus render the divorce, and a subsequent marriage of deceased, valid as against the heirs of defendant in the divorce suit.—Cook's Estate, In re, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567.

[d] Statutes of 1897, page 34, chapter 36, amending Civil Code, section 61, provided that a marriage contracted by a divorced person during the life of the former spouse and within one year after divorce should be void. The supreme court decided that marriages contracted without the state under the conditions specified in the section were valid. The legislature in 1903 (Stats. 1903, pp. 75, 76, 176, cc. 67,158) again amended section 61, and added two new sections, numbered 131 and 132, to the Civil Code. Section 61 as last amended provides that in no case can a marriage of either of the parties contracted during the life of the other and within one year after the entry of an interlocutory decree of divorce be valid. Section 131 requires the court, if it determines that a divorce ought to be granted, to enter an interlocutory judgment, from which an appeal may be taken within six months. Section 132 provides that after a year from the entry of the interlocutory judgment the court may enter final judgment, unless appeal has been taken from the interlocutory judgment, or motion for new trial made, in which case final judgment shall not be entered until such motion or appeal has been disposed of. Held, that the purpose of this legislation was to prevent collusive divorces and hasty remarriages, and complications arising from such remarriages prior to the final disposition of the cause on motion for a new trial or appeal, and to effect this purpose a final judgment entered prior to the expiration of a year from the date of the interlocutory judgment, or without any interlocutory judgment, would be absolutely void, regardless of any considerations of waiver, consent, or acquiescence of the parties.—Grannis v. Superior Court of City and County of San Francisco, 146 Cal. 245, 79 Pac. 891.

[e] Where a decree of divorce embraced both an interlocutory and final judgment, and they were simultaneously entered, but the part purporting to grant an immediate divorce was void because at that time the year from the entry of the interlocutory judgment had not expired, the validity of the interlocutory judgment was not affected thereby.—Claudis v. Melvin, 146 Cal. 257, 79 Pac. 897.

[f] Under Civil Code, section 132, as amended, an interlocutory decree of divorce must be entered in the judgment book one year before final decree.—Smith v. Superior Court of City and County of San Francisco, 77 Cal. 336, 82 Pac. 79.

§ 65. Death After Rendition.

[a] Divorce decree may be entered nunc pro tunc after death of plaintiff.—Cook's Estate, 83 Cal. 417, 418, 23 Pac. 392.

[b] As an action for divorce does not survive upon the death of either party, Code of Civil Procedure, section 473, providing that, in case of service of summons by publication, defendant may, by leave of court, answer to the merits of the original action within a year after the rendition of a judgment therein, cannot be invoked on the death of plaintiff after the entry of a judgment of divorce having no reference to the subject of property.—Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064.

§ 66. Reserving Questions as to Property.

[a] Judgment may be rendered granting plaintiff divorce and reserving questions as to property until return of report of referee. Ambrose, Ex parte, 72 Cal. 401, 402, 14 Pac. 33.

§ 67. Amendment.

[a] Where a final decree was entered without mentioning alimony or attorney's fees, or reserving jurisdiction to make a supplemental decree, and the time to appeal had expired, the court had no authority to enter an order awarding plaintiff alimony and attorney's fees, since it had lost jurisdiction of both the parties and the subject matter.—O'Brien v. O'Brien, 130 Cal. 409, 62 Pac. 598.

§ 68. Opening or Vacating.

[a] Misrepresentation of husband that property acquired during marriage was his, inducing wife to allege that there was no community property, is not ground for relief from judgment.—Champion v. Woods, 79 Cal. 21, 22, 21 Pac. 534.

[b] Judgment granting divorce to husband cannot be vacated for non-compliance with order to pay wife's expenses on appeal or motion for new trial.—Storke v. Storke, 116 Cal. 51, 47 Pac. 869.

[c] Judgment granting divorce cannot be vacated or set aside except on such proceedings as authorize vacation of judgment in any other action.—Storke v. Storke, 116 Cal. 51, 47 Pac. 869.

[d] Where a valid interlocutory decree of divorce had been entered, and the time had passed for its vacation on appeal, by motion for new trial or otherwise, an order of the trial court purporting to set aside such interlocutory decree was without jurisdiction, and therefore void.—Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

[e] Where a judgment was, in so far as it purported to grant an immediate divorce, void as being entered without any interlocutory judgment, as required by Civil Code, sections 131, 132, it was within the power of the superior court at any time, on motion of either party, or of its own motion, to vacate so much of the decree as awarded an absolute divorce, leaving the remainder of it, determining that the party was entitled to a divorce, unmodified and unaffected.—Grannis v. Superior Court of City and County of San Francisco, 146 Cal. 245, 79 Pac. 891.

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FOR AUTHORITIES FROM OTHER STATES:

Vacating and annulling proceedings for divorces and effect of: 61 Am. Dec. 459, note. See, also, 14 Cyc. 715-722; 17 Cent. Dig., cols. 721-740, §§ 533-548.

§ 69. Setting Aside Default.

[a] No affidavit of merits is required to set aside default judgment in divorce suit.—McBlain v. McBlain, 77 Cal. 509, 20 Pac. 61; Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531.

[b] Where application to set aside default shows that defendant was a nonresident and was not served, judgment should be set aside with leave to answer.—McBlain v. McBlain, 77 Cal. 510, 511, 20 Pac. 61.

[c] Court should be more liberal in relieving against defaults in divorce suits than in other cases.—Wadsworth v. Wadsworth, 81 Cal. 183, 15 Am. St. Rep. 38, 22 Pac. 648.

[d] It is not necessary, in setting aside a judgment obtained by default in divorce proceedings, to impose costs on defendant as a condition of relief.—Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531.

[e] Default judgment procured against insane wife should be set aside on motion of her guardian.—Cohn v. Cohn, 85 Cal. 109, 24 Pac. 659.

[f] Upon application to set aside default in action for divorce an affidavit of merits by the defendant has no place as such, on grounds of public policy, but may nevertheless serve the purpose of a proposed answer, where it specifically denies the material allegations of the complaint.—Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621.

[g] Where a wife living in California returns to Pennsylvania, and some years thereafter her husband obtains a divorce by publication, and six years after the divorce was obtained the wife returns to the place where her husband lives, and where the fact of his divorce is well known, a bill, filed four years after such return, alleging that she had just heard of the divorce, and that it was obtained by fraud, will not be sustained.—Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105.

[h] An application to set aside a judgment for a divorce which was rendered by default is addressed to the sound legal discretion of the trial court.—Morton v. Morton, 117 Cal. 443, 49 Pac. 557.

[i] Where the evidence adduced on an application to set aside a default is conflicting, it is not an abuse of discretion to deny the motion.—Morton v. Morton, 117 Cal. 443, 49 Pac. 557.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 714, 715; 17 Cent. Dig., cols. 713-717, §§ 522-526.

§ 70. Collateral Attack.

[a] A decree of divorce, rendered by a court having general jurisdiction, cannot be collaterally attacked on the ground that the complaint in the action does not state facts entitling the plaintiff to the relief demanded and awarded.—James' Estate, In re, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 722-724; 17 Cent. Dig., cols. 741-744, §§ 549-550.

§ 71. Construction and Operation.

[a] Where a term has two meanings differing in the degree merely, it is to be understood in its larger sense whenever it occurs, unless it appears from the context or otherwise to have been used in the narrower sense. Held, therefore, that a judgment and decree "that the plaintiff be divorced from the defendant" was a divorce from the bonds of matrimony.—Miller v. Miller, 33 Cal. 353.

[b] A judgment of divorce directed defendant to pay plaintiff one hundred dollars as counsel fees, and all her costs, and also the sum of fifteen hundred dollars alimony. It further provided "that defendant pay to plaintiff's attorney" said one hundred dollars "as counsel fees of plaintiff in this action," and to the clerk of court "for the use of plaintiff, as plaintiff's costs in this action, the sum of twenty-eight dollars and five cents." Held, that this was not a judgment in favor of the counsel or the clerk of court (persons not parties to the action), but was in favor of plaintiff, in whose name alone execution could issue.—Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095.

[c] A woman was twice married, and, having heard that her first husband was living, began proceedings to obtain a divorce from him. The proceedings were ex parte, defendant having been served with summons by publication, and a decree was entered as prayed. Held, that the proceedings were strictly in rem, and determined only that plaintiff was no longer the wife of defendant, and did not determine that defendant was then living, and that she was his wife at the time of entering the decree.—Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756.

[d] A decree of divorce affirmatively shows that plaintiff therein had been a resident of the state for a year, and of the county for three months, when the action was commenced, so as to give jurisdiction; the complaint alleging that she was born in the state over forty years before, and had been a resident of the state all her life, and then was, and for the eighteen months last past had been, a resident of the county, and the decree reciting that all the allegations of the complaint are sustained by the testimony.—Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466.

FOR AUTHORITIES FROM OTHER STATES:

Extraterritorial effect of decrees of divorce: 83 Am. St. Rep. 616, note. See, also, 14 Cyc. 727-729; 17 Cent. Dig., col. 720, § 532; cols. 744, 745, § 551.

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§ 72. Time of Taking Effect.

[a] The decree was signed by the judge, and delivered to the clerk for filing, who neglected to enter it for over a year. Held, that it became operative as to the parties from the date of its delivery to the clerk.—Newman's Estate, In re, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887.

[b] Divorce decree operates from time of rendition regardless of date of entry.—Cook, In re, 77 Cal. 226, 232, 17 Pac. 923, 19 Pac. 431.

[c] Divorce decree takes effect at time it is rendered regardless of time of entry.—Cook's Estate, 83, 417, 23 Pac. 392.

[d] Where an interlocutory decree of divorce is ordered entered nunc pro tunc, the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment.—Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 730; 17 Cent. Dig., col. 745, §§ 552, 553.

§ 73. Judgment as Bar.

[a] Judgment in a suit for divorce on the ground of desertion, in which it is found that the desertion had not continued for the statutory time when the suit was commenced, is no bar in a subsequent suit for the same cause.—Lowell v. Lowell, 55 Cal. 316.

[b] A judgment in favor of the husband, in an action by his wife for a divorce on the ground of his willful neglect to provide her with the common necessaries of life, is not a bar to a subsequent action brought by her for a divorce on account of his continued neglect to support her for a year, occurring after the entry of such prior judgment.—Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

[c] A decree dismissing a bill filed by the wife for divorce, and also dismisssing the husband's cross-bill, because the charges of either party had been sustained, does not bar another bill by the wife against the husband on the ground that the charges in his cross-bill, which the court had found to be false, amounted to cruel and inhuman treatment.—Haley v. Haley, 14 Pac. 92.

FOR AUTHORITIES FROM OTHER STATES:

Effect of decrees of divorce: 65 Am. Dec. 355, note. See, also, 14 Cyc. 725, 726; 17 Cent. Dig., cols. 745-749, §§ 554-558.

G. APPEAL.

JURISDICTION, § 74.
DECISIONS REVIEWABLE, § 75.
RESERVATION OF GROUNDS, § 76.
TIME TO APPEAL, § 77.
EFFECT OF APPEAL, § 78.
REVIEW, § 79.

§ 74. Jurisdiction.

[a] An action for divorce is a case in equity, within Constitution, article 6, section 4, giving the supreme court appellate jurisdiction, in such cases.—Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 752-754, § 563.

§ 75. Decisions Reviewable.

[a] Since a new trial is "a re-examination of an issue of fact" (Code Civ. Proc., sec. 656), where no answer is filed in a divorce case controverting any fact, and judgment goes against defendant without a trial on issues of fact, a motion for a new trial is nugatory, and cannot be reviewed, though Civil Code, section 130, provides that no divorce can be granted on the mere default of defendant, and that the court shall in all cases "require proof of the facts alleged" before granting the relief, since under Code of Civil Procedure, sections 588, 590, an issue of fact arises only where a material averment of facts is made on one side and is controverted on the other.—Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

[b] An appeal may be taken from an order, made after final judgment in a divorce suit, requiring the defendant to pay an attorney's fee to plaintiff to enable her to contest a motion for a new trial.—Harron v. Harron, 128 Cal. 303, 60 Pac. 932.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 752-754, § 563.

§ 76. Preservation of Grounds.

[a] Where, with plaintiff's consent, defendant in divorce files an amended cross-complaint setting up adultery committed by plaintiff, since the beginning of the action, plaintiff after going to trial on the issues raised thereby cannot object for the first time on appeal that the amended cross-complaint contained no prayer for affirmative relief.—Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 754-755, § 565.

§ 77. Time to Appeal.

[a] By the express provisions of Civil Code, section 131, the right to appeal from an interlocutory decree in divorce continues for six months after the entry.—Smith v. Superior Court of City and County of San Francisco, 147 Cal. 336, 82 Pac. 79.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 732, 733; 17 Cent. Dig., cols. 756, 757, § 567.

§ 78. Effect of Appeal.

[a] An appeal from an order vacating a judgment of divorce obtained by the hus-

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band against the wife cannot affect or suspend the operation of a prior decree rendered in an action for maintenance brought by the wife against her husband, the decree in which had become final. The judgment for divorce having been vacated, the parties cannot be considered as divorced.—Smith v. Superior Court, 136 Cal. 17, 68 Pac. 100.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 757-758, § 568.

§ 79. Review.

[a] Where, in an action of divorce by husband against his wife, she sets up among other things that he, at the time of their marriage, was the husband of one Frances B., and asks a decree declaring the marriage null, and to prove the marriage with Frances, reads in evidence a letter from plaintiff to her, held, that assuming this letter affords proof of the marriage with Frances, it is not conclusive proof of the facts recited; it is but the admission of plaintiff; and other and contradictory proof being in evidence, and the jury having found the issue on this point against defendant, this court will not interfere.—Fuller v. Fuller, 17 Cal. 605.

[b] In an action for divorce by the wife for cruelty and adultery, the court found for the wife as to cruelty, and against her as to adultery, and granted a divorce, and made an order for an equal division of the community property. She appealed from the order of division, and from the finding on the question of adultery. Held, that as the same relief could be granted her, whether the issue of adultery was found for or against her, the finding would not be reviewed.—Brown v. Brown, 60 Cal. 579.

[c] Where, in an action for divorce on the ground of adultery, the only evidence of cruelty pleaded in recrimination was the firing of a pistol by plaintiff behind defendant many years before they quit living together, judgment will not be reversed for want of a finding on that issue.—White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

[d] Refusal of trial court to consider cross-complaint in an action for a divorce, except by way of answer and defense, is error without injury where the record does not contain the evidence, and the findings show that the cause of action alleged in the cross-complaint cannot be true.—Blakely v. Blakely, 89 Cal. 324, 26 Pac. 1072.

[e] Whether certain acts cause such "grievous mental suffering" as to be a ground of divorce, within Civil Code, section 94, is a question of fact for the trial court, and is not a question of law.—Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566.

[f] A judgment cannot be reversed where there is one good count of the complaint, because of the insufficiency of another cause of action stated therein.—Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137.

[g] Under Civil Code, section 148, authorizing the appellate court to revise the distribution of property made by the trial court in a divorce action, the distribution may be reversed without disturbing other portions of the judgment.—Reid v. Reid, 112 Cal. 274, 44 Pac. 564.

[h] Where the result of two considerations of a case by a trial court is a refusal in each instance to grant a divorce on the ground of mental cruelty, and the evidence is conflicting in all substantial matters, a new trial will not be ordered.—Blair v. Blair, 122 Cal. 57, 54 Pac. 369.

[i] To justify a reversal of the trial court in refusing to grant a divorce, the record upon appeal should show a great preponderance of evidence against the findings. Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

[j] Extreme cruelty as a ground of divorce is largely a question of fact, to be determined by the trial court; and its findings thereon will not be disturbed upon appeal unless the evidence in support of them is so slight as to indicate a want of good judgment and an abuse of discretion of the trial court. This rule is particularly applicable when the findings are against a divorce.—Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

[k] Sufficiency of evidence to sustain findings of fact as to continued desertion of the plaintiff by the defendant will not be reviewed upon appeal, where it appears that there is evidence fairly tending to support the findings, though this court might have reached a different conclusion. (Van Dyke, J., dissenting as to question of sufficiency.) McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

[l] A finding in an action for divorce as to the bona fides of plaintiff's residence, based on conflicting evidence, cannot be disturbed on appeal.—Harding v. Harding, 140 Cal. 654, 74 Pac. 284.

[m] Judgment held required to be reversed in the absence of finding on a material issue. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 734-736; 17 Cent. Dig., cols. 759-766, §§ 570-573.

H. FEES AND COSTS.

§ 80. Counsel Fees.

[a] In a divorce suit, a judgment for defendant may direct that he pay the plaintiff's attorney's fee.—Lowell v. Lowell, 55 Cal. 316.

[b] In an action for a divorce the court cannot in the final judgment make an allowance of additional counsel fees for past ser-

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vices of an attorney, such allowance not being necessary to enable the wife to prosecute the action.—Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056.

[c] Where the court found that the parties to a divorce suit were husband and wife, and granted a divorce, an order that defendant pay an attorney's fee and costs to plaintiff, to enable her to contest a motion for a new trial, was proper.—Harron v. Harron, 128 Cal. 303, 60 Pac. 932.

§ 81. Power to Award Costs.

[a] The question of costs in an action of divorce is a matter resting in the discretion of the trial judge.—Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

[b] A decree awarding a divorce to plaintiff is sufficient to sustain the part of the decree awarding costs to her, though there are not findings to support the part of the decree setting apart a portion of the property to her.—Musselman v. Musselman, 140 Cal. 197, 73 Pac. 824.

[c] Costs in a divorce suit are within the discretion of the court.—White v. White, 33 Pac. 399.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 769-771, § 576.

§ 82. Costs on Appeal.

[a] A husband is entitled to have deducted from the costs allowed to a wife on the first trial of an action for divorce the amount awarded to him as costs on a successful appeal from the decree in the first action, after a second trial resulting in her favor.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

[b] It is error to allow the wife, in a suit for divorce, costs of a prior appeal on a second trial of the action resulting in her favor, where the appeal resulted in favor of the husband.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 737; 17 Cent. Dig., col. 776, § 580.

V. ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY.

A. In General, §§ 83-91.

B. Temporary Alimony, §§ 92-98.

C. Allowance for Counsel Fees and Expenses, §§ 99-110.

D. Permanent Alimony, §§ 111-121.

E. Disposition of Property, §§ 122-132.

F. Enforcement of Order, Judgment or Decree, §§ 133-139.

G. Appeal, §§ 140-144.

A. IN GENERAL.

NATURE AND PURPOSE OF ALIMONY, § 83.
STATUTE CONSTRUED, § 84.
JURISDICTION TO GRANT, § 85.
—— ON SERVICE BY PUBLICATION, § 86.
SUFFICIENCY OF PLEADING, § 87.
POWER TO DISPOSE OF PROPERTY PENDING SUIT, § 88.
INJUNCTION AGAINST DISPOSITION OF PROPERTY BEFORE AWARD, § 89.
AUTHORIZING MORTGAGE TO PAY COSTS, § 90.
PROPERTY SUBJECT TO CLAIM FOR ALIMONY, § 91.

§ 83. Nature and Purpose of Alimony.

[a] Alimony distinguished from allowance for future support.—Spencer, Ex parte, 83 Cal. 463, 464, 17 Am. St. Rep. 266, 23 Pac. 395.

[b] Alimony in its strict sense proceeds only from husband to wife and cannot exist where relation of husband and wife does not exist.—Spencer, Ex parte, 83 Cal. 463, 17 Am. St. Rep. 266, 23 Pac. 395.

[c] The purpose of alimony allowed in an action by a wife for maintenance or divorce is to give the wife support, and to enable her to conduct her side of the litigation pending the trial of the issues made by the pleadings, and the court cannot be compelled to try and determine an issue of insanity raised by the answer of the husband before it can allow alimony.—Storke v. Storke, 99 Cal. 621, 34 Pac. 339.

FOR AUTHORITIES FROM OTHER STATES:

Alimony and its allowance: 60 Am. Dec. 665, note; 24 L. R. A. 433, note. See, also, 14 Cyc. 742-803; 17 Cent. Dig., cols. 782-970, §§ 585-772.

§ 84. Statute Construed.

[a] The provision for alimony, made in the statute concerning divorces, was not intended to be a prohibition to the granting of alimony in other cases.—Galland v. Galland, 38 Cal. 265.

§ 85. Jurisdiction to Grant.

[a] In an action for divorce brought by the wife, the judge of the court in which the action is pending has no jurisdiction to hear and determine, in the district court of an adjoining county of the same district, an application by the wife for an allowance pendente lite, and for the custody of the children of the marriage.—Bennett v. Southard, 35 Cal. 688.

[b] The power conferred on the court by the statute concerning divorce and alimony, to provide for the separate maintenance of the wife, pending an action for, or after, a final decree of divorce, does, by necessary implication, negative the power or jurisdiction of the court to decree an allowance for the separate maintenance of the wife, except

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when jurisdiction is acquired by the commencement of an action for divorce upon allegations of statutory cause therefor. (Per Sprague, J., dissenting; Sanderson, J., concurring.)—Galland v. Galland, 38 Cal. 265.

[c] Supreme court cannot make an order relative to alimony in a divorce suit pending in the supreme court upon appeal. The jurisdiction of the supreme court is appellate. The order should be applied for to the superior court.—Reilly v. Reilly, 60 Cal. 624.

[d] In an action by a wife for a divorce, the trial court ordered the defendant to pay plaintiff's counsel two hundred and fifty dollars, as counsel fees, from which order defendant appealed. Pending the appeal, the trial court ordered defendant to pay plaintiff's counsel an additional two hundred and fifty dollars, to meet the expense of the appeal. It appeared that plaintiff had no means of her own with which to meet such expenses, and that defendant's means were ample. Held, that the trial court had power to make the last-mentioned order. Ross, J., dissenting, on the ground that, under Code of Civil Procedure, section 946, the power to allow a wife counsel fees in the appellate court is vested in that court alone.—Winter, Ex parte, 70 Cal. 291, 11 Pac. 630.

[e] The provision for permanent alimony in an action for a divorce brought by the wife is ordinarily an incident to the judgment for divorce, and the jurisdiction of the court to make such provision is not dependent upon averments in the complaint as to the husband's resources.—Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609.

[f] The trial court held to have acquired jurisdiction in a divorce proceeding to determine a question as to the separate character of land and to quiet title to the rightful owner.—Glass v. Glass (Cal. App.), 88 Pac. 734.

FOR AUTHORITIES FROM OTHER STATES:

Alimony, power of the court to decree after the granting of: 88 Am. Dec. 657, note. See, also, 14 Cyc. 745, 746; 17 Cent. Dig., cols. 787-789, §§ 591-592.

§ 86. —— On Service by Publication.

[a] In awarding a divorce on substituted service, where defendant and the minor children, though domiciled in the state, are living elsewhere, and defendant makes no appearance, the court has no jurisdiction to allow alimony.—De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 789-790, § 593.

§ 87. Sufficiency of Pleadings.

[a] In action for a divorce, where the complaint states the existence of common property, the court, in addition to granting the divorce, may order a division of the common property, and that a homestead be set apart to the plaintiff, although no relief of this character is prayed for in the complaint.—Gimmy v. Gimmy, 22 Cal. 633.

[b] In an action for divorce, where the issues do not embrace the disposition of property, the court has no jurisdiction to enjoin the defendant from disposing of his property until the determination of the suit.—Remington v. Superior Court, 69 Cal. 633, 11 Pac. 252.

[c] If disposition of property is sought, issue as to it should be tendered by pleadings. Remington v. Superior Court, 69 Cal. 634, 11 Pac. 252.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 746, 747; 17 Cent. Dig., cols. 790-793, §§ 594-598.

§ 88. Power to Dispose of Property Pending Suit.

[a] Pendency of action for divorce does not prevent husband from mortgaging his own interest in common property.—Perkins v. Center, 35 Cal. 723.

[b] Husband cannot dispose of separate property for purpose of defeating wife in anticipated application for alimony.—Spreckels v. Spreckels, 116 Cal. 345, 58 Am. St. Rep. 170, 48 Pac. 228.

[c] The pendency of proceedings for divorce does not of itself interrupt the exercise of the husband's power of disposition of the community property, or of his separate property, though he is held to good faith in the disposition of it, and cannot make a voluntary conveyance with intent to deprive the wife of her claim.—Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902.

§ 89. Injunction Against Disposition of Property Before Award.

[a] Divorce court has no power to enjoin disposition pending suit, of property not put in issue in divorce suit.—Remington v. Superior Court, 69 Cal. 634, 11 Pac. 252.

[b] In an action for divorce, the court has jurisdiction, in a proper case and on a proper showing, to grant an injunction pendente lite, restraining plaintiff from alienating his separate property.—White, In re, 113 Cal. 252, 45 Pac. 323.

[c] Receipt from plaintiff in a divorce suit, after a decree therein restraining him from disposing of or encumbering his property, except that he is permitted to carry on and pursue his usual and ordinary business, of money remaining unpaid on a note previously given by him and secured on his land, will, in the absence of evidence to the contrary, be held within the exception.—Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 747; 17 Cent. Dig., cols. 793-795, §§ 600-603.

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§ 90. Authorizing Mortgage to Pay Costs.

[a] In an action for divorce by a husband against his wife, where a decree was rendered in favor of the wife, and a referee was appointed to take testimony and report thereon as to the character, condition and value of the property of the husbanrd, preliminary to a rendition of final judgment, and the decree required the costs and expenses of the reference to be paid by the husband, and the referee filed a petition to have the husband pay a certain sum into court for the payment of the costs of the reference, an order of court authorizing the husband to mortgage his realty for the purpose of securing the money is within the power of the court, and is a proper order.—White v. White, 97 Cal. 604, 32 Pac. 600.

[b] A motion in a divorce proceeding for permission to plaintiff to mortgage his property in order to pay alimony, counsel fees and other expenses of the litigation, is addressed to the discretion of the court.—White v. White, 33 Pac. 399.

§ 91. Property Subject to Claim for Alimony.

[a] Subsequent earnings of divorced husband may be taken for support of former wife.—Eidenmuller v. Eidenmuller, 37 Cal. 366. Apparently overruled in Spencer, In re, 82 Cal. 113, 23 Pac. 37.

[b] When divorce is granted for offense of husband, he may be compelled to pay wife certain sum monthly out of his future earnings, regardless of any common property then in esse.—Spencer, Ex parte, 83 Cal. 464, 465, 17 Am. St. Rep. 266, 23 Pac. 395 overruling Spencer, Ex parte, 82 Cal. 110.

[c] It is not essential to the validity of a decree for the payment by a husband of a monthly allowance to his divorced wife for her maintenance that the husband should be the owner of either separate or community property from which such payment could be enforced.—Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609.

[d] Deeds of gift made by a husband and his first wife, who joined therein, to their children, passed title to them which cannot be questioned by a second wife in an action by her for divorce; and the property so conveyed cannot be subjected to an order for alimony and counsel fees in such action.—Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

B. TEMPORARY ALIMONY,

JURISDICTION TO GRANT, § 92.
DISCRETION OF COURT, § 93.
GROUNDS AND BASIS OF ALLOWANCE, § 94.
APPLICATION AND PROCEEDINGS THEREON, § 95.
AMOUNT, § 96.
ORDER, § 97.
TERMINATION, § 98.

§ 92. Jurisdiction to Grant.

[a] In suit for divorce, the court has power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt in case of refusal to pay.—Perkins, Ex parte, 18 Cal. 60.

[b] Lower court may, after appeal taken by husband, order him to pay wife counsel fees to prosecute her action in appellate court.—Winter, Ex parte, 70 Cal. 293, 11 Pac. 630.

[c] Under Civil Code, section 137, authorizing alimony pendente lite to be granted to enable the wife to maintain or defend the action, the court may require the husband to pay the wife temporary alimony and reasonable attorney's fees.—Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838.

[d] Section 137 of the Civil Code, which provides that while an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to prosecute or defend the action, empowers the court to grant an allowance only as to expenses necessary to be incurred in the future prosecution or defense of the action, and does not authorize it to make an allowance for the payment of past expenses, except where the payment is necessary to be made in order to enable the wife to further prosecute or defend the action.—Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87.

[e] Civil Code, section 137, provides that while an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action; and Code of Civil Procedure, section 350, declares "that an action is commenced when the complaint is filed." Held, that where, in divorce, the complaint is filed, but no process is served on defendant, the action is not pending, for the purposes of section 137.—Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

[f] The court has power to require a husband to pay alimony to the wife pending her appeal from a judgment granting him a divorce.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

§ 93. Discretion of Court.

[a] Discretion of court in allowing temporary alimony is to be reasonably exercised.—Sharon v. Sharon, 75 Cal. 48, 16 Pac. 345.

[b] Discretion given court to allow alimony pending suit is not arbitrary, but must be exercised in view of circumstances of parties and their several necessities.—Turner v. Turner, 80 Cal. 144, 22 Pac. 72.

[c] Where husband's burdens and necessities are greater and his ability and means to sustain them less than wife's, it is an abuse of discretion to award temporary alimony.—Turner v. Turner, 80 Cal. 144, 22 Pac. 72.

[d] Order allowing alimony in a suit for divorce is discretionary.—Langan v. Langan, 91 Cal. 654, 27 Pac. 1092.

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[e] The granting of alimony pending a wife's appeal from a judgment granting the husband a divorce is within the discretion of the trial court, and its action will not be interfered with unless clearly abused.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[f] Under Civil Code, section 137, the taking of evidence to ascertain the proper amount to be allowed a wife for alimony, suit money, etc., and the trial court's allowance are within its discretion.—Youree v. Youree, 1 Cal. App. 152, 81 Pac. 1023.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 749; 17 Cent. Dig., cols. 800-801, § 613.

§ 94. Grounds and Basis of Allowance.

[a] On an application for temporary alimony and attorney's fees, it is not necessary to show that the husband had money or property with which to pay the amount ordered to be paid, since the allowance may be based on his earnings, or his ability to earn money.—Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838.

[b] The authority given by Civil Code, section 137, to the court to require the husband, pending an action for divorce, to pay as alimony any money "necessary" to enable the wife to support herself and children, is not devested by the fact that he is paying all the bills contracted by the wife, or by his declaration that he is willing to pay them till the conclusion of the action.—Anderson v. Anderson, 137 Cal. 225, 69 Pac. 1061.

[c] In an action for divorce for cruelty, the fact that defendant had a home, in which he was willing plaintiff should live during the pendency of the action, was not material on the question of plaintiff's right to temporary alimony and counsel fees.—Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877.

[d] In a suit for divorce, where plaintiff, in her affidavit for alimony, alleged that defendant owned property worth one hundred thousand dollars, and was in the receipt of an income of six hundred dollars per month, and defendant did not deny this allegation, further than to say that his property was not worth one hundred thousand dollars, and that his monthly income was not six hundred dollars, the fact that it also appeared that plaintiff was the owner of property of the value of seven hundred dollars, or thereabouts, did not preclude the court from awarding plaintiff temporary alimony and counsel fees.—Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877.

[e] In an action for divorce an allowance may be granted the wife for the payment of expenses already incurred by her, if such an allowance is necessary to enable her to further prosecute or defend her case.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 752, 753; 17 Cent. Dig., cols. 801-806, §§ 614-618.

§ 95. Application and Proceedings Thereon.

[a] In an action instituted by a wife for a divorce, and for a division of the property of the defendant, an order was made pendente lite awarding the plaintiff a certain monthly allowance as alimony. Thereafter the court, having found that the plaintiff was entitled to a divorce, referred the action to a referee to take testimony and report upon certain questions relating to the property of the defendant. Subsequently, and while the reference was pending, the court filed additional findings of fact and conclusions of law, and directed that judgment be entered in favor of the plaintiff, reserving all questions as to the property. A judgment was accordingly entered for a divorce, containing a provision that "all questions as to property, and as to a suitable allowance to the wife for her support, are hereby reserved." Held, that the judgment was not final so far as the questions concerning the property were concerned, and did not render inoperative the prior order for alimony.—Ambrose, Ex parte, 72 Cal. 398, 14 Pac. 33.

[b] On application for alimony pendente lite, where marriage is denied, wife must show prima facie marriage, her needs and husband's ability.—Sharon v. Sharon, 75 Cal. 43, 16 Pac. 345.

[c] Application for temporary alimony may be made at any time—at least after answer.—Sharon v. Sharon, 75 Cal. 48, 16 Pac. 345.

[d] Under Civil Code, section 137, providing that the court may, in its discretion, require the husband to pay alimony pending proceedings, the court may, on application of a wife, make an order requiring the husband to appear, and show cause why it should not be granted, and no notice of the application to the husband is required previous to the making of such order.—Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114.

[e] Where there is no issue as to the marriage in divorce proceedings, the merits of the case will not be considered on an application for temporary alimony further than is necessary to determine that the wife is proceeding in good faith.—Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877.

[f] The question whether a wife's appeal from a judgment granting the husband a divorce is meritorious, so as to justify the allowance of alimony pending the appeal, is to be determined from the entire showing made on the hearing, so that the court may consider the wife's affidavit and the bill of exceptions served on the motion for a new trial.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[g] Where, after a judgment of divorce in favor of the husband, the wife's motion for alimony pending an appeal which she alleged she intended to take was denied, this order was not res judicata preventing the granting of the motion on its renewal after an appeal had been perfected.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[h] Where, on motion by a wife for alimony pending her appeal from a judgment granting

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a divorce to her husband, she filed an affidavit stating that the appeal was taken in good faith and on the advice of counsel that she had good grounds for appeal, and also filed notice of intention to move for a new trial, and served a bill of exceptions for use on this motion, there was a sufficient showing that the appeal was in good faith and meritorious to justify the trial court in granting the wife alimony pending the appeal.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[i] On an application of a wife for alimony and suit money in divorce, it was within the court's discretion to permit her attorney to file an affidavit at the hearing.—Youree v. Youree, 1 Cal. App. 152, 81 Pac. 1023.

[j] On an application for alimony, suit money, etc., in an action against a wife for divorce, refusal to permit plaintiff to file an affidavit at the hearing, in reply to an affidavit then filed by defendant, held not an abuse of discretion.—Youree v. Youree, 1 Cal. App. 152, 81 Pac. 1023.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 756; 17 Cent. Dig., cols. 811-818, §§ 626-631.

§ 96. Amount.

[a] Allowance of seven thousand five hundred dollars as temporary alimony held excessive and an abuse of discretion.—Sharon v. Sharon, 75 Cal. 48, 49, 16 Pac. 345.

[b] Measure of temporary alimony is that which is necessary to provide for reasonable support according to wife's station in life.—Sharon v. Sharon, 75 Cal. 47, 48, 16 Pac. 345.

[c] Temporary alimony should, ordinarily, be less than permanent alimony.—Sharon v. Sharon, 75 Cal. 46, 16 Pac. 345.

[d] Actual conditions should be considered in fixing amount of temporary allowance.—Sharon v. Sharon, 75 Cal. 46, 16 Pac. 345.

[e] Plaintiff and defendant had been secretly married, and the wife agreed to keep the marriage secret. The husband agreed to allow the wife a certain amount of money per month until the marriage was acknowledged. Held, in an action for divorce, on application for temporary alimony, that it was an abuse of discretion to allow the wife more than the husband had agreed to allow her until the marriage was acknowledged.—Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

[f] An order was made in a divorce suit requiring the husband to pay to his wife (defendant) alimony pendente lite, one hundred and twenty-five dollars per month, and two hundred dollars counsel fees. There was one son, aged twelve years, who lived with his mother. Defendant's father had conveyed to her a house and lot worth at present thirty thousand dollars, and yielding a rental of one hundred and thirty-five dollars per month. Two weeks after the suit was commenced, she conveyed it back to her father, without consideration, by deed, which was not recorded. The rents thereof were still paid to her. Plaintiff's net earnings were two hundred and seventy-five dollars per month; his personal expenses, one hundred and fifty dollars per month. He owed six hundred dollars, which he was paying in installments. Held, that the monthly allowance should be reduced to fifty dollars per month, to include the support and education of the son.—Meyer v. Meyer, 120 Cal. 225, 52 Pac. 486.

[g] Where, in divorce, defendant has no property, save some personalty, of the value of about four hundred and seventy dollars, and which, according to his testimony, could not be sold on forced sale for over three hundred dollars, an order for three hundred dollars alimony and counsel fees is excessive.—Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 756; 17 Cent. Dig., cols. 818-823, §§ 632-634.

§ 97. Order.

[a] On suit by a wife for divorce she was granted two hundred and fifty dollars per month as alimony pendente lite, and on judgment granting the husband a divorce on his cross-complaint this order was revoked. On application by the wife for alimony pending appeal, the court granted her one hundred dollars per month, the order also reciting that, as she had received no alimony for three months, the payments should date from three months before the order and the husband immediately pay her three hundred dollars. Held, that it was a reasonable inference from the order that the allowance of three hundred dollars was made in order to enable the wife to further carry on her case.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 759, 760; 17 Cent. Dig., cols. 823, 824, §§ 635, 636.

§ 98. Termination.

[a] Though an absolute divorce obtained by a husband would relieve him from a prior judgment for maintenance obtained against him by his wife, a judgment awarding the divorce, when set aside by the trial court, cannot have that effect, even though the order setting it aside has been appealed from. Smith v. Superior Court in and for City and County of San Francisco, 136 Cal. 17, 68 Pac. 100.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 760; 17 Cent. Dig., col. 826, § 640.

C. ALLOWANCE FOR COUNSEL FEES AND EXPENSES.

STATUTE CONSTRUED, § 99.
CONDITION OF CAUSE, § 100.
—— AFTER TRIAL AND JUDGMENT, § 101.
NUMBER OF COUNSEL ALLOWED, § 102.

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DISCRETION OF COURT, § 103.
TIME TO FIX, § 104.
GROUNDS, § 105.
DEFENSES AND OBJECTIONS, § 106.
APPLICATION AND PROCEEDINGS THEREON, § 107.
AMOUNT AND ITEMS, § 108.
ORDER, § 109.
FEES AND EXPENSES OF APPEAL OR MOTION FOR NEW TRIAL, § 110.

§ 99. Statute Construed.

[a] Civil Code, section 137, provides that during the pendency of the action the court may require the husband to pay any money to enable the wife to prosecute her action for divorce, Code of Civil Procedure, section 1049, provides that an action is deemed pending until time for appeal has passed. Held, that these sections are applicable to a proceeding to vacate a judgment in a divorce case under Code of Civil Procedure, section 473, granting the trial court power to relieve a party from judgment where application is made within six months from entry.—Grannis v. Superior Court of City and County of San Francisco, 143 Cal. 630, 77 Pac. 647.

§ 100. Condition of Cause.

[a] If, pending an action for divorce, the parties thereto admit a condonation, and ask that the action be dismissed, the court should order a dismissal, and thereafter the husband cannot be compelled to pay the counsel fees of the wife.—Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480.

[b] The court had jurisdiction, in a divorce case, to order defendant to pay plaintiff twenty-five dollars per month alimony, though issue of fact had not been joined, and there was pending a demurrer to the complaint.—Langan v. Langan, 91 Cal. 654, 27 Pac. 1092.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 761; 17 Cent. Dig., cols. 829-831, § 644.

§ 101. —— After Trial and Judgment.

[a] Under section 137 of the Civil Code the power of the trial court to make an allowance to the wife for her support as alimony, or for the purpose of defending or prosecuting an action for divorce, is not exhausted upon the rendition of the judgment, but may be exercised at any time during the pendency of an appeal.—Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732.

[b] Under Civil Code, section 137, providing that the court may, while an action for divorce is pending, require the husband to pay, as alimony, money necessary to enable the wife to prosecute or defend the action, an allowance of counsel fees incurred during the trial cannot be made on final judgment.—Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056.

[c] The power of the court to compel the husband to pay the wife's counsel fees for services of her attorney in an action for divorce, where she is without means to pay them, is not exhausted by the granting of a final judgment.—Grannis v. Superior Court of City and County of San Francisco, 143 Cal. 630, 77 Pac. 647.

§ 102. Number of Counsel Allowed.

[a] Wife cannot, as of course, employ as many attorneys as she chooses and compel husband to furnish funds for whatever she is to pay them.—Sharon v. Sharon, 75 Cal. 39, 16 Pac. 345.

[b] It seems that where husband employs three attorneys to prosecute his case wife may employ equal number.—White v. White, 86 Cal. 215, 24 Pac. 996.

§ 103. Discretion of Court.

[a] Court has discretionary power to allow wife counsel fees pending appeal by husband from order directing him to pay her counsel fees, pending suit for support and maintenance.—Winter, Ex parte, 70 Cal. 293, 11 Pac. 630.

[b] Allowance of alimony and costs is discretionary.—Schammel v. Schammel, 73 Cal. 105, 106, 14 Pac. 393.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 762; 17 Cent. Dig., cols. 831-832, § 645.

§ 104. Time to Fix.

[a] The court cannot know, at the commencement of the action, the amount of labor that will be required, or the value of the services to be performed in the prosecution or defense of the action on behalf of the wife, and there is no rule of procedure which requires it to fix the entire amount of counsel fees at the beginning of the action, or to prevent it from making a new allowance from time to time, as the exigencies of the case shall seem to demand.—Rose v. Rose, 109 Cal. 544, 42 Pac. 452.

§ 105. Grounds.

[a] In an action for divorce, brought by a wife, where the marriage is denied, to entitle her to alimony and suit money she must prove it by a preponderance of the evidence; a mere prima facie showing is not sufficient. Judgment and order (1898) 55 Pac. 900, reversed.—Hite v. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. 227.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 762; 17 Cent. Dig., cols. 833-834, § 646.

§ 106. Defenses and Objections.

[a] Where attorneys are prosecuting wife's cause on contingent fee basis, she is entitled to no allowance as counsel fees.—Sharon v. Sharon, 75 Cal. 42, 16 Pac. 345.

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[b] It is proper to refuse alimony pendente lite to pay fees of attorney who has agreed to give his services for contingent fee.—White v. White, 86 Cal. 213, 215, 24 Pac. 1030.

[c] Fact that one of wife's attorneys gives his services for contingent fee does not preclude allowance to pay for services of others. White v. White, 86 Cal. 214, 217, 24 Pac. 1030.

[d] Under Civil Code, section 137, wife is not entitled to an order requiring her husband to pay her a sum of money for counsel fees, where counsel have agreed to render her their services gratuitously.—Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114.

[e] Where application of divorced wife to modify decree is without merit, her application for counsel fees is properly denied.—Parkhurst v. Parkhurst, 118 Cal. 22, 50 Pac. 9.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 762; 17 Cent. Dig., cols. 834-836, §§ 647-650.

§ 107. Application and Proceedings Thereon.

[a] On an application by a wife for an allowance for attorney's fees under Civil Code, section 137; authorizing the court to require the husband to pay as alimony any money necessary to enable the wife to prosecute or defend the action, no proof is necessary to assist the court in fixing the amount of the fees, as the court may determine, in its own discretion, from the facts and circumstances of the case as they appear to it, from the pleadings, and from the papers, what is reasonable fee.—Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838.

[b] Where, in divorce, defendant is not served with process, and has no notice of an application for alimony and counsel fees, an ex parte order for the same is unauthorized and void.—Baker v. Baker, 130 Cal. 302, 68 Pac. 971.

[c] An order in a divorce suit that defendant, who had moved for a new trial, pay costs and attorney's fees, is not complied with by paying the reporter and sheriff, but not the attorney; and defendant is not entitled, upon such payment, to a discharge on habeas corpus from the imprisonment to which he had been sentenced for contempt in refusing to comply with the order.—Robinson, Ex parte, 13 Pac. 852.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 763, 764; 17 Cent. Dig., cols. 836-837, § 651.

§ 108. Amount and Items.

[a] Allowance of one thousand dollars as attorney's fees held proper.—Kohler, Ex parte, 74 Cal. 38, 15 Pac. 436.

[b] Allowance of fifty-five thousand dollars counsel fees held excessive.—Sharon v. Sharon, 75 Cal. 42, 16 Pac. 345.

[c] Under Civil Code, section 137, providing that the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to prosecute or defend the action, it is not within the discretion of the court to allow the wife money for unnecessary counsel in the action. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

[d] It appearing that two thousand four hundred dollars had already been allowed for attorney's fees, and that this sum was more than had been paid by the husband to his attorneys, and more than half the amount that they were to receive in the suit, it was not an abuse of discretion to refuse a further allowance for that purpose to the wife.—White v. White, 86 Cal. 212, 24 Pac. 1030.

[e] Wife is entitled to such allowance out of community estate as is necessary to employ sufficient counsel to maintain her rights.—White v. White, 86 Cal. 214, 24 Pac. 996.

[f] Where the expenses of a divorce action have been incurred and paid by the wife with money borrowed by her entirely upon the strength of her own credit they cannot be made the basis of an order granting an allowance therefor, and compelling the husband to pay them.—Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87.

[g] An allegation, in a complaint for divorce by a wife, that a certain sum was a reasonable allowance for counsel fees, does not prevent the court from ordering the payment of a greater sum.—Rose v. Rose, 109 Cal. 544, 42 Pac. 452.

[h] An order by the judge who tried a divorce case, granting one hundred dollars printer's fees and two hundred and fifty dollars counsel fee, on a pending appeal from a judgment in favor of the wife, and a contemplated appeal from an order denying a new trial, will not be reversed as excessive. Wolff v. Wolff, 37 Pac. 858.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 764, 765; 17 Cent. Dig., cols. 838-841, §§ 653-654.

§ 109. Order.

[a] Money necessary to prosecute or defend suit should be ordered paid to wife; court cannot order husband to pay it to her attorneys.—Sharon v. Sharon, 75 Cal. 38, 39, 16 Pac. 345.

[b] An order to pay plaintiff alimony was not erroneous because the requirement to pay the amount fixed by it was not expressly limited to such time as the action should be pending.—Langan v. Langan, 91 Cal. 654, 27 Pac. 1092.

[c] An order awarding counsel fees "to the plaintiff or to her counsel" in a suit for divorce, while inaccurate in directing payment to be made to plaintiff's counsel, is not sufficiently irregular to justify a reversal.

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Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877.

[d] In a divorce action, the trial judge could vacate an order for the payment of attorney's fees made ex parte upon the wife's misrepresentation that she had no separate estate.—Glass v. Glass (Cal. App.), 88 Pac. 733.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 766; 17 Cent. Dig., cols. 841-842, § 655.

§ 110. Fees and Expenses of Appeal or Motion for New Trial.

[a] The superior court has power in an action of divorce, after an appeal has been taken by the wife from a judgment rendered against her, to compel the husband to pay her a reasonable sum of money for costs and counsel fees with which to prosecute the appeal.—Larkin v. Larkin, 71 Cal. 330, 12 Pac. 227.

[b] Under Code of Civil Procedure, section 1049, an action is pending from its commencement until final determination on appeal, or until the time for appeal has passed; and under Civil Code, section 137, providing that "when an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action"—the court, in an action by the husband for divorce, may, after judgment for him, on the wife's showing that she wishes in good faith to appeal, and has no means, order the husband to pay for transcribing the testimony, and other costs, and to pay into court for the wife's attorney a certain sum for prosecuting appeal; such order being an allowance for the wife, and not a direct judgment in favor of persons not parties to the suit.—Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732.

[c] Court may order husband in whose favor decree is entered to pay wife such money as it might deem necessary to enable her to prosecute motion for new trial or to appeal. Storke v. Storke, 116 Cal. 51, 47 Pac. 869.

D. PERMANENT ALIMONY.

IN GENERAL, § 111.
DISCRETION OF COURT, § 112.
RIGHT OF WIFE ON REFUSAL OF DIVORCE, § 113.
AFTER FINAL JUDGMENT, § 113½.
DEFENSES AND OBJECTIONS, § 114.
AMOUNT, § 115.
AWARD OF GROSS SUM, § 116.
LIEN OF CLAIM OR JUDGMENT, § 117.
NEW TRIAL, § 118.
JUDGMENT OR DECREE, § 119.
MODIFICATION OF JUDGMENT, § 120.
VACATION OR SETTING ASIDE, § 121.
ASSIGNMENT OF ALIMONY, § 121½.

§ 111. In General.

[a] Decree for permanent alimony may provide for payment of allowance from appearance of defendant or commencement of suit. Sharon v. Sharon, 75 Cal. 46, 16 Pac. 345.

§ 112. Discretion of Court.

[a] Allowance of permanent alimony is in discretion of court.—Wolff v. Wolff, 102 Cal. 433, 36 Pac. 767, 1037.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 769; 17 Cent. Dig., col. 852, § 665.

§ 113. Right of Wife on Refusal of Divorce.

[a] Alimony cannot be awarded to wife upon granting to husband a divorce for her fault—as here, for her cruelty to him.—Everett v. Everett, 52 Cal. 383.

[b] Under section 136, Civil Code, court may refuse wife divorce and grant her maintenance.—Hagle v. Hagle, 68 Cal. 590, 9 Pac. 842.

[c] Under Civil Code, section 136, providing that, "though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband," alimony cannot be granted to the wife living apart as in a judicial separation, where there is no statutory ground for an absolute divorce.—(1888) Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; (1880) Reade v. Reade, 22 Pac. 284.

[d] Civil Code, section 136, providing that in an action for divorce, if relief be denied the plaintiff, the court may direct that the husband maintain the wife or children, does not authorize an allowance of permanent alimony in such a case upon the mere allegation by defendant of her husband's cruelty without proof.—Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838.

[e] Under our code allowance for future support of wife is compensation for wrong done her and is allowed only when divorce is granted for offense of husband.—Spencer, Ex parte, 83 Cal. 464, 17 Am. St. Rep. 266, 23 Pac. 395.

§ 113½. After Final Judgment.

[a] Where a final judgment has been rendered in a divorce suit settling the property rights of the parties, without an award of alimony, and the time for appeal therefrom has expired, the court has no jurisdiction to make an order, or supplemental decree, granting alimony for the support of the wife and children.—Howell v. Howell, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770.

FOR AUTHORITIES FROM OTHER STATES:

21 L. R. A. 677, note. See, also, 14 Cyc. 769; 17 Cent. Dig., cols. 850-852, § 663.

§ 114. Defenses and Objections.

[a] When the court grants a divorce to the husband on account of the offense of the wife

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it cannot require the husband to pay to the wife, after the divorce, out of his separate property, a sum or sums of money for her support.—Everett v. Everett, 52 Cal. 383.

[b] Where a wife had, in a suit for maintenance, obtained a decree for monthly payments, the granting of alimony to the wife in a subsequent suit for divorce by the husband held error.—Smith v. Smith, 147 Cal. 143, 81 Pac. 411.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 856-859, §§ 670-672.

§ 115. Amount.

[a] Court, in granting a divorce, may direct the defendant to pay the plaintiff a monthly sum as alimony, and the allowance may be based on his earnings or upon his ability to earn money.—Eidenmuller v. Eidenmuller, 37 Cal. 364.

[b] Alimony of one hundred and twenty-five dollars per month to bedridden wife is not excessive where husband's income is four hundred and thirty-two dollars.—Schammel v. Schammel, 74 Cal. 37, 38, 15 Pac. 354.

[c] In fixing amount of future allowance, court may regard earnings of husband or his ability to earn, and may subsequently reduce or increase amount as circumstances warrant. Spencer, Ex parte, 83 Cal. 465, 17 Am. St. Rep. 266, 23 Pac. 395.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 772-779; 17 Cent. Dig., cols. 861-868, §§ 675-678.

§ 116. Award of Gross Sum.

[a] Under Civil Code, section 139, providing that, when a divorce is granted for an offense of the husband, "the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during life, or for a shorter period, as the court may deem just," etc., alimony may be decreed in gross.—Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095.

[b] Where defendant's property is worth five thousand dollars, there is no abuse of discretion in decreeing plaintiff alimony in the sum of fifteen hundred dollars for the support of herself and two small children.—Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095.

[c] Where the wife had declared a homestead upon the separate property of the husband, the court may set it apart to her for a limited period upon granting a divorce in her favor; but it is not compelled to do so, and may, in lieu thereof, adjudge a specific sum for permanent alimony, and charge it as a lien upon the premises.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 777-779; 17 Cent. Dig., cols. 868-875, §§ 679, 680.

§ 117. Lien of Claim or Judgment.

[a] A court has the power to make its judgment for the payment of alimony to a wife a lien on property of the husband, the provision of Civil Code, section 140, authorizing it to require a husband to give security for the payment of alimony, or to appoint a receiver, not being an abridgment of its general equity powers.—Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609.

[b] Under sections 139 and 140 of the Civil Code the court may make the wife's alimony a lien upon the husband's estate, and may enforce the lien by appointing a receiver to collect the rents and profits, and to proceed to sell the property and pay the several sums adjudged to be due to the plaintiff.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

§ 118. New Trial.

[a] Allowance of alimony is an incident to an action for divorce, and the determination as to its allowance is not the trial of an issue in the case; and hence a new trial will not be granted for a re-examination of an allowance of alimony, a new trial being a re-examination of an issue of fact in the same court after a trial.—Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756.

§ 119. Judgment or Decree.

[a] Under Civil Code, section 4, requiring the code to be liberally construed, with a view to promote justice, a permanent future allowance to a divorced wife will not be defeated because granted under the misnomer of "permanent alimony," where it is a lawful grant under Civil Code, section 139, which provides that where a divorce is granted for an offense of the husband the court may make a suitable allowance to the wife for her support for life, or for a shorter period.—Spencer, Ex parte, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395.

[b] Where, on rendering a decree of divorce, the question of alimony is reserved, a subsequent order awarding alimony is not void.—O'Brien, Ex parte (Cal.), 48 Pac. 71.

[c] Under Code of Civil Procedure, section 580, the part of a default judgment for divorce which allows alimony held not void on the ground that the relief is in excess of that prayed for.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

[d] A decree awarding alimony to a wife obtaining a divorce held prima facie based on the obligation of the husband to give her support, and not on any property rights possessed by her at the time of the divorce.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 782-788; 17 Cent. Dig., cols. 879-881, §§ 684-686.

§ 120. Modification of Judgment.

[a] Order granting alimony may be increased or modified from time to time.—Cottrell, Ex parte, 59 Cal. 417.

[b] Provision of section 139, Civil Code, authorizing court from time to time to modify its orders for the maintenance and support of the wife and children, contemplates that the right to alimony as well as other property rights shall have been presented in the action and established by the judgment, and there can be no modification of an allowance for alimony where there is no allowance to modify.—Howell v. Howell, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770.

[c] On an application to modify a decree for alimony, the stipulation pursuant to which the decree was made was admissible.—Parkhurst v. Parkhurst, 118 Cal. 18, 50 Pac. 9.

[d] A decree in divorce awarded the custody of an infant daughter to the mother, with an allowance for its support. Thereafter the mother obtained a modification of the decree, giving the custody of the child to its maternal grandmother, but retained nearly all the allowance for the child's support for her own use; having subsequently remarried. At the age of three and one-half years the child had learned to swear and use vulgar language. The father was of ample means and of good character. Held to justify the modification of the decree so as to award the custody of the child to the father.—Crater v. Crater, 135 Cal. 633, 67 Pac. 1049.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 784-788; 17 Cent. Dig., cols. 885-893, §§ 691-695.

§ 121. Vacation or Setting Aside Judgment.

[a] Where a divorce has been granted without personal service on defendant, who was not in the state when suit was brought, and made no appearance, a motion to vacate that part of the judgment allowing alimony will lie; and defendant need not seek relief under Code of Civil Procedure, section 473, by offering to appear and plead on the merits.—De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345.

[b] The discharge of an order for alimony, on the ground of the husband's inability to pay, will not be disturbed where, from the uncontradicted affidavits, it does not appear that the court's discretion was not well exercised.—Smith v. Smith, 142 Cal. 636, 76 Pac. 489.

[c] Under Civil Code, section 139, the court, on the re-marriage of a wife who had been awarded alimony in a judgment for divorce, may vacate the decree as to the alimony.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

[d] Under Code of Civil Procedure, section 1963, a husband liable to pay alimony to his divorced wife is presumptively entitled to a vacation of the decree as to alimony on proving a remarriage of the wife.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

[e] A husband seeking relief from a decree of divorce granting alimony to his wife held not barred as against the wife by laches.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

§ 121½. Assignment of Alimony.

[a] An assignee of sums due a divorced wife under the decree awarding to her as alimony a specified sum per month is entitled only to the rights the wife had.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 787, 788; 17 Cent. Dig., cols. 893, 894, § 696.

E. DISPOSITION OF PROPERTY.

IN GENERAL, § 122.
JURISDICTION, § 123.
STIPULATIONS AND AGREEMENTS OF PARTIES, § 124.
ESTATES AND INTERESTS SUBJECT TO DISPOSAL OR DIVISION, § 125.
RESTORATION OF PROPERTY TO WIFE, § 126.
ASSIGNMENT OF HOMESTEAD, § 127.
DIVISION OF PROPERTY, § 128.
APPLICATION AND PROCEEDINGS THEREON, § 129.
JUDGMENT OR DECREE, § 130.
—— OPERATION AND EFFECT, § 131.
—— EFFECT OF REMARRIAGE, § 132.

§ 122. In General.

[a] Settlement of property rights between parties is incident of every divorce decree where there is any property involved.—Mott v. Mott, 82 Cal. 419, 22 Pac. 1140.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 789-793; 17 Cent. Dig., cols. 897-917, §§ 701-720.

§ 123. Jurisdiction.

[a] Any other court than the one rendering the decree of divorce, if otherwise competent, has the jurisdiction to determine the disposition of the community property, under the provisions of the statute.—Godey v. Godey, 39 Cal. 157.

[b] Court acquired jurisdiction herein to determine question of separate character of land and to quiet title to the rightful owner. Glass v. Glass (Cal. App.), 88 Pac. 734.

§ 124. Stipulations and Agreements of Parties.

[a] In action by wife for divorce on ground of extreme cruelty, in which she waives all claim to the community property, the court

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has power, under subdivision 3 of section 146 of the Civil Code, in the judgment granting her the divorce, to set aside a homestead which had been declared upon community property to the husband.—Stockton v. Knock, 73 Cal. 425, 15 Pac. 51.

[b] In an action for divorce, the court, in making disposition of the community property, may disregard an agreement between the parties as to a division of the property, and a separate suit to set aside the same is not necessary.—Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801.

§ 125. Estates and Interests Subject to Disposal or Division.

[a] Where land claimed as a homestead has never been the residence of the family, it is common property, and is to be treated as such upon judicial division of the property after divorce.—Elmore v. Elmore, 10 Cal. 224.

[b] Where a husband took title to lots purchased out of his separate funds in the name of children by a former marriage, and built a house thereon with community funds, the building is community property, so far as to give his wife her share on a divorce, but the husband can claim nothing as against the children.—Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533.

[c] Section 146, Civil Code, does not authorize court to divide common property in possession of mortgagee and adjudge that proportionate share of debt be chargeable against share of each spouse.—Cummings v. Cummings, 75 Cal. 439, 17 Pac. 442.

[d] Civil Code, section 141, which prescribes that in executing the provisions of section 139, providing for the maintenance of the wife in case of divorce, the court shall resort first to the community property, and then to the separate property of the husband, does not embrace the earnings of the husband after divorce.—Spencer, In re, 82 Cal. 110, 23 Pac. 37.

[e] In an action for divorce, the court has no jurisdiction over the separate property of the wife.—Reid v. Reid, 112 Cal. 274, 44 Pac. 564.

§ 126. Restoration of Property to Wife.

[a] Where the court, upon decreeing a divorce in favor of the wife, finds that there is a judgment outstanding against her in favor of the husband, and that the judgment, which was wrongfully rendered, was for money which he had given her in consideration of the relinquishment by her of her rights in the homestead, so that he might sell it, the court may order the judgment to be assigned to her.—Haley v. Haley, 14 Pac. 92.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 790; 17 Cent. Dig., cols. 902-907, §§ 706-708.

§ 127. Assignment of Homestead.

[a] In case of divorce, a homestead established on the common property of husband and wife may be set apart to one of the parties, in the division of the common property. Gimmy v. Doane, 22 Cal. 635.

[b] Court has no authority to assign homestead or any equitable interest in it, in trust for any purpose.—Simpson v. Simpson, 80 Cal. 241, 22 Pac. 167.

[c] The power of the court, in an action of divorce, to assign for a limited period the homestead selected from separate property cannot extend beyond the life of the innocent party to whom the property is awarded; and in construing the decree it must be presumed that the court intended to keep within its powers, and the decree must be read in the light of the law as having a life limitation inseparately connected with it.—Neary v. Godfrey, 102 Cal. 338, 36 Pac. 655.

[d] Where a divorce is granted to the husband on the ground of the extreme cruelty of the wife, and a homestead selected from her separate property has been assigned to him for a period of years, his right to the use of the homestead terminates upon his death before the expiration of the term of years designated by the decree of the court. Neary v. Godfrey, 102 Cal. 338, 36 Pac. 655.

[e] Under Code of Civil Procedure, section 146, subdivision 4, providing, with reference to a divorce on the ground of extreme cruelty or adultery, that, "if a homestead has been selected from the separate property of either, it shall be assigned to the former owner of said property, subject to the power of the court to assign it for a limited period to the innocent party," such "limited period" cannot exceed the life of the innocent party.—Huellmantel v. Huellmantel, 117 Cal. 407, 49 Pac. 574.

§ 128. Division of Property.

[a] It is in the discretion of the court, in a divorce for adultery, to award all the common property to the prevailing party.—Miller v. Miller, 33 Cal. 353.

[b] The inference to be derived from sections 146 and 147 of the Civil Code is, that if a divorce is granted on the ground of adultery or extreme cruelty, the injured party is entitled to more than one-half of the common property.—Eslinger v. Eslinger, 47 Cal. 62.

[c] Where a divorce is granted on ground of extreme cruelty the guilty party is entitled to receive only so much of the community property as the court may deem just under the facts of the case; and the discretion of the court in dividing the property is subject to revision on appeal.—Eslinger v. Eslinger, 47 Cal. 62.

[d] On granting divorce to wife on ground of adultery court may award whole community property to her, though exact extent

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of husband's resources is unknown.—White v. White, 86 Cal. 222, 24 Pac. 996.

[e] On granting a wife a divorce for extreme cruelty, where it appears that the husband is a shoemaker, earning from forty to sixty dollars per month, the entire community property, consisting of a house and lot worth two thousand dollars, and the household furniture, should be awarded to the wife, as this will still leave her to earn her own support, and that of her minor daughter, awarded to her custody.—Strozynski v. Strozynski, 97 Cal. 189, 31 Pac. 1130.

]f] Where a divorce is properly granted to a wife for willful neglect of the husband to provide the necessaries of life, the court has power to divide the community property upon which a homestead has been declared, and it has a wide discretion in making the division. The homestead need not be divided in severalty.—Smith v. Smith, 124 Cal. 651, 57 Pac. 573.

[g] In an action for a divorce, it is not an abuse of discretion for the trial court to set off to plaintiff the homestead and a small amount of personalty from the community property, leaving to defendant all other community property; section 146, subdivision 1, Civil Code, providing: "The community property shall be assigned to the respective parties in such proportion as the court, from all the facts of the case and the condition of the parties, may deem just."—Boyd v. Boyd, 31 Pac. 1108.

[h] Plaintiff being an invalid, and defendant more than able to make his living, it was proper for the court, while allowing no permanent alimony, to give plaintiff, besides most of the household furniture, the whole community house and lot, which was worth only three thousand dollars, and was subject to a mortgage of two thousand five hundred dollars.—Johnson v. Johnson, 35 Pac. 637.

FOR AUTHORITIES FROM OTHER STATES:

34 L. R. A. 110, note. See, also, 14 Cyc. 792; 17 Cent. Dig., cols. 908-912, §§ 713-715.

§ 129. Application and Proceedings Thereon.

[a] The statute defining the common property of husband and wife, and providing for the division of common property, in case of divorce, is a mere regulation of a right of property, and does not provide a new right of action, and a proceeding for a division of such property need not conform with the strict requirements governing statutory actions.—Gimmy v. Doane, 22 Cal. 635.

[b] Welfare of children is a matter of paramount importance in determining division of property and alimony.—Eidenmuller v. Eidenmuller, 37 Cal. 365.

[c] Sale of community property under section 147, Civil Code, does not require confirmation where order of sale does not require it.—Kimble v. Conroy, 75 Cal. 414, 415, 17 Pac. 546.

[d] When on issue of community property husband introduces antenuptial contract that all property acquired after marriage should remain separate property of husband, wife may attack its validity for any cause.—White v. White, 86 Cal. 223, 24 Pac. 996.

[e] Upon the issue as to the character of the property to be disposed of by the court, in an action by the wife for divorce on the grounds of the extreme cruelty and habitual intemperance of the husband, a paper signed by the husband, in which he offered to divide the property, and described it as community property, is admissible in evidence against him as a declaration or admission of its community character, though the offer was made by way of compromise, the declaration not being essential to the purpose of the compromise, or to be regarded as a concession made for that purpose, but being the statement of an independent fact. Rose v. Rose, 112 Cal. 341, 44 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 792, 793; 17 Cent. Dig., cols. 912-914, §§ 716, 717.

§ 130. Judgment or Decree.

[a] In the course of a suit for divorce, the parties having agreed upon a certain plan of division of the community property, if the wife, relying upon the false representations of the husband, was wronged in such division, the court will annul the division, and decree another, notwithstanding that the wife or her attorney had, in the first instance, the means of knowing the true state of the case.—Senter v. Senter, 70 Cal. 619, 11 Pac. 782.

[b] In an action for divorce and an accounting, plaintiff alleged that a conveyance, purporting to be a deed, was voluntary and made with intent to defraud plaintiff; but the trial court found that the conveyance was a mortgage, based upon a valuable consideration. Held, that a decree ordering a division of the mortgaged property in payment of alimony is inconsistent with the case made and should be reversed.—Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442.

[c] A decree for divorce awarded the homestead, as to which the wife had prior thereto executed and recorded a declaration of homestead, to her absolutely, gave her the custody of the children, and ordered that the homestead be held by her "in trust for her support and that of her children." Held, that the latter clause did not create a trust in the property nor qualify her absolute estate, especially in view of Civil Code, section 146, subdivision 3, which only authorizes the court in case of a divorce, where the homestead has been selected from the community property, to assign it to the innocent party, either absolutely or for a limited time, subject in the latter case to the future disposition of the court.—Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167.

[d] Under Civil Code, section 146, providing that, in case of divorce, if the homestead

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has been selected from the separate property of either, it shall be assigned to the former owner, subject to the power of the court to assign it for a limited period to the innocent party, the court cannot assign it to the innocent party for a longer period than his life, and an assignment to him for ten years is on the implied condition that he lives that long.—Neary v. Godfrey, 102 Cal. 338, 36 Pac. 655.

[e] A judgment for a divorce adjudged certain land to have been community property, and vested the same in the husband absolutely and ordered that he pay the wife a certain sum upon her delivery of a quitclaim to the premises, and that on failure of the wife to execute the deed, the husband should be relieved from the payment of such sum. The wife failed to execute the deed. Shortly before the entry of the judgment, the husband conveyed the land to another, who subsequently brought ejectment against both husband and wife. In the ejectment suit, the wife demurred to the husband's cross-complaint, and the demurrer was sustained, and, on failure of the husband to amend, a judgment for costs was entered against him in favor of the wife. Held, in a proceeding by the husband against the wife for a writ of assistance to recover possession of the land, that the absoluteness of the husband's title was not made to depend upon the payment of the money to the wife, but, on the contrary, the wife's right to the money was made to depend on the condition precedent that she execute the deed.—Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164.

[f] Where decree of divorce provides for payment of alimony, etc., to innocent party, grantee of husband to whom he had fraudulently conveyed real estate holds same subject to lien of wife, but cannot be compelled to reconvey to husband.—Huellmantel v. Huellmantel, 117 Cal. 410, 411, 49 Pac. 574.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 793; 17 Cent. Dig., cols. 914-917, §§ 718-720.

§ 131. —— Operation and Effect.

[a] After a decree of divorce directing that the property held in community by the husband and wife shall be equally divided, such property is held by them thereafter as tenants in common, eo nomine.—McLeran v. Benton, 31 Cal. 29.

[b] Where, pending an appeal from a judgment for a wife in divorce proceedings, involving community property rights, the wife conveys the property secured to her by the trial court's judgment, and dies before the affirmance thereof by the supreme court, the interests of the wife pass to the grantees under her deed.—Smith v. Smith, 64 Pac. 302, judgment affirmed, 66 Pac. 81.

[c] Where a wife dies pending an appeal from a judgment of divorce in her favor, together with an adjudication as to certain rights to community property, and the supreme court affirms the trial court's judgment, such decision will govern in a subsequent action brought by the husband to recover such community property on the ground that the action abated on the death of the wife.—Smith v. Smith, 64 Pac. 302, judgment affirmed 66 Pac. 81.

§ 132. —— Effect of Remarriage.

[a] Where the wife's alimony was made by the decree of divorce a charge and lien upon the property conveyed by the husband, and thereafter the husband and wife remarried, the decree for alimony was thereby extinguished, and the lien discharged, and the grantees continued to hold the legal title freed from the lien.—Tully v. Tully, 137 Cal. 60, 69 Pac. 700.

F. ENFORCEMENT OF ORDER, JUDGMENT, OR DECREE.

CONTEMPT PROCEEDINGS, § 133.
COMPELLING DEFENDANT TO SEEK EMPLOYMENT, § 134.
DISMISSAL, STRIKING OUT, OR STAY OF PROCEEDINGS ON NONPAYMENT, § 135.
EXECUTION, § 136.
RECEIVER, § 137.
ACTION ON JUDGMENT, § 138.
ACTIONS TO SET ASIDE FRAUDULENT CONVEYANCE, § 139.

§ 133. Contempt Proceedings.

[a] Ability to pay alimony is a question of fact to be determined by the court.—Cottrell, Ex parte, 59 Cal. 418, 420.

[b] Party committed for contempt for refusing to pay alimony is entitled to discharge on proof of inability to pay.—Wilson, In re, 75 Cal. 582-584, 17 Pac. 698.

[c] Payment of future allowance may be enforced by imprisonment for contempt.—Spencer, Ex parte, 83 Cal. 465, 17 Am. St. Rep. 266, 23 Pac. 395.

[d] Petition for discharge from imprisonment for nonpayment of alimony held properly denied hearing before lapse of ten days after hearing to determine ability to pay.—Spencer v. Lawler, 79 Cal. 216, 21 Pac. 742.

[e] A decree for a divorce, pursuant to Civil Code, section 139, granted for an offense of the husband, and awarding alimony to be paid during the life of the plaintiff, or until modified by the court, is not void for uncertainty as to the period during which alimony is to be paid, and hence can be enforced by process of contempt.—Hart, Ex parte, 94 Cal. 254, 29 Pac. 774.

[f] Disobedience of an order, in an action for divorce, requiring the husband to pay a certain amount to a third person for the support of his child, is contempt of court, for which the court has power to imprison.—Gordan, Ex parte, 95 Cal. 374, 30 Pac. 561.

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[g] One cannot be imprisoned for contempt in failing to pay alimony which he is unable to pay.—Silvia, Ex parte, 123 Cal. 293, 69 Am. St. Rep. 58, 55 Pac. 988.

[h] One imprisoned for contempt for failing to pay alimony will be released on habeas corpus where the order for his imprisonment does not show that he was able to pay.—Silvia, Ex parte, 123 Cal. 293, 69 Am. St. Rep. 58, 55 Pac. 988.

[i] Where the order committing petitioner for contempt in failing to pay alimony did not recite that petitioner was able to comply with the order, and such fact was not proved by affidavit or otherwise, the commitment was illegal, though the order recited that petitioner willfully refused to pay the amount adjudged.—Cowden, In re, 139 Cal. 244, 73 Pac. 156.

FOR AUTHORITIES FROM OTHER STATES:

Alimony, enforcement of payment of by imprisonment: 37 Am. St. Rep. 763, note.

§ 134. Compelling Defendant to Seek Employment.

[a] Court cannot compel a man to seek employment in order to earn money to pay alimony.—Todd, Ex parte, 119 Cal. 58, 50 Pac. 1071.

§ 135. Dismissal, Striking Out, or Stay of Proceedings on Nonpayment.

[a] A defendant in an action for a divorce cannot be denied the process provided by law for procuring the testimony of witnesses residing beyond the jurisdiction, on the ground that he has not obeyed the order of the court requiring him to pay the plaintiff her costs and counsel fees.—Johnson v. Superior Court of San Francisco, 68 Cal. 578.

[b] Court may refuse to proceed with trial of suit for maintenance until defendant has complied with order directing him to pay counsel fees to plaintiff.—Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633.

[c] Court cannot deny defendant's right to answer for his failure to obey its order for alimony.—Foley v. Foley, 120 Cal. 39-42, 65 Am. St. Rep. 147, 52 Pac. 122.

[d] Law authorizing court to strike defendant's answer from files or refuse to allow him to answer deprives him of his rights without due process.—Foley v. Foley, 120 Cal. 42, 65 Am. St. Rep. 1, 52 Pac. 122.

[e] Section 1991, Code of Civil Procedure, authorizing court to refuse defendant's right to file answer, is unconstitutional and inapplicable to divorce cases.—Foley v. Foley, 120 Cal. 42, 65 Am. St. Rep. 147, 52 Pac. 122.

§ 136. Execution.

[a] Under Civil Code, section 139, providing that, on granting a divorce for an offense of the husband, the court may compel him to provide for the support of the wife and children, and Code of Civil Procedure, section 1007, providing that an order by a court for the payment of money may be enforced by execution, an execution in such case is not void because issued without an order for defendant to show cause why he had not obeyed the order of the court.—Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954.

[b] A judgment for alimony, to be paid to a divorced wife monthly is not within the provisions of Code of Civil Procedure, section 681, limiting the right to the issuance of execution on a judgment to five years from the date of its entry.—Gaston v. Gaston, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609.

[c] A judgment for alimony rendered in an action of divorce, for the support of the plaintiff and her children, which, by its terms, makes the alimony a lien upon all the real estate of the defendant and directs a receiver appointed by the court to take charge of the real estate, and out of the net income thereof to pay the alimony to plaintiff as it should accrue, cannot be enforced by execution against other property; and the bond of three hundred dollars given upon appeal from the judgment stays all proceedings upon the judgment appealed from, and a writ of supersedeas will be issued to stay execution issued upon the judgment, pending the appeal.—Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61.

[d] Where no appeal was taken from an order for an execution sale of community property to satisfy costs and alimony on judgment of divorce in favor of a wife, the purchaser of such property acquired a good title thereto, though an appeal was taken from the judgment and the wife died before the supreme court's affirmance thereof.—Smith v. Smith, 64 Pac. 302, judgment affirmed 66 Pac. 81.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 796; 17 Cent. Dig., cols. 937-939, § 739.

§ 137. Receiver.

[a] Court has no power to appoint receiver of common property in possession of mortgagee who has not abused his trust.—Cummings v. Cummings, 75 Cal. 439, 440, 17 Pac. 442.

[b] Civil Code, section 140, provides that the court may require the husband in a divorce case to give reasonable security for alimony, and may enforce the same by the appointment of a receiver. Held, that a receiver appointed in such case takes the property of the husband subject to all prior liens, and that the holders of such liens may take such proceedings elsewhere as the law exacts for preserving and enforcing the liens, according to their priority, without regard to the mere volition of the court or judge making the appointment.—Petaluma Sav. Bank v. Superior Court of City and County of San Francisco, 111 Cal. 488, 44 Pac. 171.

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[c] Evidence that the husband has failed to ay alimony pursuant to orders of the court, nd that he has attempted to dispose of his roperty for the purpose of preventing the ife from getting any part of it, authorizes he appointment of a receiver on her appli- ation, and after notice to him, under Civil ode, section 140, which provides that the ourt may enforce the payment of alimony y the appointment of a receiver.—Huell- nantel v. Huellmantel, 124 Cal. 583, 57 Pac. 82.

[d] A receiver may be appointed to en- orce the decree for maintenance, where the leadings admit that the husband has en- leavored and is endeavoring to sell, or en- umber his property in this state, and that e is a resident of another state, to which e is attached by large holdings of property herein, and cannot give personal attention o his properties in this state.—Anderson v. nderson, 124 Cal. 48, 71 Am. St. Rep. 17, 6 Pac. 630, 57 Pac. 81.

[e] A judgment for alimony is a mere money udgment, and hence is not within Code of ivil Procedure, section 564, subdivision 3, roviding that the court may appoint a re- eiver after judgment, to carry the judgment nto effect; the subdivision applying only hen specific property is affected. Order, 62 ac. 34, reversed.—White v. White, 130 Cal. 97, 80 Am. St. Rep. 150, 62 Pac. 1062.

[f] Code of Civil Procedure, section 564, ubdivision 3, provides that the court may ppoint a receiver after judgment, to carry he judgment into effect. Respondent was warded a divorce from her husband and ne hundred thousand dollars alimony. A eceiver had been previously appointed to ake charge of his property, but had not taken ossession. The final judgment continued the eceivership. Thereafter the court ordered eceiver to sell certain premises, and respon- nt became the purchaser at the sale. Held, n a petition for a writ of assistance to ain possession, that, as the judgment for imony was a final judgment, the court had o jurisdiction to continue the receivership enforce its collection; the statute being pplicable only when specific property was af- cted. Order, 62 Pac. 34, reversed.—White White, 130 Cal. 597, 80 Am. St. Rep. 150, Pac. 1062.

g] In a suit for divorce an interlocutory de- ee was entered, granting respondent a di- ree from her husband, and enjoining the tter from disposing of his property before al decree. Thereafter a receiver was ap- inted to take charge of all of his property. the final decree it was provided that the fe, "do have and recover the sum of one ndred thousand dollars," and that the re- iver be continued and directed to take all cessary steps to collect the said sum. An der was made directing him to sell certain operty, which the husband had leased after injunction, but before the receiver's ap- intment, and in accordance therewith the operty was sold to respondent. Held, on tition for writ of assistance to gain posses- sion, that, though the judgment was not ex- pressly made a charge on the husband's land, the court had jurisdiction to direct the sale, since the property was under its control by vir- tue of the receivership.—White v. White, 62 Pac. 34, order reversed 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 797; 17 Cent. Dig., cols. 940, 941, § 743.

§ 138. Action on Judgment.

[a] Action may be brought upon a decree for alimony.—Flandreau v. Downey, 23 Cal. 354.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 797; 17 Cent. Dig., cols. 941, 942, § 744.

§ 139. Actions to Set Aside Fraudulent Conveyance.

[a] In an action by the wife against the husband to obtain a divorce, and to have property which the husband has deeded to a third person decreed to be held in trust for the husband, and adjudged to be community property, and awarded to her, the facts that such third person is a brother of the husband, that the latter held a letter of attorney from the former, who lived in the Atlantic states, that the husband managed the property as he pleased, and the brother took little or no interest in it, that the brother was a man of small means at his own home, while the property here was valuable, and that the brother was not present at the trial in which his title was involved, are some evidence tending to show that the husband is the true owner, and that the sale to the brother was fraudulent.—Brown v. Brown, 41 Cal. 88.

[b] In an action for divorce, and to set aside a conveyance of land owned by her husband, made to deprive plaintiff of her homestead rights, a decree which cancels the deed, and decrees that plaintiff have judgment for a certain sum in lieu of her homestead rights, and makes such judgment a lien on the land, is erroneous, in so far as it annuls the deed from the husband to his codefendants, other than for the purpose of subjecting it to the lien of the judgment, as, between the parties thereto, such conveyance is valid.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

[c] Under Civil Code, section 3439, declaring that every transfer of property made with intent to delay or defraud any creditor or other person on his just demand shall be void, the transfer of certain property by a husband to his daughter after his wife had commenced suit for a divorce, but before himself or his daughter had any knowledge of such action or its contemplation, was valid.—Tuers v. Tuers, 131 Cal. 625, 63 Pac. 1008.

[d] A conveyance by a husband to children by a former wife after the commencement of

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a divorce proceeding against him was not entirely void, though voidable as to the rights of the wife.—Tully v. Tully, 137 Cal. 60, 69 Pac. 700.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 798, 799; 17 Cent. Dig., cols. 944-951, §§ 749-753.

G. APPEAL.

APPEALABLE ORDERS, § 140.
TIME TO APPEAL, § 141.
BONDS AND STAY, § 142.
RECORD, § 143.
REVIEW, § 144.

§ 140. Appealable Orders.

[a] Order denying alimony for counsel fees pendente lite is appealable.—White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; 86 Cal. 212, 24 Pac. 1030.

[b] Order granting or denying alimony pendente lite is appealable.—White v. White, 86 Cal. 213, 24 Pac. 1030.

[c] Where a divorce has been granted without personal service on defendant, who was not in the state when suit was brought, and made no appearance, an order denying a motion to set aside that part of the judgment awarding alimony is appealable.—De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345, 32 L. R. A. 82.

[d] An application for alimony, though not a separate suit, is a proceeding for separate judgment, independent of the final judgment in the case, and is appealable. In order to due process of law in obtaining the separate judgment for alimony, there must be a hearing or an opportunity to be heard.—Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 961-963, § 764.

§ 141. Time to Appeal.

[a] In an action for divorce, an order granting a counsel fee for an appeal from an order denying a new trial, made before such appeal is taken, will not be reversed as premature where, on the hearing of the appeal from the order granting such allowance, it appears that an appeal from the order denying a new trial is pending.—Wolff v. Wolff, 37 Pac. 858.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., col. 963, § 766.

§ 142. Bonds and Stay.

[a] An order in relation to payment of alimony and counsel fees is in the nature of a final judgment, and the statute as to undertakings to stay proceedings on a final judgment applies; and, under such statute (Code Civ. Proc., sec. 942), an undertaking for double the whole amount of alimony and counsel fees allowed is sufficient.—Sharon v. Sharon, 67 Cal. 185, 8 Pac. 709.

§ 143. Record.

[a] The mere absence from the record of the evidence on which an order for payment of alimony was based is not ground for reversing the order.—Rose v. Rose, 109 Cal. 544, 42 Pac. 452.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 803; 17 Cent. Dig., col. 964, § 768.

§ 144. Review.

[a] A division of the property between parties to a divorce case rests primarily with the trial court, and will not be disturbed, except for a palpable abuse of discretion.—(1883) Bovo v. Bovo, 63 Cal. 77; (1896) Rose v. Rose, 112 Cal. 341, 44 Pac. 658.

[b] An order for payment of alimony and attorney's fees to a wife pending an action for divorce against her husband, where the affidavits upon which it is based are conflicting, will not be reversed.—White v. White, 73 Cal. 105, 14 Pac. 393; Schammel v. Schammel, 74 Cal. 36, 15 Pac. 364.

[c] Civil Code, section 137, empowering the court, in its discretion, to require the payment of alimony by a husband to a wife pending an action for a divorce, when necessary to the support of herself or children, or the prosecution or defense of the action, invests the court with nothing but a legal discretion, reviewable on appeal, and an order granting such alimony will be reversed when it appears that the wife occupies the homestead, which yields a good income; that she is in no immediate need of money; that the property enjoyed by her is more valuable and productive than that held by the husband; and that he is maintaining the greater number of their children.—Turner v. Turner, 93 Cal. 141, 22 Pac. 72.

[d] An order granting alimony and counsel fees will not be disturbed on appeal unless it clearly shows that the court abused its discretion.—Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732.

[e] Civil Code, section 148, which provides that the division of community property by the trial court in granting a divorce to the spouses is subject to revision on appeal in all particulars, including those in the discretion of the trial court, empowers the appellate court to review the action of the trial court for any degree of error, though not amounting to an abuse of discretion.—Strozynski v. Strozynski, 97 Cal. 189, 31 Pac. 1130.

[f] An order allowing counsel fees as alimony pending an appeal from a previous order, "in lieu" of the alimony appealed from, which is modified, before an appeal is

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taken therefrom, by striking out the "lieu" clause, and leaving it as a new order for further counsel fees, will be affirmed upon appeal.—Storke v. Storke, 99 Cal. 621, 34 Pac. 339.

[g] Discretion of superior court in disposing of community property, where a divorce is granted for the extreme cruelty of the husband will not be interfered with upon appeal, where there is no palpable abuse of discretion, though the disposition may be somewhat harsh and inequitable, if the discretion rested primarily with the appellate court.—Rose v. Rose, 112 Cal. 341, 44 Pac. 658.

[h] Civil Code, section 146, subdivision 1, provides that, on divorce on the ground of extreme cruelty, the community property shall be assigned in such proportions as the court may deem best. Subdivision 2 provides that, on divorce on any other ground than that of adultery or extreme cruelty, community property shall be equally divided. Section 148 provides that the disposition of the property shall be subject to revision on appeal. Held, that where, on a divorce on a ground of extreme cruelty, the innocent spouse was awarded seven-twelfths of the community property, it being evident that the trial court had exercised discretion, the apportionment would not be disturbed on appeal.—Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313.

[i] On appeal from an order denying a new trial in divorce the supreme court has no power to modify the provision of the decree providing for the support of a minor child until its maturity.—Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304.

[j] A husband's discharge from payment of alimony will not be disturbed on the grounds urged by the wife, where the evidence does not support her contentions.—Smith v. Smith, 142 Cal. 636, 76 Pac. 489.

[k] The court on appeal from an order refusing to vacate the part of a default judgment for divorce which awards alimony to the wife cannot vacate the judgment on a ground not presented to the court below.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 803; 17 Cent. Dig., cols. 965-969, §§ 769, 770.

VI. CUSTODY AND SUPPORT OF CHILDREN.

STATUTES CONSTRUED, § 145.
POWER TO CONTROL OR AWARD, § 146.
JURISDICTION OF PERSON OF CHILD, § 147.
SUFFICIENCY OF PLEADINGS, § 148.
AFTER FINAL DECREE, § 149.
ON DENIAL OF DIVORCE, § 150.
DISCRETION OF COURT, § 151.
STIPULATIONS OF PARTIES, § 152.
FORFEITURE OF RIGHTS, § 153.
GROUNDS FOR AWARD OF CUSTODY, § 154.
MODIFICATION OF DECREE AWARDING CUSTODY, § 155.
DEATH OF PARENT AS TERMINATING RIGHT TO CUSTODY, § 156.
GROUNDS FOR AWARD OF SUPPORT, § 157.
ORDER FOR SUPPORT, § 158.
—— MODIFICATION, § 159.
—— ENFORCEMENT, § 160.
APPEAL, § 161.
COSTS, § 162.

§ 145. Statute Construed.

[a] The provisions of section 138 of the Civil Code are in their nature prospective, and the use of the term "direction" implies that the action of the court is to be limited to the "care and education" which the children are subsequently to receive under its direction.—McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

§ 146. Power to Control or Award.

[a] An order for the custody of the children pendente lite can only be made by the court in which the action for divorce is pending. It cannot be made by the judge of the court where pending in the district court of an adjoining county of the same district. Bennett v. Southard, 35 Cal. 688.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 804; 17 Cent. Dig., cols. 971, 972, § 773.

§ 147. Jurisdiction of Person of Child.

[a] In awarding a divorce on substituted service, where defendant and the minor children, though domiciled in the state, are living elsewhere, and defendant makes no appearance, the court has no power to award the custody of the children to plaintiff.—De La Montanya v. De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 44 Pac. 345.

[b] A decree rendered upon publication of summons, in an action brought by a mother to secure the custody of the children, who have been removed from the state by the father, awarding to the plaintiff the exclusive custody of the children, is without jurisdiction, and should be vacated upon motion of the defendant.—De La Montanya v. De La Montanya, 112 Cal. 131, 44 Pac. 354.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 804; 17 Cent. Dig., cols. 972-973, § 774.

§ 148. Sufficiency of Pleadings.

[a] Under Civil Code, section 138, providing that in an action of divorce the court may give such direction for the custody of the children as may seem necessary, such order may be given, though neither party prays for the custody of the child, nor alleges the unfitness of the other in that respect.—Gordon, Ex parte, 95 Cal. 374, 30 Pac. 561.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 804; 17 Cent. Dig., col. 973, § 775.

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§ 149. After Final Decree.

[a] Court may make order for maintenance of children, under proper petition, long after final decree has been entered.—McKay v. Superior Court, 120 Cal. 146, 52 Pac. 147.

[b] Where a decree of divorce makes no provision for the maintenance of the children of the marriage, the court is without jurisdiction subsequently to make any order compelling either party to pay the other for such maintenance.—Shattuck v. Shattuck, 135 Cal. 192, 67 Pac. 45.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 805; 17 Cent. Dig., col. 975, § 778.

§ 150. On Denial of Divorce.

[a] Where a wife, having left her husband without cause, and taken with her the minor children, applies for a divorce, the court may, although it denies the application, direct that the children be given to the custody of the husband; and the fact that the husband lives in an adjoining county can make no difference, since, under Civil Code, section 156, he is the head of the family, and may choose any reasonable place or mode of living.—Luck v. Luck, 92 Cal. 653, 28 Pac. 787.

[b] In an action of divorce the question as to the proper custody of the minor child is entirely incidental to the main relief sought, and dependent alone upon the divorce proceedings; and when a decree of divorce is denied to both parties the court is not required to make any order as to the care and custody of the minor child.—Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 805; 17 Cent. Dig., cols. 974, 975, § 777.

§ 151. Discretion of Court.

[a] Naturally and presumptively the mother is entitled to the custody and care of minor children of tender years; yet, where she brings an action against the father for a divorce on the ground of extreme cruelty, and for the custody and control of such children on the ground that the father is not a fit person to have the care, custody, or control of them, it is for the trial court to say, upon all the evidence, whether she is in fact more worthy of such a trust than the father.—Luck v. Luck, 92 Cal. 653, 28 Pac. 787.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 808; 17 Cent. Dig., cols. 975, 976, § 779.

§ 152. Stipulations of Parties.

[a] Where by stipulation of parties wife is given ten thousand dollars worth of community property while husband retains only sufficient to pay his debts, and custody of children is awarded to wife to be maintained by her wife's application to so modify decree as to have husband support children should be denied.—Parkhurst v. Parkhurst, 118 Cal. 20-22, 50 Pac. 9.

[b] Stipulation of parties to divorce suit cannot devest parent, as against children, of duty to support them.—Parkhurst v. Parkhurst, 118 Cal. 22, 50 Pac. 9.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 808; 17 Cent. Dig., cols. 976, 977, § 780.

§ 153. Forfeiture of Rights.

[a] Although a wife, by her fault in the matters involved in an action for a divorce, may forfeit her own claim to be supported by her husband, she cannot forfeit the claims of their children to such support.—Gordon, Ex parte, 95 Cal. 374, 30 Pac. 561.

§ 154. Grounds for Award of Custody.

[a] Female child of tender years should be awarded to wife, if successful, with privilege of husband to see it at convenient times. People v. Lee, 14 Cal. 512.

[b] A wife divorced from her husband for extreme cruelty on his part is entitled to the custody of their female child of tender years, the wife being blameless. The father has a right to see the child at all convenient times. Wand v. Wand, 14 Cal. 512.

[c] The interest of the child is the leading, if not the paramount, consideration in determining in whose custody a child shall be placed after divorce.—Wand v. Wand, 14 Cal. 512.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 805-808; 17 Cent. Dig., cols. 977-984, §§ 781-787.

§ 155. Modification of Decree Awarding Custody.

[a] Since Civil Code, section 224, provides that the consent to the adoption of a child is not necessary from a father or mother adjudged guilty of adultery or of cruelty, and "for either cause divorced," where, after a decree awarding the custody of a child to its mother on a divorce from its father for cruelty, the mother consents to its adoption, the court awarding the divorce cannot, under section 138, modify the decree so as to give the custody of the child to the father. Younger v. Younger, 106 Cal. 377, 39 Pac. 779.

[b] Under Civil Code, sections 138, 139, providing that the court may, before or after judgment, give directions for the custody of the children, and, when the divorce is granted for the husband's offense, compel him to provide for their maintenance, and may from time to time modify its orders, where the original decree, granted for the husband's fault, awarded the custody of the children

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to the mother, but made no provision for their maintenance, the court cannot thereafter modify the decree, and compel the husband to pay for their past or future maintenance.—McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

[c] Court may upon sufficient showing modify decree awarding custody of child to mother, award same to the father.—DeLemos v. Siddal, 143 Cal. 313.

[d] Under Civil Code of 1903, section 138, power of court to modify decree in divorce held not abridged by reason of adoption of agreement of parties as to the disposition of children of the marriage.—Black v. Black (Cal. Sup.), 86 Pac. 505.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 810; 17 Cent. Dig., cols. 987-991, §§ 793-795.

§ 156. Death of Parent as Terminating Right to Custody.

[a] Upon the death of the parent to whom is awarded the custody of a minor child by the decree divorcing the parents, the other parent becomes entitled to the custody of the child.—Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 809; 17 Cent. Dig., col. 991, § 796.

§ 157. Grounds for Award of Support.

[a] Under Civil Code, section 209, providing that, "if the husband receives his wife's children by a former husband into his family and supports them, it is presumed he does so as a parent," a divorced father of children in the lawful custody of their mother is not liable for their support in the family of her second husband.—McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

[b] Under Civil Code, section 138, providing that "the court may before or after judgment give such direction for the custody, care and education of the children as may be necessary," where children in the lawful custody of their divorced mother have been supported by the voluntary act of herself or her second husband, their father cannot be compelled to pay therefor.—McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

FOR AUTHORITIES FROM OTHER STATES:

Liability of father for support of child awarded to mother in a decree of divorce: 47 Am. St. Rep. 314, note. See, also, 14 Cyc. 811, 812; 17 Cent. Dig., cols. 991, 992, § 798.

158. Order for Support.

[a] Where, by a decree of divorce, the custody of a child has been awarded to the other, the court may thereafter, on her petition, make an order of allowance for the past as well as future support of the child; and a stipulation of the parties, made at the time of entering the decree, that the wife shall receive a sum certain as her part of the common property, and shall have the custody of the infant child, and that such sum shall be in full for her allowance for the support of the child, does not deprive the court from afterwards, on her petition, making such an allowance.—Wilson v. Wilson, 45 Cal. 399.

[b] In an action by a husband against the wife for divorce, an order requiring him to pay a certain amount to a third person for the support of his child is authorized by Civil Code, sections 196, 197, making it primarily the husband's duty to support his minor children, and hence may be issued, though the husband is not in fault in the matters involved in the case.—Gordan, Ex parte, 95 Cal. 374, 30 Pac. 561.

[c] Though an order in an action for divorce, requiring the husband to pay a certain amount to a third person for the support of his child, describes the child by a wrong name, it is valid if it sufficiently identify the child.—Gordan, Ex parte, 95 Cal. 374, 30 Pac. 561.

[d] In an action for divorce, an order requiring the husband to pay a certain amount to a third person for the support of his child is not a judgment in favor of a stranger to the action, but is a valid order for the payment of money to an agent of the court charged with the duty of carrying its decree into effect.—Gordan, Ex parte, 95 Cal. 374, 30 Pac. 561.

[e] Under Civil Code, sections 138, 139, empowering the court in divorce to provide for the care and custody of the minor children, the court cannot require a defendant husband to pay money for the support of his child to its legal guardian other than its mother. Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729.

[f] In an action for divorce, where the custody of the children was awarded to the wife without any provision in the decree for their maintenance, the court, though having no jurisdiction to act subsequently under section 139 of the Civil Code, has jurisdiction, under section 138 of that code, to give a subsequent direction "for the custody, care, and education of the children," and to provide for the expenses reasonably to be incurred for their "care and education."—McKay v. McKay, 125 Cal. 65, 57 Pac. 677.

[g] Where, on an application for an allowance for the support of a child, the plaintiff made affidavit that thirty dollars per month was required, and that defendant's income was two hundred and fifty dollars per month,—all of which defendant denied by his affidavit,—held, that an allowance by the court of twenty dollars per month was not excessive.—Rogers v. Rogers, 31 Pac. 157.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 813, 814; 17 Cent. Dig., cols. 993-995, §§ 801, 802.

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§ 159. —— Modification.

[a] Court may modify divorce decree in proper case so as to provide that parent support and educate children.—Parkhurst v. Parkhurst, 118 Cal. 22, 50 Pac. 9.

[b] The court, in modifying the decree as to the custody of a child, proceeds upon new facts, considered in connection with facts formerly established, including the change of circumstances, the conduct of the parties, the morals of the parents, their financial condition, subsequent marriage, the age of the child, and the devotion of either parent to its best interest and the good of the child, which is the controlling force in directing its custody.—Crater v. Crater, 135 Cal. 633, 67 Pac. 1049.

[c] The court has power to vary and modify a decree of divorce as to the custody of minor children from time to time, as circumstances change; and its legal discretion in exercising such power, and the conclusion reached by it, will not be disturbed upon appeal, unless it clearly appears that its discretion has been abused.—Crater v. Crater, 135 Cal. 633, 67 Pac. 1049.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 813; 17 Cent. Dig., cols. 995, 996, § 803.

§ 160. —— Enforcement.

[a] The refusal of the husband to pay money for the support of a minor child, which the court, in an action for divorce, has ordered to be paid to its grandmother, to whom the custody of the child was awarded, is a contempt of court, punishable by imprisonment until the money is paid, if the husband is found to have the ability to do so.—Gordan, Ex parte, 95 Cal. 374, 30 Pac. 561.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 814; 17 Cent. Dig., cols. 997, § 805.

§ 161. Appeal.

[a] An order denying a petition for custody of children, in proceedings for divorce, will not be disturbed unless it clearly appears from the evidence that the denial was an abuse of discretion.—Dickerson v. Dickerson, 108 Cal. 351, 41 Pac. 475.

[b] Appeal from order modifying decree of divorce so as to take custody of children from mother suspends power of court to enforce it.—Queirolo, Ex parte, 119 Cal. 636, 51 Pac. 956.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 814; 17 Cent. Dig., cols. 997-999, § 806.

§ 162. Costs.

[a] Upon appeal by father from order for maintenance of children made after decree of divorce, court may compel him to pay wife's necessary costs on appeal.—McKay v. Superior Court, 120 Cal. 145, 147, 52 Pac. 147.

[b] A wife in a suit for divorce is, after the determination of an appeal in her favor, entitled to interest on amounts awarded her for suit money and alimony on the trial below from the date of the decree awarding the suit money, and the date when the alimony became due.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

[c] A wife is not entitled to interest on sums awarded in her favor as costs upon the first trial of an action for divorce, when the action was reversed after the first trial on appeal by the husband.—Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

VII. OPERATION AND EFFECT OF DIVORCE AND RIGHTS OF DIVORCED PERSONS.

§ 163. In General.

[a] Where husband and wife are divorced, and the decree also directs an equal division of the common property, and both afterwards die, the former husband leaving a will, and the former wife intestate, the executors of the last will of the former husband cannot exclude from the lands formerly held in community the heirs of the former wife.—McLeran v. Benton, 31 Cal. 29.

[b] After divorce a separate suit may be brought for division of community property not adjudicated.—Godey v. Godey, 39 Cal. 157.

[c] Decree of divorce is not an estoppel as to rights of property, if not adjudicated.—Godey v. Godey, 39 Cal. 157.

[d] On grant of divorce to wife without adjudging property rights, her title in homestead existing on her separate property becomes absolute.—Burkett v. Burkett, 78 Cal. 317, 12 Am. St. Rep. 58, 20 Pac. 715.

[e] Where the court, in an action for a divorce, assigns all the community property to the wife, leaving the husband without separate property, the property so assigned is taken subject to the equitable claim of existing contract creditors whose demands are due, or to become due, on account of credit extended to the husband for the benefit of the community during the existence of the marital relation.—Frankel v. Boyd, 106 Cal. 608, 39 Pac. 939.

[f] Where husband and wife acquire an estate by the entirety, and are afterward divorced, they then become tenants in common.—Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064.

§ 164. Right to Remarry.

[a] Where a court dissolves the bonds of matrimony it has no power to impose any

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restraint upon a second marriage, in the absence of express statute conferring it.—Barber v. Barber, 16 Cal. 378.

FOR AUTHORITIES FROM OTHER STATES:

24 L. R. A. 831. 55 L. R. A. 169, notes. See, also, 14 Cyc. 729; 17 Cent. Dig., cols. 1005-1009, §§ 818-820.

§ 165. **Foreign Divorces.**

[a] An Indiana divorce, obtained upon the appearance of an attorney without the knowledge or consent of the defendant, is not void, but at most only voidable, at the election of the defendant, and cannot be impeached in California by the plaintiff, at whose instance the appearance was entered and the divorce obtained.—Elliott v. Wohlfrom, 55 Cal. 384.

[b] Where one has obtained a valid divorce in one state, the fact that his wife afterward brings an action in another state for divorce from bed and board, and for support, and obtains judgment therefor, he not pleading his decree of divorce, will not change his status of a single man.—James' Estate, In re, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

[c] A decree of divorce which has been regularly obtained in one state by a citizen thereof against a nonresident defendant, constructively served with process by publication of summons, and without other notice, and which is valid and effectual in the state in which such decree is rendered, is equally valid in a sister state.—James, Estate of, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

[d] It is competent collaterally to impeach a judgment of divorce rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed did not exist, notwithstanding a recital of such facts in the judgment, but where, upon such collateral attack, the evidence is conflicting as to whether the plaintiff was a bona fide resident of the state for the length of time required to give jurisdiction to the court, a finding of the court that he was such resident for a sufficient length of time will not be disturbed upon appeal.—Estate of James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

[e] Plaintiff was served with process in a divorce action in Hawaii, brought by her husband's guardian, on the ground of adultery, and appeared therein by attorney, but before judgment removed to California to make it her permanent home. The judgment was merely a decree for divorce, and did not deal with property rights; but a statute of Hawaii provided that, when a divorce was decreed for the adultery of the wife, the husband should hold her personal estate forever. Held, in an action in California on a policy of insurance on her husband's life, payable to plaintiff, that she was entitled to recover, since, as she was domiciled in California at the time of the judgment for divorce, the statute of Hawaii had no operation on her or her personal property.—McGrew v. Mutual Life Ins. Co of New York, 132 Cal. 85, 84 Am. St. Rep. 20-n, 64 Pac. 103.

[f] Under Civil Code, section 91, providing that the effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, and section 61, providing that a subsequent marriage contracted by any person during the life of a former husband or wife of such person with any person other than such former husband or wife is void unless the former marriage has been annulled or dissolved, provided that in case it be dissolved the decree of divorce must have been rendered at least one year prior to such subsequent marriage, where a woman, within five months after obtaining a divorce in California, was married in Nevada, to a citizen thereof, in accordance with the laws of that state, the marriage was valid in California, the prohibition of remarriage in the statute having no extraterritorial force. Wood's Estate, In re, 137 Cal. 129, 69 Pac. 900; Appeal of Wood, 137 Cal. 129, 69 Pac. 900.

[g] Where a judgment in a suit for maintenance brought by a wife against her husband in another state was entered on stipulation, and recited that the stipulation admitted that the separation was without any fault on the part of the wife, and such judgment would not have estopped the husband, in the state where it was rendered, to recontest the question of the wife's desertion in another suit, it could not have such effect in a suit for divorce brought by the husband in California on the ground of desertion.—Harding v. Harding, 140 Cal. 690, 74 Pac. 284.

FOR AUTHORITIES FROM OTHER STATES:

Divorces granted in another state, domicile of parties: 7 Am. Dec. 206, note.

Foreign divorce, effect of: 21 Am. Dec. 747, note. See, also, 14 Cyc. 814-822; 17 Cent. Dig., cols. 1018-1041, §§ 827-844.

DOCKETS.

Judgment docket or judgment-book. See Judgment, § 210.

Docketing judgment to create and sustain lien. See Judgment, §§ 523-525.

Of justices of the peace. See Justices of the Peace, § 100.

DOCKS.

See Levees; Wharves.

DOCTORS.

See Physicians and Surgeons.

DOCTRINE OF CONTRIBUTION.

Application of. See Contribution, § 2.

DOCTRINE OF CONVERSION.

Application of. See Conversion, §§ 1-9.

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DOCTRINE OF CY PRES.

Application of. See Charities, § 23.

DOCTRINE OF RELATION.

As maxim of equity. See Equity, § 46.

DOCTRINE OF RES GESTAE.

Application of. See Evidence, § 115.

DOCUMENTARY EVIDENCE.

In criminal cases. See Criminal Law, §§ 205-217.
In civil cases. See Evidence, X.
As inferior to oral evidence. See Evidence, § 163.

DOGS.

Right to keep savage dog. See Animals, § 3.
Liability of keeper of vicious dog for injuries by it. See Animals, § 21.
Sheep-killing dogs. See Animals, § 27.

DOING BUSINESS.

What constitutes "doing business" in state, by foreign corporation. See Corporations, § 485.

DOING EQUITY.

"Who seeks equity must do equity" applied. See Equity, § 44.

DOMESTIC CORPORATIONS.

See Corporations, § 1 et seq.

DOMESTIC RELATIONS.

See Adoption; Bastards; Divorce; Guardian and Ward; Infants; Marriage; Parent and Child; Husband and Wife.

DOMESTIC USE.

Right of riparian owner to water for. See Waters and Watercourses, § 30.

DOMESTIC WATER SUPPLY.

See Waters and Watercourses, VIII, A.

DOMICILE.

Include places of fixed habitation of individuals; nature, acquisition, and change thereof in general.

RESIDENCE DEFINED, § 1.
INMATES OF PUBLIC INSTITUTIONS, § 2.
CHANGE OF DOMICILE, § 3.
—— FACTS SHOWING CHANGE GENERALLY, § 4.
REGAINING LOST DOMICILE, § 5.
STATUS OF PERSONS AS DETERMINING DOMICILE—MARRIED WOMEN, § 6.
—— CHILDREN OR WARDS, § 7.
—— PERSONS ENGAGED IN OFFICIAL OR MILITARY SERVICE, § 8.
EVIDENCE AND DETERMINATION—ADMISSIBILITY OF EVIDENCE, § 9.
—— WEIGHT AND SUFFICIENCY OF EVIDENCE, § 10.
—— QUESTIONS FOR COURT, § 11.

Of corporations. See Corporations, §§ 64, 65.
Official residence of county supervisors. See Counties, § 24.
Criminal responsibility of county officer for failure to reside at county seat. See Counties, § 102.
As determining jurisdiction of suit for divorce. See Divorce, § 28.
As determining right to vote. See Elections, §§ 34-36.
Of decedent as determining jurisdiction over estate. See Executors and Administrators, § 11.
Necessity for actual permanent residence, to acquire homestead. See Homesteads, § 15.
As determining qualification of juror. See Jury, § 46.
As determining jurisdiction of courts of justices of the peace. See Justices of the Peace, § 34.
Averments as to residence in application for order for publication of summons. See Process, § 30.
As determining venue of civil actions. See Venue §§ 11-13.

§ 1. Residence Defined.

[a] Residence is place of ordinary dwelling without present intention of removal.—Dow v. Gould etc. Co., 31 Cal. 630.

FOR AUTHORITIES FROM OTHER STATES:
Definitions of domicile and how ascertained and changed: 59 Am. Dec. 111, note.

§ 2. Inmates of Public Institutions.

[a] The fact that the petitioner was an inmate of a soldiers' home was as much in accord with his claim of residence as if he had lived elsewhere in the state. It is no disproof of his residence in this state that the petitioner, who was seventy-four years of age, was married and had children living in Massachussetts, where there is no evidence that he had a wife living, or that his children were living in a family home when he came to this state. They cannot be presumed to be minors, or to need a father's care, neither is it any disproof of intention to reside in this state that the petitioner never registered as a voter therein.—Gordon, Estate of, 142 Cal. 125, 75 Pac. 672.

§ 3. Change of Domicile.

[a] Where a domicile has been once obtained, it will not be lost by a temporary absence with the intention to return.—Dow v. Gould & Curry Silver Min. Co., 31 Cal. 630.

[b] Union of act and intent are necessary to make a change of residence; and where one has been in the state but three days, nothing can be inferred from his presence in the state for so short a time, and it is for the court to determine from the whole of his

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testimony what his intention was.—Estate of Donovan, 104 Cal. 623, 38 Pac. 456.

FOR AUTHORITIES FROM OTHER STATES:

Loss or change of domicile: 32 Am. Dec. 427, note.

Where is domicile, and how may be lost or changed: 48 Am. St. Rep. 711, note.

§ 4. —— Facts Showing Change Generally.

[a] Political Code, sections 52, 1239, provide that a person's residence is the place where he remains when not called elsewhere for labor or other temporary purpose, and to which he returns in seasons of repose, and in which his habitation is fixed, and to which he intends to return when absent; but, if he removes to another state with the intention of remaining an indefinite time, he loses his residence, notwithstanding his intention of returning at some future time. Held, where a husband and wife remove from the state for a temporary purpose, intending to return within a year and a half or two years, and take all their property with them, and remain away nearly five years, although the work which called them away is completed several months previous to their return, that they lose their residence upon leaving the state.—Weed's Estate, In re, 120 Cal. 634, 53 Pac. 30.

[b] Decedent, for several years prior to his death, had been a resident of L., in Alameda county, where he owned and operated a farm. Having been unsuccessful in an attempt to join a lodge in L., he came to S. F., and had his name placed on the great register as a voter; claiming in his application to be a resident of the latter city. Subsequently he voted in the general and judicial elections in S. F., and there joined a lodge, claiming in his application to be a resident of the city. Most of his time he spent at L., coming to S. F. about once a week, engaging a room at a hotel; but it did not appear that he had such room except when in the city. He died in S. F. Held, that his alleged residence in S. F. was false, and claimed for the purpose of imposing on the lodge he wished to join; that his residence was in L.; and that proceedings for the appointment of an administrator at S. F. should be vacated.—Samuel's Estate, In re, Myr. Prob. 228.

[c] A public officer of the city and county of S., having acquired a country residence in an adjoining county, was in the habit of repairing to it frequently for pleasure and recreation. Saturdays and Sundays were spent at such residence, and he frequently repaired to it during the week; in the summer time spending most of his nights there, and returning to the city in the morning for business. He voted, however, in the city, and had rooms continuously at a hotel, where he and his wife stayed when in the city. Held, that the husband was a resident of S.—Austin's Estate, In re, Myr. Prob. 237.

§ 5. Regaining Lost Domicile.

[a] Where a husband and wife have lost their residence in this state, the wife cannot regain her residence immediately by returning to the state on the death of her husband. Weed's Estate, In re, 120 Cal. 634, 53 Pac. 30.

§ 6. Status of Persons as Determining Domicile—Married Women.

[a] The domicile of the husband is the domicile of the wife.—Kashaw v. Kashaw, 3 Cal. 312; Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Dow v. Gould & Curry Silver Min. Co., 31 Cal. 630.

FOR AUTHORITIES FROM OTHER STATES:

Domicile of wife, when different from that of her husband: 84 Am. St. Rep. 27, note.

§ 7. —— Children or Wards.

[a] Where children under fourteen years of age abandoned by their father, live with and are supported by their grandmother for several years, the residence of the grandmother is that of the children.—Vance, In re, 92 Cal. 195, 28 Pac. 229.

[b] Where the father subsequently removes such children to another county, against the will of their grandmother, the residence of the children is not changed.—Vance, In re, 92 Cal. 195, 28 Pac. 229.

[c] A guardian of wards domiciled in California obtained an order permitting him to remove them to another state, "there to remain until the further order of the court." Subsequently the guardian was discharged without being required to return the wards to California. Held, that the domicile of the wards continued to be California, since the wards themselves were incapable of changing their domicile, and the order of the court permitting their removal indicated no intention to surrender jurisdiction of their persons.—Henning's Estate, In re, 128 Cal. 214, 79 Am. St. Rep. 43, 60 Pac. 762.

§ 8. —— Persons Engaged in Official or Military Service.

[a] Constitution, article 2, section 4, declaring that "no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States," does not deprive a person of his privilege of acquiring a residence in a county to which he removes while in such service, if it be his intention so to do.—People v. Holden, 28 Cal. 123.

§ 9. Evidence and Determination—Admissibility of Evidence.

[a] Residence of a person at a particular time cannot be proved by evidence of common report.—Pfister v. Dascey, 68 Cal. 572, 10 Pac. 117.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 856-864; 17 Cent. Dig., cols. 1093-1100, §§ 36-39.

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§ 10. —— Weight and Sufficiency of Evidence.

[a] Evidence of defendant's intention to take up his place of abode in a certain city, unaccompanied with acts calculated to carry such intention into effect, other than the mere placing of his wife in the home of her father, in such city, and defendant's occasional vists to her, was insufficient to establish his residence in such city.—Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

FOR AUTHORITIES FROM OTHER STATES:
3 C. C. A. 316, note; 56 L. R. A. 67, note. See, also, 14 Cyc. 862-864; 17 Cent. Dig., cols. 1099-1100, § 39.

§ 11. —— Questions for Court.

[a] Whether a person is a resident of the state is a mixed question of law and fact, to be determined by the court.—Weed's Estate, In re, 120 Cal. 634, 53 Pac. 30.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 865; 17 Cent. Dig., cols. 1100, § 40.

DOMINANT TENEMENTS.

Relation between dominant and servient owners. See Easement, II.

DONATIONS.

See Charities; Dedication; Gifts.

Of public lands. See Public Lands, § 41.

DONEE.

Necessary to valid dedication. See Dedication, § 7.

DORMANT JUDGMENTS.

See Judgment, § 564.

DORMANT PARTNERS.

See Partnership, §§ 16, 62, 77.

Liability of. See Partnership, § 62.

DOUBLE APPEALS.

In civil cases. See Appeal and Error, § 15.
In criminal cases. See Criminal Law, § 607.

DOUBLE COMPOUND INTEREST.

See Interest, § 49.

DOUBLE DAMAGES.

See Damages, § 133.

For trespass. See Trespass, § 23.

DOUBLE HOMESTEAD.

Different homesteads in same property. See Homesteads, § 65.
Right of surviving spouse and heirs to more than one homestead. See Homesteads, § 106.

DOUBLE INSURANCE.

As avoiding policy. See Insurance, § 97.

DOUBLE JUDGMENTS.

In same case. See Judgment, § 136.

DOUBLE OFFICE.

Right to hold more than one public office. See Officers, § 12.

DOUBLE PUNISHMENT.

For crime. See Criminal Law, § 325.

DOUBLE REPEAL.

Effect of repeal of repealing act. See Statutes, § 64.

DOUBLE TAXATION.

Constitutional inhibition of. See Taxation, § 14.

DOWER.

Include nature and incidents of the interest in the real property of a deceased husband to which his widow is entitled for her life or absolutely, at common law or by statute; abolition of dower and its effect; rights, powers, and liabilities of married women and widows in respect of their dower; releasing, barring, or defeating rights of dower; and remedies relating thereto.

§ 1. Statutory Abolition.

[a] The statute in this state has done away with the common-law right of dower, and substituted a half interest in the common property.—Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125.

[b] There is no estate in dower in California. Estate in dower is abolished by Civil Code, section 173.—Stewart, In re, 74 Cal. 103, 15 Pac. 445.

FOR AUTHORITIES FROM OTHER STATES:
Constitutionality of statutes destroying dower: 84 Am. St. Rep. 446, note.
Dower in mortgaged lands: 5 Am. Dec. 233, note.
Valuation of dower in aliened lands: 9 Am. Dec. 363, note.
Bar of dower by adultery: 19 Am. Dec. 688, note.
Assignment of dower: 79 Am. Dec. 600, 39 Am. St. Rep. 25, notes.
Husbands' transfers in fraud of wives: 39 Am. Dec. 218, note.
When barred by provisions in will: 51 Am. Dec. 579, note.
Merger of dower in the fee: 99 Am. St. Rep. 156, note; 3 C. C. A. 316, 4 C. C. A. 295, notes; 15 L. R. A. 542, 16 L. R. A. 209, 776, 18 L. R. A. 75, 425, 21 L. R. A. 180, 23 L. R. A. 642, 25 L. R. A. 564, 27 L. R. A. 340, notes. See, also, 14 Cyc. 871-1016; 17 Cent. Dig., cols. 1105-1214, §§ 1-80.

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DRAFTS.

Form and contents of. See Bills and Notes, § 1 et seq.
Transfer of non-negotiable drafts without indorsement. See Bills and Notes, § 120.
Necessity that promise to pay draft be in writing. See Frauds, Statute of, § 6.

DRAINAGE DISTRICTS.

See Drains, §§ 7-53.

DRAINS.

Include channels and other works constructed by public authority for drainage of swamp or lowlands; nature and scope of power to establish and maintain such works; constitutional and statutory provisions relating thereto; creation of drainage districts, and appointment, rights, powers, duties, and liabilities of drainage boards, officers, etc.; and construction and maintenance of such works, and taxes and local assessments therefor.

I. ESTABLISHMENT AND MAINTENANCE, §§ 1-36.

II. ASSESSMENTS AND SPECIAL TAXES, §§ 37-53.

Right to join actions on several swamp land assessments. See Actions, § 81.
Swamp land certificate as color of title sufficient to sustain title by adverse possession. See Adverse Possession, § 94.
Right to condemn land for. See Eminent Domain, § 19.
Obstruction of highway drainage. See Highways, § 75.
Liability of city for defects in. See Municipal Corporations, § 293.
State swamp lands. See Public Lands, §§ 65-88.
Reclamation of lands under navigable waters. See Navigable Waters, § 15.
Irrigation districts. See Waters and Watercourses, § 262.
Rights in lands under non-navigable water. See Waters and Watercourses, § 72.

I. ESTABLISHMENT AND MAINTENANCE.

GENERAL RIGHT TO ESTABLISH, § 1.
—— CUSTODY AND DISBURSEMENT OF FUNDS, § 2.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 3.
—— EFFECT OF REPEAL OF LAW, § 4.
—— OPERATION, § 5.
PURPOSE FOR WHICH DRAINS MAY BE ESTABLISHED, § 6.
DRAINAGE AND RECLAMATION DISTRICTS—NATURE, § 7.
CREATION AND EXISTENCE, § 8.
—— RECLAMATION AND IRRIGATION DISTRICTS DISTINGUISHED, § 9.
—— COLLATERAL ATTACK, § 10.
—— REORGANIZATION, § 11.
—— TERRITORIAL EXTENT AND ANNEXATION OR INCLUSION OF LAND, § 12.
—— POWERS, § 13.
—— ENLARGEMENT OR SUBDIVISION, § 14.
—— DRAINAGE, WARRANTS AND ORDERS, § 15.
—— BY-LAWS, § 16.
—— ACTIONS AGAINST, § 17.
ESTABLISHMENT BY LAND OWNERS OVER LANDS OF OTHERS, § 18.
PROCEEDINGS FOR ESTABLISHMENT—PETITION, § 19.
—— NOTICE, § 20.
—— ANSWER, § 21.
—— APPOINTMENT OF SPECIAL COMMISSIONERS AND VIEWERS, § 22.
—— PROCEEDINGS OF COMMISSIONERS AND VIEWERS, § 23.
—— REPORT OF ENGINEER, § 24.
—— HEARING AND DETERMINATION OF QUESTIONS, § 25.
—— EVIDENCE, § 26.
—— CONCLUSIVENESS OF PROCEEDINGS OF BOARD OF SUPERVISORS, § 27.
—— APPEAL, § 28.
—— REVIEW ON CERTIORARI, § 29.
—— INJUNCTION TO RESTRAIN PROCEEDINGS, § 30.
FORFEITURE AND DISSOLUTION, § 31.
CONSTRUCTION—DEVIATION, § 32.
DAMAGES AND INJURIES — COMPENSATION FOR LANDS TAKEN AND DAMAGES, § 33.
—— DEDUCTION OR SETOFF OF BENEFITS, § 34.
LIABILITIES OF DISTRICT OR LAND OWNER FOR EXPENSES OR DAMAGES, § 35.
INJURIES FROM DEFECTIVE CONSTRUCTION OF DRAINS, § 36.

§ 1. General Right to Establish.

[a] Legislature has constitutional power to compel local improvements, which, in its judgment, will promote the health of the people and abate nuisances, and it may open canals for irrigating arid districts, and build levees for draining lands, and impose local assessments to pay for such works.—Hagar v. Supervisors of Yolo County, 47 Cal. 222.

[b] Act of 1868 (Stats. 1867-68, p. 514), which provides for the reclamation of swamp and overflowed lands, is not limited to swamp and overflowed lands acquired by the state under the Arkansas act, but applies to all swamp and overflowed lands in the state, even if the title was derived from a Mexican grant.—Hagar v. Yolo County Supervisors, 47 Cal. 222.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1018-1073; 17 Cent. Dig., cols. 1536-1620, §§ 1-71.

§ 2. Custody and Disbursement of Funds.

[a] Under the provisions of the Political Code for the reclamation of swamp lands, where the district is situated in different counties, the assessment upon such tract of land is to be paid into the treasury of the county in which the particular tract is situated, and is to be paid out upon the warrants of the trustees approved by the board of supervisors of that county.—Cosner v. Colusa County Supervisors, 58 Cal. 274.

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§ 3. Constitutional and Statutory Provisions.

[a] The act of April 23, 1880, entitled "An act to promote drainage," is unconstitutional, in that it creates no relation between the taxes to be levied within any district which the state board may choose to establish, and the benefits received by such district.—People v. Parks, 58 Cal. 624.

[b] Act of April 23, 1880, to promote drainage, is unconstitutional because it delegates to a board of executive officers, called "drainage commissioners," the power to divide the state into drainage districts according to their own discretion. Such division is necessarily a legislative duty.—People v. Parks, 58 Cal. 624.

[c] The act of April 23, 1880, entitled "An act to promote drainage," is not obnoxious to article 4, section 24, of the constitution. (Myrick, J., concurring.) (People v. Parks, 58 Cal. 624.

[d] The act of April 23, 1880, entitled "An act to promote drainage," is not so clearly unconstitutional as to authorize the court to oust from office a director of a drainage district, or to enjoin the letting of contracts under the act, or to adjudge that one of said drainage districts was illegally formed. (Sharpstein, J., dissenting.)—People v. Parks, 58 Cal. 624.

[e] The drainage act of 1881 is not repealed by the County Government Act of March 14, 1883.—Holley v. County of Orange, 106 Cal. 42, 39 Pac. 790.

[f] Law in regard to reclamation districts is not void because it requires property qualifications for voters for trustees of district.—People v. Reclamation District, 117 Cal. 123, 48 Pac. 1016.

[g] Statutes of 1899, page 182, chapter 149, amending Statutes of 1893, page 341, chapter 229, section 5, providing for the payment of the purchase price of swamp lands purchased after the reclamation thereof, was only a fulfillment of the state's contract with such purchasers contained in the act of 1893, making such lands subject to reclamation as provided by law, and was not, therefore, objectionable as a gift of public money.—McCord v. Slavin, 143 Cal. 325, 76 Pac. 1104.

§ 4. —— Effect of Repeal of Law.

[a] Where the evidence showed that no reclamation district was organized under Statutes of 1878, page 911, a repeal of such act by the legislature in 1880 destroyed any rights which might have been acquired under the original statute.—People v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016.

§ 5. —— Operation.

[a] Statutes of 1893, page 342, chapter 229, section 6, authorizing the reclamation of swamp and overflowed lands, and declaring that such reclamation should be subject to all the provisions of law regulating the reclamation of such lands, to the extent that such laws provided that, after the reclamation had been completed, purchasers should be repaid the amount of their payments made for the purchase of the land, constituted a contract between them and the state, which the state could not disregard.—McCord v. Slavin, 143 Cal. 325, 76 Pac. 1104.

§ 6. Purposes for Which Drains may be Established.

[a] The storage of debris and the promotion of the drainage of a district of country are things essentially different. The former is in its nature a private enterprise, while the drainage of a state is a public purpose.—People v. Parks, 58 Cal. 624.

[b] Statutes of 1893, page 342, chapter 229, section 6, provides that any of the swamp lands designated in the act, which, by reason of periodical overflow, need and are susceptible of reclamation, may be reclaimed in the same manner and subject to all the provisions of law regulating the reclamation of swamp and overflowed lands, provided that the board of supervisors of the county in which the land, or the greater part thereof, shall be situated, must first determine that such reclamation is necessary and advisable. Held, that the purpose of such section was to enable the holders of land needing and susceptible of reclamation to avail themselves of the provisions of Political Code, sections 3446-3491, providing a scheme for the reclamation of such lands, and that the limitation of the privilege to lands needing reclamation "by reason of periodical overflow" was a mere statutory designation of the test to be applied for the determination of what lands were "swamp and overflowed lands" within the meaning of act of Congress of September 28, 1850, chapter 84, 9 Stats. 519.—McCord v. Slavin, 143 Cal. 325, 76 Pac. 1104.

FOR AUTHORITIES FROM OTHER STATES:
See 14 Cyc. 1025, 1026; 17 Cent. Dig., cols. 1538-1540, § 2.

§ 7. Drainage and Reclamation Districts—Nature.

[a] Reclamation district is public corporation for municipal purposes.—People v. Reclamation District No. 108, 53 Cal. 346; Heke v. Perdue, 62 Cal. 545; People v. La Rue, 67 Cal. 526; Swamp Land District No. 150 v. Silver, 98 Cal. 51.

[b] Reclamation districts are not corporations of any kind, but public agencies which cease to exist when there is no further function for them to perform.—People v. Reclamation District, 117 Cal. 121, 48 Pac. 1016.

[c] Reclamation districts marked out under act of 1861 were not public corporations.—People v. Reclamation District, 117 Cal. 118-120, 48 Pac. 1016.

[d] Reclamation districts are not corporations organized under provisions of Civil

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Code.—Hensley v. Reclamation Dist., 121 Cal. 97, 53 Pac. 401.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1026; 17 Cent. Dig., cols. 1541-1544, §§ 4-6.

§ 8. —— Creation and Existence.

[a] Reclamation district, as a public corporation, may be created by special act or implication of law from legislative recognition, without regard to defects in its organization.—People v. Reclamation Dist., 53 Cal. 346; People v. Williams, 56 Cal. 647.

[b] A reclamation district can be created not only by the means and in the manner provided by the general law, but also by special act or implication.—Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779.

[c] The creation of a reclamation district may be shown by acts recognizing its existence.—Swamp Land District No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866.

[d] In an action for an assessment levied on defendant's land by the commissioners of a reclamation district, evidence of legislative recognition of the district is conclusive proof that the district existed from the time of such recognition, and it cannot be contended that the assessment, made after such legislative recognition, was invalid, on the ground that the district was not legally organized.—Reclamation Dist. No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779.

[e] "Inhabitants" are not necessary to organize a reclamation district, and such organization does not affect "residents" who own no land within the district.—People v. Reclamation District, 117 Cal. 120, 48 Pac. 1016.

[f] The fact that a reclamation district has for twenty years expended its means in reclaiming the land does not estop the state from asserting that the corporation had no legal existence.—People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068.

[g] An insufficient petition for the formation of a reclamation district was approved by the board of supervisors. No business was transacted by the district for fifteen years. Thereafter the supervisors were requested to call an election of trustees, and trustees were chosen. They employed an engineer to make plans, and his report was approved. The supervisors later appointed persons to assess the land. No further business was transacted. The trustees joined with other persons, and formed the defendant district, embracing the same lands, and commenced reclamation. Held, on quo warranto proceedings setting up the prior district as a bar to the defendant's organization, that a finding against the former's defacto existence was supported by the evidence.—People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27.

[h] A reclamation district regularly organized under section 3446 of the Political Code has a legal existence which cannot be successfully assailed in quo warranto if there is no existing swamp land or reclamation district within its limits.—People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1542-1544, § 5.

§ 9. —— Reclamation and Irrigation Districts Distinguished.

[a] Reclamation districts are unlike irrigations districts created under Wright act.—People v. Reclamation District, 117 Cal. 123, 48 Pac. 1016.

§ 10. —— Collateral Attack.

[a] Where, under act of March 30, 1874 (Stats. 1873-74), providing that immediately after the passage of the act, owners of land in swamp-land district No. 150 may elect trustees, and proceed in the work of reclamation, as provided in the code, the land owners organized the district by electing trustees, and making and recording by-laws, the organization was complete; and an attack on the validity of such organization could not be considered in an action by such district to recover assessments against land of persons lying within such district.—Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866; Swamp Land Dist. No. 150 v. Bump, 32 Pac. 867; Swamp Land Dist. No. 150 v. Cornish, 32 Pac. 867; Swamp Land Dist. No. 150 v. Winter, 32 Pac. 867.

[b] Plaintiff instituted quo warranto proceedings against a reclamation district, claiming that it included land within an earlier district, but failed to show that the latter had a de jure existence. Plaintiff then relied on a de facto organization. Held, that defendant was not precluded from controverting the de facto organization by the rule prohibiting collateral attacks.—People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27.

§ 11. —— Reorganization.

[a] In reorganizing a reclamation district under the act of 1868 the approval of the board of supervisors was not required.—Reclamation District No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676.

[b] Under act of 1868, section 43, requiring that a meeting of land owners for the purpose of reorganizing a reclamation district be called by the clerk of the board of supervisors, the swamp land clerk, created by section 46 of said act, may call the meeting.—Reclamation Dist. v. Goldman, 65 Cal. 635, 4 Pac. 676.

[c] A California swamp land and reclamation district is a public corporation, and, when acting as such de facto in good faith under an attempted compliance with the law, may, under the statute, be united, consoli-

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dated and reorganized, so as to form a new corporation in all respects valid.—People v. La Rue, 67 Cal. 526, 8 Pac. 84.

§ 12. —— Territorial Extent and Annexation or Inclusion of Land.

[a] The board of supervisors of a county may be empowered by the legislature to include within a reclamation district lands situated in another county.—Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945.

[b] Fact that reclamation district incorporated under section 3446, Political Code, includes lands included in former district does not invalidate its organization if such former district was not a subsisting corporation. People v. Reclamation Dist., 117 Cal. 117, 48 Pac. 1016; Reclamation Dist. v. Sels, 117 Cal. 165, 49 Pac. 131.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1545-1547, §§ 7-10.

§ 13. —— Powers.

[a] Reclamation districts are public agencies having only such powers and liabilities as are prescribed by law which creates them. Hensley v. Reclamation Dist., 121 Cal. 97, 53 Pac. 401.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1027-1029; 17 Cent. Dig., cols. 1547-1549, § 11.

§ 14. —— Enlargement or Subdivision.

[a] A petition for the division of a swamp land district, formed prior to March 28, 1868, and for the formation of a new district out of a part of the old district, must state that the petitioners are the owners of all the land within the proposed new district, and that they are the holders of certificates of purchase or patents for the lands claimed by them within the district, and the land to be included in the proposed new district must be described by legal subdivisions or other boundaries.—Ralston v. Sacramento County Supervisors, 51 Cal. 592.

[b] Act of April 15, 1880, as amending Political Code, section 3481, providing that the owners of more than two-thirds of any body of lands within any reclamation or swamp land district, and in which the lands have not been reclaimed, desiring to have said body of lands set off from the district, must show that said body of lands is capable of independent reclamation, does not authorize the setting off of an independent district within the limits of a reclamation district formed before the adoption of the Political Code, and not reorganized under the Code.—People v. Parvin, 74 Cal. 549, 16 Pac. 490.

[c] The act of April 15, 1880, does not authorize the setting apart of a new and independent reclamation district, within the limits of a district formed or organized prior to the adoption of the Political Code, and which has not reorganized under the Political Code.—People ex rel. Attorney General v. Parvin, 74 Cal. 549, 16 Pac. 490.

[d] Political Code, section 3481, provides that the requisite number of owners of "lands within any reclamation or swamp land district, and in which the lands have not been reclaimed, may have said body of lands set off from such district." Held, that this did not repeal the prior laws, or affect the assessment proceedings thereunder, and applied to all future cases, whether the existing district was organized under the code or not.—People v. Parvin, 14 Pac. 783.

§ 15. —— Drainage, Warrants and Orders.

[a] The provisions of code, section 3456, requiring that money collected on a judgment for the reclamation of swamp land shall be paid out by the reclamation district trustees upon warrants approved by the board of supervisors of the county, vest in the county board the same discretion and power of adjudication with respect to warrants drawn upon their county, where the district extends beyond a single county, as has the board where the whole district is included in one county.—Cosner v. Colusa County Supervisors, 58 Cal. 274.

§ 16. —— By-laws.

[a] Under acts of 1868, page 507, it was not necessary that the by-laws of swamp land district should be signed by holders of certificates of purchase or patents. It was sufficient if they were signed by holders of "other evidences of title" to the requisite amount.—People v. Hagar, 52 Cal. 171.

§ 17. —— Actions Against.

[a] Reclamation districts cannot be sued. Hensley v. Reclamation Dist., 121 Cal. 97, 98, 53 Pac. 401.

§ 18. Establishment by Land Owners Over Lands of Others.

[a] Person has no right to construct ditch through inclosure of another without his consent.—Weimer v. Lowery, 11 Cal. 104.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1536-1540, §§ 1-2.

§ 19. Proceedings for Establishment—Petition.

[a] A petition for the organization of a reclamation district is not void upon its face merely because the names of some of the owners of land were attached to it by other parties. If the names were signed by proper authority, the signatures were those of the owners.—People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

[b] A petition to the board of supervisors for the organization of a district for the

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reclamation of lands must be signed by owners of one-half the acreage in the district, to give such board jurisdiction.—Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156.

FOR AUTHORITIES FROM OTHER STATES:

60 L. R. A. 161, note. See, also, 14 Cyc. 1029-1050; 17 Cent. Dig., cols. 1553-1600, §§ 16-54.

§ 20. —— Notice.

[a] Section 3447, Political Code, requires publication of petition for swamp land district once in every seven days for four weeks before the hearing.—Williams v. Sacramento County, 58 Cal. 237.

[b] If there are two intervals of more than one week in the publication, board of supervisors have no jurisdiction to organize.—Williams v. Sacramento County, 58 Cal. 237.

[c] Under Statutes of 1867-68, page 507, section 30, requiring publication of a petition for the formation of a reclamation district "for four weeks next preceding the hearing thereof, in some newspaper published in the county," a publication in a daily paper "once a week for four weeks, commencing on the fifth day of December, ... to and including the second day of January," is a sufficient publication for a hearing on January 3d.—People v. Reclamation Dist. No. 136, 121 Cal. 522, 53 Pac. 1085.

[d] Under act of March 28, 1868, providing for the organization of reclamation districts, and that a petition for the same shall be published "for four weeks next preceding the hearing thereof in some newspaper published in the county," a publication in a daily newspaper once a week for four weeks is insufficient.—People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1033-1036; 17 Cent. Dig., cols. 1561-1567, §§ 25-28.

§ 21. —— Answer.

[a] If the petition for the formation of a swamp land district under the act of March 28, 1868, is signed by persons purporting to be holders of certificates of purchase, patents, or other evidences of title, representing at least one-half of the land in the proposed district, and if the petition is approved and the district organized by the board of supervisors. in an action to enforce an assessment, an averment in the answer that there were a large number of land owners in the district who did not sign the petition is immaterial, and may be stricken out.—People v. Hagar, 52 Cal. 171.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1036, 1037; 17 Cent. Dig., cols. 1567-1569, § 29.

§ 22. —— Appointment of Special Commissioners and Viewers.

[a] A person appointed a commissioner to view and assess the lands in a reclamation district is a "disinterested person," within Political Code, section 3456, where he owns no land in the district, and has no pecuniary interest that could have affected the assessment, although he was secretary of the board of trustees of the district, and received a salary as such.—Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1037-1040; 17 Cent. Dig., cols. 1569-1575, §§ 30-33.

§ 23. —— Proceedings of Commissioners and Viewers.

[a] If a board of commissioners is created by statute to assess a tax upon swamp and overflowed land for the purpose of reclaiming the same, and the statute requires such board to jointly view and assess the land, all the commissioners must be present, and they must jointly view and assess, or the assessment will be void.—People v. Coghill, 47 Cal. 361; People v. Hagar, 49 Cal. 229.

[b] Under the act of March 28, 1868, it is not necessary that the commissioners of assessment should jointly go in person upon each and every acre in the district; and it will be sufficient if the commissioners jointly make such an examination of the land as will enable them to form an intelligent judgment as to the benefits which will accrue to each and every acre.—People v. Hagar, 52 Cal. 171.

[c] An assessment of swamp lands under the act of 1868 is void, unless the commissioners jointly view them. This rule is not changed by Political Code, section 3456.—People v. Ahern, 52 Cal. 208.

[d] Section 33 of the act of March 28, 1868, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a tax," etc., means that the three commissioners, acting jointly or together, shall view and assess.—Reclamation District No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43.

[e] Under section 3456 of the Political Code, the commissioners appointed to make an assessment for the reclamation of swamp land need not act jointly in viewing the lands within the district.—Swamp Land District No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462.

[f] Commissioners appointed to make assessments for swamp land purposes, whose statutory duty was to view the land in question, proceeded to the lands which were mostly covered with water, and went to a point where they could look over the whole area, and see every part except a few parcels along its eastern margin, hidden by trees. Held, that the finding of the court that they

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viewed all the lands, and each and every tract thereof, was not, as a matter of law, erroneous.—Swamp Land Dist. No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462.

[g] The commissioners of swamp land assessments were verbally sworn before viewing the land, but it did not appear that they subscribed their oath, and filed it in the county clerk's office, as required of all "officers" by Political Code, sections 904, 909. Held, that whether the commissioners were or were not "officers," within the meaning of those sections, a failure of strict compliance with their requirements would not avoid official acts fully performed.—Swamp Land Reclamation Dist. No. 407 v. Wilcox, 75 Cal. 443, 17 Pac. 241, affirming judgment 14 Pac. 843; Swamp Land Reclamation Dist. No. 407 v. Ruble, 17 Pac. 246.

§ 24. —— Report of Engineer.

[a] Report of engineer containing detailed statement of character and amount of ditch work to be done with estimates of cost thereof, and also cost of proposed pumping plant are sufficient basis for assessment though ditches and pumping plant are not located.—Reclamation Dist. v. Sels, 117 Cal. 166, 49 Pac. 131.

§ 25. —— Hearing and Determination of Questions.

[a] On the hearing of a petition for the formation of a swamp land reclamation district, the board of supervisors have jurisdiction to determine what lands will be benefited by the proposed reclamation, and to include such lands within the district.—Reclamation District No. 108 v. Hagar, 66 Cal. 59, 4 Pac. 945.

[b] A party being present at the hearing of the petition for the formation of a reclamation district, and making no objection, admits the truth of the facts stated in it, and is estopped to deny the same.—Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945, 949, 950; Reclamation Dist. v. Martin, 66 Cal. 54, 4 Pac. 945, 949, 950.

[c] Proof of the existence of a reclamation district as a de facto corporation does not entitle it to proceed to assess an owner of land within such district without a hearing on notice of the petition to create the district. Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156.

For Authorities from Other States:

See 14 Cyc. 1042, 1043; 17 Cent. Dig., cols. 1578-1581, §§ 36-39.

§ 26. —— Evidence.

[a] In an action for a swamp land assessment, an entry in the record of the board of supervisors, which is conceded to have been altered without authority by one who was, at the time of the entry, but not at the time of the alteration, clerk of the board, is admissible, where the record as altered conforms to the original entry-book, and the person who made the alteration testifies that it was done to amend a clerical error.—Swamp Land Reclamation Dist. No. 407 v. Wilcox, 75 Cal. 443, 17 Pac. 241, reversing 14 Pac. 843; Swamp Land Reclamation Dist. No. 407 v. Ruble, 17 Pac. 246.

[b] Where a petition for the formation of a reclamation district has been granted by the board of supervisors, and the names of some of the subscribers appear to have been signed by third persons, it is conclusively presumed that such board found that they were authorized and genuine signatures.—People v. Reclamation Dist. No. 136, 121 Cal. 522, 53 Pac. 1085.

§ 27. —— Conclusiveness of Proceedings of Board of Supervisors.

[a] In the absence of any showing of fraud, the decision of the commissioners of assessment, as to the benefit which the several parcels of swamp land would receive from the reclamation, is conclusive in a collateral action.—People v. Hagar, 52 Cal. 171.

[b] The board of supervisors had power to decide upon the genuineness of the signatures to the petition for the organization of the reclamation district; and the approval of the petition by the board was conclusive adjudication of that fact.—People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

[c] The board of supervisors is authorized to determine whether a petition for the organization of a reclamation district is sufficiently signed, and their finding is conclusive. Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156.

[d] The action of county supervisors in forming a reclamation district is conclusive that the lands therein are of the character for the reclamation of which such district is authorized by statute to be formed.—Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

§ 28. —— Appeal.

[a] In appeals to the superior court from the order of the board of supervisors as to the formation of a drainage district, the judgment of the court is final, and no further appeal lies to the supreme court.—Appeal of Bixler, 59 Cal. 550.

For Authorities from Other States:

See 14 Cyc. 1044-1048; 17 Cent. Dig., cols. 1584-1593, §§ 44-50.

§ 29. —— Review on Certiorari.

[a] When the proceedings of a board of supervisors in organizing a district for the reclamation of swamp lands are reviewed on certiorari, and it appears that the petition to organize the district was defective, on account of not stating with precision what lands

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in the district had been sold, yet, if the petitioner for the writ appeared before the board and did not raise the objection, and waited several months before applying for the writ, and mischievous consequences might follow from a reversal of the proceedings, the court will dismiss the writ.—Hagar v. Yolo County Supervisors, 47 Cal. 222.

[b] Order of board of supervisors creating swamp land district is not a judicial act, and cannot be reviewed upon certiorari.—Williams v. Supervisors, 65 Cal. 160.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1048; 17 Cent. Dig., cols. 1593, § 51.

§ 30. —— Injunction to Restrain Proceedings.

[a] In view of Political Code, title 8, chapter 2, and under Civil Code, section 3423, in relation to reclamation districts, held, that a court of equity had no jurisdiction to restrain a board of supervisors from proceeding on an application for the formation of a reclamation district.—Glide v. Superior Court of Yolo County, 1 Cal. App. 152, 81 Pac. 225.

§ 31. Forfeiture and Dissolution.

[a] The fact that the reclamation of the lands of the district is impracticable is not a ground for judgment of forfeiture of the corporation.—People v. Reclamation Dist. No. 108, 53 Cal. 346.

§ 32. Construction—Deviation.

[a] A deviation from approved plans in making the reclamation, where no injury results therefrom, is a discretion vested by statute in the trustees; and a work of reclamation, with a deviation justifiable under the circumstances, is a substantial compliance with the original approved plan.—Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1051, 1052; 17 Cent. Dig., cols. 1601, 1602, § 55.

§ 33. Damages and Injuries—Compensation for Lands Taken and Damages.

[a] Laws of 1885, page 78, provided (section 3) that "all persons having claims, 'unaudited by the state board of drainage directors,' for work done or materials furnished under the provisions of 'An act to promote drainage,' approved April 23, 1880 [and which had been declared unconstitutional], are authorized to present their claims to the state board," and have them allowed. Plaintiff, in proceedings to compel the state comptroller to draw a warrant for his claim as audited, the basis of which claim was a judgment condemning his land for drainage purposes under the act of 1880, alleged that by that judgment it was adjudged that the land should be condemned, and that plaintiff should recover therefor the sum of, etc. Held, that even assuming that land so taken can be regarded as "material furnished," within the meaning of the act of 1885, yet, as it is not shown that the award was for "damages" sustained, but rather for the proposed "taking" of the land, nor that any final order of condemnation was made or recorded, as required by Code of Civil Procedure, section 1253, which provides that "thereupon" the property shall vest in the corporation, and, as the award was never paid, the title to the land condemned never vested in the drainage district, and hence nothing was "furnished," and plaintiff is not entitled to payment.—Callahan v. Dunn, 78 Cal. 366, 20 Pac. 737.

[b] An allegation that the award was "as compensation for the property condemned and taken, and as damages thereby done to his property not taken," evidently refers to an injury which would result to the residue of plaintiff's tract from segregation of the portion condemned; but as there was no taking, and so no segregation, that element of damages did not accrue.—Callahan v. Dunn, 78 Cal. 366, 20 Pac. 737.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1056, 1057; 17 Cent. Dig., cols. 1614-1617, §§ 67-69.

§ 34. —— Deduction or Setoff of Benefits.

[a] By-law providing that value of work already done should be included in estimate is inconsistent with the provisions of the code upon the subject.—Swamp and Overflowed Land District No. 110 v. Feck, 60 Cal. 403.

[b] The "benefits" which are to be taken into account by the commissioners in apportioning the charge or assessment are those benefits only which spring from the system of works which such assessment is levied to construct or maintain.—Reclamation Dist. v. West, 129 Cal. 622, 62 Pac. 272.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1057; 17 Cent. Dig., col. 1616, § 68.

§ 35. Liabilities of District or Land Owner for Expenses or Damages.

[a] In an action to recover one-fifth of the cost of a drainage ditch, evidence held to support a finding that defendant fully consented to the scheme and promised to defray her part of the expense.—Showers v. Zanone (Cal. App.), 85 Pac. 857.

FOR AUTHORITIES FROM OTHER STATES:

58 L. R. A. 353, note. See, also, 17 Cent. Dig., cols. 1612-1614, § 66.

§ 36. Injuries from Defective Construction of Drains.

[a] Action lies by one ditch owner for damage caused by negligent construction and

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management of another ditch.—Karth v. Orth, 10 Cal. 193.

[b] Maxim, Sic utere tuo ut alienum non laedas, applies to negligent construction of a ditch and dam.—Hoffman v. T. C. W. Co., 10 Cal. 413.

FOR AUTHORITIES FROM OTHER STATES:

39 L. R. A. 69, note. See, also, 14 Cyc. 1057; 17 Cent. Dig., cols. 1617, 1618, § 70.

II. ASSESSMENTS AND SPECIAL TAXES.

ASSESSMENT OR LEVY—POWER TO ASSESS OR LEVY IN GENERAL, § 37.
—— APPLICABILITY OF CONSTITUTIONAL PROVISIONS GOVERNING TAXATION, § 38.
—— RESTRICTIONS AND LIMITATIONS, § 39.
—— AMOUNT AND APPORTIONMENT, § 40.
—— PROCEEDINGS FOR ASSESSMENT, § 41.
—— MODE OF ASSESSMENT, § 42.
—— REASSESSMENT, § 43.
—— APPORTIONMENT OF BENEFITS AND EXPENSES, § 44.
—— APPEAL OR CERTIORARI, § 45.
PROCEEDINGS TO CONFIRM OR ESTABLISH VALIDITY, § 46.
COLLECTION AND ENFORCEMENT—LIEN, § 47.
—— PAYMENT, § 48.
—— INTEREST—PENALTY FOR NONPAYMENT, § 49.
—— ACCEPTANCE OF PART OF DELINQUENT ASSESSMENT AS WAIVER OF RIGHT OF ACTION FOR ENTIRE ASSESSMENT, § 50.
—— ACTIONS, § 51.
—— DEFENSES, § 52.
—— APPEAL, § 53.

§ 37. Assessment or Levy—Power to Assess or Levy in General.

[a] The legislature has the constitutional power to provide that lands benefited by drains shall be assessed to pay for the expense incurred.—Hagar v. Yolo County Supervisors, 47 Cal. 222.

[b] Reclamation districts can levy assessments and issue warrants for one purpose only: for works of reclamation.—Hensley v. Reclamation Dist., 121 Cal. 98, 53 Pac. 401.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1620-1623, §§ 72, 73.

§ 38. —— Applicability of Constitutional Provisions Governing Taxation.

[a] Those clauses in the constitution which provide that taxation shall be equal and uniform, and prescribe the mode of assessment, and the officer by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements.—Hagar v. Supervisors of Yolo County, 47 Cal. 222.

§ 39. —— Restrictions and Limitations.

[a] The assessment of lands to pay for local improvements benefiting such lands, such as drains and levees to reclaim them, is not strictly taxation, and such assessment need not conform to the general rules regulating taxation.—(Cal. 1874) Hagar v. Yolo County Supervisors, 47 Cal. 222.

[b] It is not essential to the validity of an assessment for drainage that it should have been made by a municipal corporation.—Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945, 949, 950; Reclamation District No. 108 v. Martin, 4 Pac. 950.

[c] Assessments upon lands benefited by the drainage for swamp lands, fixed in proportion to the benefits received, are not a "tax" within proviso to act of 1883, section 25, subdivision 13, that no tax shall be levied upon any district until the proposition shall have been approved by the qualified electors; and such proviso did not repeal the act of March 3, 1881, providing a system of drainage, in so far as it authorizes a levy of the assessment without first submitting the question to popular vote.—Holley v. Orange County, 106 Cal. 420, 39 Pac. 790.

§ 40. —— Amount and Apportionment.

[a] Whether or not the mode of assessment in a reclamation district is in accordance with proper apportionment, or equality of burden or benefit, is for the consideration of the legislative department, in the absence of a palpable violation of private rights.—Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945, 949, 950; Reclamation Dist. v. Martin, 66 Cal. 54, 4 Pac. 950.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1626-1630, § 75.

§ 41. —— Proceedings for Assessment.

[a] Where a board of commissioners is created by statute to assess a tax upon swamp and overflowed land for the purpose of reclaiming the same, and the statute requires such board to jointly view and assess the land, their report, stating that they had jointly viewed and assessed the land, when in fact they were not all present, is not conclusive of the question if the statute does not require them to thus report, nor even prima facie evidence of the fact, but the assessment may be attacked in a collateral action to recover the tax.—People v. Hagar, 49 Cal. 229.

[b] Political Code, title 8, chapter 1, provides for drainage districts, and section 3471 thereunder provides that "districts formed under laws in force prior to May 28, 1868, may reorganize under the provisions of this chapter." Held, that a district formed under such prior laws, and not reorganized under the provisions of the said chapter, cannot make an assessment based on the provisions of such chapter.—Reclamation Dist. No. 3 v. Kennedy, 58 Cal. 124.

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[c] The fact that drainage assessments are made against land without notice to the owner does not make the assessments unconstitutional, since the owner may contest the assessment in the action to collect it.—Reclamation Dist. No. 108 v. Evans, 61 Cal. 104.

[d] The Political Code did not repeal act of March 28, 1868; hence a reclamation district formed under the provisions of such act may make its assessment in accordance with such act, and not in conformity to the code.—Reclamation Dist. No. 3 v. Goldman, 61 Cal. 205.

[e] Political Code, section 3456, provides that assessments for swamp land improvements shall be proportionate to the resulting benefit, and section 3461 provides, among other requisites, that the list must contain "the amount of the charge assessed against each tract." The list in question conformed to the requirements of section 3461. Held, that the commissioners were not required to report that, in making the assessment, they had complied with section 3456; and that, in the absence of evidence to the contrary, they must be presumed to have regularly performed their official duty.—Swamp Land Reclamation Dist. No. 407 v. Ruble, 14 Pac. 846; Swamp Land Reclamation Dist. No. 407 v. Wilcox, 75 Cal. 443, 17 Pac. 241, affirming judgment, 14 Pac. 843.

[f] In an action for an assessment, it appeared that, in the assessment list, there was no dollar mark before the figures opposite defendant's name, under the heading "Amount of Charges Assessed," but such mark preceded the figures in the same column, in other places. Held, that the figures must be construed to represent dollars.—Swamp Land Reclamation Dist. No. 407 v. Wilcox, 75 Cal. 443, 17 Pac. 241, affirming judgment, 14 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1061-1064; 17 Cent. Dig., cols. 1630-1640, §§ 76-83.

§ 42. —— Mode of Assessment.

[a] Under Political Code, section 3461, requiring certain assessment lists to contain "a description, by legal subdivisions, swamp land surveys, or natural boundaries," a description naming the adjoining proprietors on the respective boundaries is sufficient.—Swamp Land Reclamation Dist. No. 407 v. Wilcox, 14 Pac. 843; Swamp Land Reclamation Dist. No. 407 v. Ruble, 14 Pac. 846; Swamp Land Reclamation Dist. No. 407 v. Wilcox, 75 Cal. 443, 17 Pac. 241.

[b] Where a swamp land assessment named a person as the owner, no liability is created against anybody else, and none against the person named, unless such person is the owner of the property.—Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103.

[c] A swamp land assessment to a party named and to unknown owners is void.—Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103.

[d] The lands included in a reclamation district assessment are sufficiently described in a list which contains such abbreviations as are uniformly used in such lists, and which must have been understood by all taxpayers who examine them.—Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630.

[e] Political Code, section 3628, relating to tax assessments in general, and providing that no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid, has no application to an assessment by a reclamation district.—Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254.

[f] Under Political Code, section 3461, requiring reclamation assessment lists to contain "the names of the owners of each tract, if known, and, if unknown, that fact," and section 3466, authorizing suits for the collection of such assessments to be commenced "against the person to whom the same is assessed, and, if assessed to unknown owners, then against the real owners," where the assessment was made against only one of two owners, the judgment for enforcement thereof was not binding on the other owner.—Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254.

[g] Under Political Code, section 3461, providing that the assessment list for the expense of reclaiming lands must contain a description by legal subdivisions, of each tract assessed, the number of acres, the name of the owner, and the amount assessed against each tract, the land need not be described in the smallest legal subdivisions. Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

[h] In an assessment for the expense of reclaiming lands, a description of a tract gave the east boundary as the east line of section 26 of a certain township, and the west boundary as the division line between the southeast quarter and the southwest quarter of said section 29; thence south, on such line, to a certain point. If the second and third calls were followed, the last point would not be reached; and if the second call was followed, and the course of the third call rejected, other land than that of the person named as owner would be included; but, if section 26 were substituted for 29, the description would close, and include no other land. Held, that the call for section 29 was a clerical error, and the description was sufficient to sustain the assessment.—Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1630, 1631, § 76.

§ 43. —— Reassessment.

[a] Where a board of supervisors appointed three commissioners to view and assess swamp lands for the purpose of reclaiming the same, under the act of 1868 for the

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reclamation of swamp and overflowed lands, who undertook to make an assessment, but which was void, they are not authorized to appoint new commissioners, or direct the old commissioners to make a further assessment. Harris v. Colusa County Supervisors, 49 Cal. 662.

[b] If an assessment is levied on the swamp land of a district for the purpose of reclaiming it according to the plan presented by the trustees, and the work is performed, and the assessment is insufficient to pay for the same, a new assessment may be made, under the act of March 30, 1874, to pay the deficiency due on the work already done.—Hagar v. Yolo County Supervisors, 51 Cal. 474.

[c] The reclamation district being situated wholly in Sacramento county, held, that the estimates for an additional assessment as authorized by the act of 1868 were properly presented to the board of supervisors of that county.—Reclamation District No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676.

[d] Where original assessment proves inadequate, an additional assessment may be made.—Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945.

[e] Political Code, section 3459, as amended by act of March 30, 1874, provides that if the original assessment is insufficient for the reclamation of the district lands, or if further assessments are necessary to maintain the reclamation work, the trustees must present to the board of supervisors by which the district was formed a statement of the work "done" or "to be done." Held, that an assessment levied for work "to be done" was not invalid because the trustees, in their statement to the board of supervisors, did not specify the work already done.—Swamp Land Dist. No. 150 v. Silva, 98 Cal. 51, 32 Pac. 866; Swamp Land Dist. No. 150 v. Bump, 32 Pac. 867; Swamp Land Dist. No. 150 v. Cornish, 32 Pac. 867; Swamp Land Dist. No. 150 v. Winter, 32 Pac. 867.

[f] Political Code, section 3459, as amended by act of March 30, 1874, provides that if the original assessment is insufficient for the reclamation of the district lands, or if further assessments are necessary to maintain the reclamation work, the trustees must present to the board of supervisors by which the district was formed a statement of the work "done" or "to be done." Held, that an assessment levied for work "to be done" was not invalid because it included incidental expenses, and the sum of thirty-three thousand four hundred dollars for erecting and maintaining a pump.—Swamp Land Dist. No. 150 v. Silva, 98 Cal. 51, 32 Pac. 866; Swamp Land Dist. No. 150 v. Bump, 32 Pac. 867; Swamp Land Dist. No. 150 v. Cornish, 32 Pac. 867; Swamp Land Dist. No. 150 v. Winter, 32 Pac. 867.

§ 44. —— Apportionment of Benefits and Expenses.

[a] Assessments must be proportionate to benefit received.—Doane v. Weil, 58 Cal. 334, 624.

[b] The trustees are authorized to cause surveys, plans and estimates of cost to be made, and the commissioners may assess upon each acre of the district a tax proportionate to the whole expense.—Reclamation District No. 108 v. Hagar, 66 Cal. 59, 4 Pac. 945.

[c] Although the assessment books of commissioners appointed to make assessments for swamp land purposes might be considered prima facie evidence of the facts therein recited, under sections 1920, 1926, Code of Civil Procedure, making entries in official books and records prima facie evidence of facts recited, yet this rule does not operate to prevent the introduction of evidence in contradiction, to show that the commissioners did not in fact, as recited in the assessment books, assess their charges against a tract of land in proportion to the whole expense and the benefits to result from the work, as required by law, but arrived at their charge by arbitrarily assuming that each acre of the tract would be benefited a certain sum, and multiplying this sum by the number of acres in the tract.—Swamp Land Dist. No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462.

[d] Under Political Code, section 3456, which provides for the assessment of the cost of works constructed by a reclamation district upon the lands of the district, such assessment to be "proportionate to the whole expense, and to the benefits which will result from such works," the benefits to be taken into account in making an assessment on particular lands are those only which spring from the system of works which such assessment is levied to construct or maintain: and where some of the lands of a district are subject to overflow from a river only, while others are also subject to overflow from streams on the other side to such an extent as to render them wholly unproductive, the latter cannot legally be assessed equally with the others for the cost of a levee along the river, on the theory that such levee, in connection with contemplated works for their protection on the other side, will effect their reclamation.—Reclamation Dist. No. 108 v West, 129 Cal. 622, 62 Pac. 272.

[e] Commissioners appointed to assess charges for the reclamation of lands in a district, in arriving at each owner's proportionate share, added the estimated value of an old levee bordering the district to the estimated cost of the new work, and, using the aggregate as a basis of calculation, ascertained that each owner should pay according to the number of acres he owned, crediting him with the estimated value of the portion of the levee on his land. Held, that the assessment was improper, as each owner's land should have been assessed in proportion to the benefits resulting from the work.—Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1059, 1060; 17 Cent. Dig., cols. 1630, 1631, § 76.

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§ 45. —— Appeal or Certiorari.

[a] The superior court cannot review, by certiorari, the action of a county board of supervisors in vacating an order, previously made by the board, directing a supplemental assessment to be made in a swamp land reclamation district. In such case, the power exercised by the board is not a judicial power.—Bixler v. Sacramento County Supervisors, 59 Cal. 698.

[b] Under the swamp land reclamation acts, the board of supervisors, having authority to determine what lands will be benefited, and to assess them, the court will not consider whether certain land was in fact benefited, or to what extent.—People v. Hagar, 66 Cal. 59, 4 Pac. 951.

§ 46. Proceedings to Confirm or Establish Validity.

[a] In a proceeding by a reclamation district to establish the validity of an assessment by it, defendant may show that the assessment of his property is excessive and unfair.—Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131.

[b] Proceedings by a reclamation district under Political Code, section 3493½, to establish the validity of an assessment by it, wherein all objections are heard before the bringing of an action on the assessment, is in the nature of a proceeding in rem, and hence a plea of consular privilege is not available therein.—Reclamation Dist. No. 551 v. Runyon, 117 Cal. 164, 49 Pac. 131.

[c] On a proceeding to determine whether property in a reclamation district was properly assessed, it is incompetent to ask witnesses their opinion as to whether the assessments made were in proportion to the benefits.—Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1630-1640, §§ 76-83.

§ 47. Collection and Enforcement—Lien.

[a] An assessment on swamp land for the purpose of reclaiming the same, under the act of 1868, may be enforced by a lien on the land.—People v. Hagar, 52 Cal. 171.

§ 48. —— Payment.

[a] It is not error to make an assessment on a swamp land district payable in gold coin.—People v. Hagar, 52 Cal. 171.

[b] The provision of section 3466 of the Political Code, that if an installment of an assessment upon property in a reclamation district remains unpaid twenty days after it becomes due, the whole of the assessment "shall become due and payable at once, and may, in the discretion of the board, be collected immediately, in one and the same action," is for the benefit of the reclamation district, and to insure prompt payment of installments as called for by the board, and may be waived by it.—Reclamation Dist. No. 536 v. Hall, 131 Cal. 662, 63 Pac. 1000.

[c] A notice of protest to the payment of taxes in a drainage district stated that the drainage district was not legally formed and that the assessment was not legally made; that the commissioners did not make any assessment of the land in question, and return the same to the board of directors; that no certified assessment-rolls had ever been returned to the tax collector of any assessment in said district; and that the tax was wholly void. Held, that the notice showed that protestant was under no legal compulsion to pay the tax, and hence the payment was voluntary, giving him no right to recover the same.—Justice v. Robinson, 142 Cal. 199, 75 Pac. 776.

[d] Political Code, section 3819 (Stats. 1893, p. 32, c. 20), providing that a payment of taxes under protest shall not be regarded as voluntary, and that, if taxes so paid are recovered, and such taxes, or a portion thereof, may have been paid by the county treasurer into the state treasury, it shall be regarded as an amount due the county, applies only to county and state taxes, and not to those of drainage districts.—Justice v. Robinson, 142 Cal. 199, 75 Pac. 776.

§ 49. —— Interest Penalty for Nonpayment.

[a] In enforcing the lien of an assessment on swamp land, for reclaiming the same, under the act of 1868, the court cannot award interest on the delinquent assessment.—People v. Hagar, 52 Cal. 171.

§ 50. —— Acceptance of Part of Delinquent Assessment as Waiver of Right of Action for Entire Assessment.

[a] Under Political Code, section 3466, providing that, if any installment of an assessment due a reclamation district shall remain unpaid at the expiration of twenty days from the date of the order directing its payment, a right of action for the entire assessment shall accrue, the acceptance by the district of an installment so delinquent is a waiver of its right of action thereunder for the entire assessment, so that the right of action for the remainder of the assessment is not barred in three years from the time such installment became delinquent.—Reclamation Dist. No. 536 v. Hall, 131 Cal. 662, 63 Pac. 1000.

§ 51. —— Actions.

[a] An action to recover an assessment levied for reclamation purposes in a swamp land district, organized under the act of March 28, 1868, may be prosecuted in the name of the people of the state.—People v. Hagar, 52 Cal. 171.

[b] In an action to enforce an assessment upon lands in a reclamation district, after

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judgment and after the expiration of forty days from the publication of summons and posting within which anyone claiming an interest may appear and answer, one claiming an interest, but who has neglected to answer, may move to vacate the judgment. Ignorance of the pendency of the action will excuse his neglect to answer.—Reclamation Dist. No. 124 v. Coghill, 56 Cal. 607.

[c] An action to recover an assessment upon a swamp land district should be brought in the name of the district, not in the name of the people, and, if brought in the name of the latter, a demurrer will lie, no cause of action having been stated.—People v. Haggin, 57 Cal. 579.

[d] The complaint in an action to recover an assessment upon a swamp land district stated that the petition for the formation of the district was published for four weeks, ending with February 25th, and that on May 2d thereafter, at the next meeting of the board of supervisors, the board made an order approving the petition, which order was signed by the president and attested by the clerk. Held, that the complaint was insufficient in not showing that the publication was made for four weeks next preceding the hearing, and in not showing that the board noted its approval on the petition.—People v. Haggin, 57 Cal. 579.

[e] In an action by a drainage district to collect assessments, the fact that the plaintiff is not duly organized cannot be taken advantage of by demurrer.—Swamp etc. Land Dist. No. 110 v. Feck, 60 Cal. 403.

[f] Two assessments for drainage made on the same lands at different times may be recovered in the same action.—Swamp etc. Land Dist. No. 110 v. Feck, 60 Cal. 403.

[g] Where an action for the assessment is brought in the name of the reclamation district instead of the people, and the real party in interest is the reclamation district, the substantial rights of the parties are not affected, and such error or defect will not be ground for a reversal.—Reclamation Dist. No. 108 v. Hager, 66 Cal. 54, 4 Pac. 945, 950; Reclamation Dist. No. 108 v. Martin, 4 Pac. 950.

[h] Where a statute requires that commissioners shall "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a certain tax," etc., the complaint in an action to recover such assessment is sufficient if it alleges that "the commissioners jointly viewed the lands in the district, and jointly assessed upon each and every acre to be reclaimed or benefited thereby the amount of the assessment in proportion to the whole expense, and to the benefits resulting from the works of reclamation, and that they made a list showing the amount of the charges assessed against each tract." Reclamation Dist. No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43.

[i] A reclamation district, as the real party in interest, may sue in its own name to recover delinquent assessments for the reclamation of swamp lands.—Reclamation Dist. No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43.

[j] When, in an action to collect a swamp land assessment, defendant admits ownership of the land described, the fact that the land did not contain the acreage alleged is immaterial, where it is not shown that the assessment was levied by acreage.—Swamp Land Dist. No. 307 v. Glide, 112 Cal. 85, 44 Pac. 451.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1067-1071; 17 Cent. Dig., cols. 1650-1665, §§ 91-101, 103.

§ 52. —— Defenses.

[a] It is not a defense to an action to recover an assessment for reclamation purposes that the state, by accepting the grant under the Arkansas act, assumed the burden of reclaiming the land, and therefore could not impose it upon the grantees of the state. Reclamation District No. 108 v. Hagar, 66 Cal. 54, 4 Pac 945.

[b] The nature of the indebtedness in a reclamation district is determined by the trustees, and by the board of supervisors in making the order for the assessment, and when determined to have been proper, and such as the law contemplated, the action of the trustees and board of supervisors cannot be contradicted or impeached in a suit to recover the assessment.—Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54, 4 Pac. 945, 949, 950; Reclamation Dist. No. 108 v. Martin, 4 Pac. 950.

[c] A land owner, assessed for drainage ditches, may defend an action to enforce the assessment by showing that the assessment is unjust or excessive, provided there is no opportunity to make such defense when the assessment is made. Such an attack on the assessment is only apparently, not really, collateral.—Reclamation Dist. No. 307 v. Glide, 41 Pac. 278; Lower Kings River Reclamation Dist. No. 531 v. Phillips, 108 Cal. 306, 41 Pac. 335, affirming on rehearing (1895) 39 Pac. 630.

§ 53. —— Appeal.

[a] In an action on a swamp land assessment the objection that there is a difference in the acreage of defendant's land embraced in the exterior lines of the district and that in the assessment-roll cannot be considered upon appeal for the first time; nor is there any presumption in favor of the accuracy of the former over the latter; and where ownership of the tract of land described in the complaint is admitted, it is immaterial whether the acreage is correctly described, where it does not appear that the assessment was levied upon the lands by acreage. Swamp Land District No. 307 v. Glide, 112 Cal. 85, 44 Pac. 451.

[b] In an action by a reclamation district to determine the validity of an assessment,

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where there is a substantial conflict in the evidence as to the character of the land assessed for benefits, the finding of the court in favor of the assessment will not be disturbed on appeal.—Lower Kings River Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887.

DRAWING JURORS.

Grand jurors. See Grand Jury, § 6.
Trial jury. See Jury, § 65.

DRAWING PANEL.

Of petit jury. See Jury, § 54.

DRAYMEN.

Exemption of horses of. See Exemptions, § 6.

DRESSMAKER'S FRAME.

Right to use, at criminal trial for purpose of exhibiting clothing of victim of crime. See Criminal Law, § 150.

DRIVING FROM PASTURE.

Liability for driving cattle from pasture. See Animals, § 6.

DRIVING OUT ANIMALS.

Driving out trespassing animals. See Animals, § 33.

DRUGGISTS.

Include regulation of the manufacture, dispensing, and sale of medicines and other drugs by apothecaries or others, and liability for injuries from negligence therein.

§ 1. In General.

[a] A municipal ordinance covering all kinds of opium, and prohibiting the sale thereof without the prescription of a physician, repeals by implication a prior ordinance licensing the sale of smoking opium without requiring such prescription, and the court cannot say as a matter of law or fact that no respectable physician would give a prescription for smoking opium.—Hong Shen, Ex parte, 98 Cal. 681, 33 Pac. 799.

FOR AUTHORITIES FROM OTHER STATES:

Exemplary damages against druggists for negligent acts of their employees: 101 Am. St. Rep. 765, note. See, also, 14 Cyc. 1078-1087; 17 Cent. Dig., cols. 1667, 1678.

DRUNKENNESS.

As defense to action for assault. See Assault and Battery, § 4.
Effect on validity of contract. See Contracts, § 53.
As affecting responsibility for crime. See Criminal Law, §§ 13-15.
Admissibility of evidence of, in criminal case. See Criminal Law, § 106.
Competency of evidence of. See Criminal Law, § 140.
Admissibility of declarations made while drunk. See Criminal Law, § 161.
As affecting admissibility of confession. See Criminal Law, § 259.
As affecting capacity to murder. See Homicide, § 25.

DUAL TENANCY.

See Joint Tenancy; Tenancy in Common.

DUCES TECUM.

Subpoena duces tecum. See Witnesses, § 4.

DUEBILLS.

See Bills and Notes, §§ 8-16.

DUE CARE.

See Care.

Admissibility of opinion evidence to prove. See Evidence, § 469.
As subject of expert testimony See Evidence, §§ 480-483.

DUELLING.

Include fighting with weapons by previous agreement or on a previous quarrel, advising or aiding therein, sending, carrying, delivering, or accepting a challenge so to fight, provoking or inducing another to give or accept such challenge, and posting or advertising another for not fighting, or for not sending or accepting a challenge to fight such a duel; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

§ 1. As Defense to Murder Charge.

Homicide in duel as murder. See Homicide, § 18.

[a] A man may not wickedly or willfully by prearranged duel, or by consent to a deadly combat, invite or create the appearances of necessity, or the actual necessity which, if present to one without blame, would justify the homicide.—People v. Hecker, 109 Cal. 451, 42 Pac. 307.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1111-1118; 17 Cent. Dig., cols. 1695-1700.

DUE PROCESS.

Right of attorney to notice and hearing before disbarment. See Attorney and Client, § 36.
Constitutional guaranty of. See Constitutional Law, XI.
Right to notice and hearing in contempt proceedings. See Contempt, § 48.

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DUES.

Of members of unincorporated associations. See Associations, § 11.
Insurance dues. See Insurance, VI.

DUPLICATE ASSESSMENT-ROLLS.

Making and requisites of. See Taxation, § 90.

DUPLICITY.

In criminal pleading. See Indictment and Information, § 102.
In civil pleading. See Pleading, § 39.

DURATION.

Of adverse possession. See Adverse Possession, §§ 65-73.
Of attachment lien. See Attachment, § 99.
Of continuance. See Continuance, § 31.
Of terms of court. See Courts, § 58.
Limitation as to duration of dedication. See Dedication, § 9.
Of easement. See Easements, § 19.
Of execution lien. See Execution, § 51.
Of family allowance out of estate of decedent. See Executors and Administrators, § 247.
Of use of land as highway necessary to establishment of highway by prescription. See Highways, § 12.
Of probate homestead. See Homesteads, § 130.
Of insurance risk. See Insurance, § 43.
Of judgment lien. See Judgment, §§ 533-537.
Of estoppel of tenant. See Landlord and Tenant, § 29.
Of maritime lien. See Maritime Liens, § 5.
Of employment. See Master and Servant, § 4.
Of mortgage lien. See Mortgages, § 64.
Of term of public office. See Officers, § 17.
Of power. See Powers, § 10.
Of agency. See Principal and Agent, § 11.
Of contract of suretyship. See Principal and Surety, § 18.
Of tax lien. See Taxation, § 108.
Measure of duration. See Time.
Of appropriation of water. See Waters and Watercourses, § 116.

DURESS.

See Threats.

In procuring execution of note or draft. See Bills and Notes, § 57.
Liability of indorser of note procured by. See Bills and Notes, § 140.
In procuring execution of contract. See Contracts, § 57.
Admissibility of evidence of declarations made under duress. See Criminal Law, § 162.
Validity of deed procured by. See Deeds, § 60.
Recovery of payments made under duress. See Payment, § 40.
Right to recover taxes paid under. See Taxation, § 117.

DURESS PER MINAS.

See Threats.

DUTY.

Breach of duty as element of fraud. See Fraud § 4.
Of city officers. See Municipal Corporations, § 57.
Of postmasters. See Postmasters, § 1.

DUTY TO RETREAT.

Before killing in self-defense. See Homicide, § 54.

DWELLING.

See Domicile.

DYING CONFESSIONS.

Of conspirators as evidence. See Criminal Law, § 209.

DYING DECLARATIONS.

As evidence in prosecutions for homicide. See Homicide, VI, C.

DYNAMITE.

Keeping dynamite on insured premises as avoiding insurance. See Insurance, § 92.

EARMARKS.

On animals as evidence of ownership. See Animals, § 4.

EARNING CAPACITY.

Amount of damages awardable for impairment of. See Damages, § 91.

EARNINGS OF HUSBAND.

As community property. See Husband and Wife, § 141.

EARNINGS OF WIFE.

Right to. See Husband and Wife, § 5.
As community property. See Husband and Wife, § 141.

EASEMENTS.

Include nature and incidents of privileges of proprietors of real property in lands of others independent of ownership of the soil; creation thereof by reservation, grant, express or implied, or prescription, and use, transfer, and extinguishment thereof; rights, powers, and liabilities of proprietors of dominant and servient estates; and remedies relating thereto.

I. CREATION, EXISTENCE AND TERMINATION, §§ 1-31.

II. EXTENT OF RIGHT, USE AND OBSTRUCTION, §§ 32-43.

Right of owner of, to maintain ejectment suit. See Ejectment, § 30.

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Necessity that contract creating or transferring easement be in writing. See Frauds, Statute of, § 14.
Protection of, by injunction. See Injunction, § 33.
In party-walls. See Party-walls.
Right of tenant in common to acquire easement adverse to cotenant. See Tenancy in Common, § 14.
Transfer of easements in non-navigable waters. See Waters and Watercourses, §§ 138-145.

I. CREATION, EXISTENCE AND TERMINATION.

NATURE AND ELEMENTS OF RIGHTS, § 1.
—— EASEMENT OR FEE, § 2.
—— EASEMENT APPURTENANT OR IN GROSS, § 3.
PARTICULAR KINDS OF EASEMENTS—RIGHTS OF WAY, § 4.
—— "ANCIENT LIGHTS," § 5.
CREATION AND EXISTENCE IN GENERAL, § 6.
IMPOSSIBILITY OF EASEMENT IN ONE'S OWN PROPERTY, § 7.
CREATION BY PRESCRIPTION, § 8.
—— LIGHT AND AIR, § 9.
—— PROJECTING ROOF, § 10.
—— PIPE-LINE, § 11.
—— RIGHT OF WAY, § 12.
CREATION BY DEED, GRANT OR RESERVATION, § 13.
CREATION BY IMPLICATION, § 14.
—— LIGHT AND AIR, § 15.
—— WAYS OF NECESSITY, § 16.
RIGHT AS AGAINST PURCHASERS OF SERVIENT TENEMENT, § 17.
SEVERANCE AND TRANSFER OF RIGHT, § 18.
DURATION, § 19.
EXTINGUISHMENT IN GENERAL, § 20.
—— BY NONUSER OR ABANDONMENT, § 21.
—— BY ESTOPPEL, § 22.
—— BY DISCLAIMER OF EASEMENT, § 23.
EXTINGUISHMENT OF RIGHT OF WAY OF NECESSITY, § 24.
—— BY JUDGMENT ESTABLISHING WAY, § 25.
ACTIONS TO ESTABLISH—PLEADING, § 26.
EVIDENCE—PRESUMPTIONS, § 27.
—— BURDEN OF PROOF, § 28.
—— ADMISSIBILITY OF EVIDENCE, § 29.
—— WEIGHT AND SUFFICIENCY, § 30.
TRIAL, § 31.

§ 1. Nature and Elements of Rights.

[a] Grant of easement is always made for benefit of other premises, which are described in the grant.—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

[b] An easement to real estate granted is a privilege off and beyond the local boundaries of the lands or tenement conveyed.—Cave v. Crafts, 53 Cal. 135.

[c] Easement is permanent interest in another's land, with right at all times to enter and enjoy it.—Emerson v. Bergin, 76 Cal. 201, 18 Pac. 264.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1139-1144; 17 Cent. Dig., cols. 1707-1726, §§ 1-12.

§ 2. —— Easement or Fee.

[a] A deed to R, "his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway," conveys only an easement, and dedicates the land for use as an alleyway.—Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465.

[b] A deed conveying "a road and right of way over and across" land, "to be forever appurtenant to" adjoining land of the grantee, and providing that neither party shall, "nor shall his successors in interest, grant or give to any other person a right of way over said road," conveys only an easement for a right of way, and not a fee simple title.—Peterson v. Machado, 43 Pac. 611.

§ 3. Easements Appurtenant or in Gross.

[a] Principal distinction between easement and right of way in gross is, that in the first there is, and in the second there is not, a dominant tenement.—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

[b] Whether the grant of a right of way be in gross or appurtenant to some other estate must be determined from the grant itself, and not by matters aliunde.—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

[c] Where the owner of a tract of land sells one-half of it, reserving a right of way across it, such right is not appurtenant to the unsold tract, and does not pass with the title, but is a right of way in gross.—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

[d] Right of way in gross is personal, cannot be assigned and dies with the person.—Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

[e] Section 801, Civil Code, merely defines easements appurtenant and makes no pretense of prescribing or regulating manner of acquiring them.—McDaniel v. Cummings, 83 Cal. 517, 23 Pac. 795.

[f] If an easement becomes appurtenant to an estate, it follows every part of the estate into whosoever hands the same may come by purchase or descent.—Currier v. Howes, 103 Cal. 431, 37 Pac. 521.

[g] Where the owner of land to which a right of way is appurtenant sells or devises it in separate parcels to different persons, each of such persons acquires a right of way as appurtenant to his particular part of the land.—Currier v. Howes, 103 Cal. 431, 37 Pac. 521.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1140, 1141; 17 Cent. Dig., cols. 1719-1726, §§ 8-12.

§ 4. Particular Kinds of Easements—Rights of Way.

[a] Nature of easement of right of way and its effect on owner of fee, stated.—Kripp v. Curtis, 71 Cal. 63, 11 Pac. 879.

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[b] Right of way defined.—Kripp v. Curtis, 71 Cal. 63, 11 Pac. 879.

[c] Right of way may be public or private.—Kripp v. Curtis, 71 Cal. 64, 11 Pac. 879.

FOR AUTHORITIES FROM OTHER STATES:

Ways and the rights and remedies of the parties entitled thereto: 100 Am. Dec. 115, note. See, also, 14 Cyc. 1166-1171; 17 Cent. Dig., cols. 1781-1792, §§ 45-49.

§ 5. —— "Ancient Lights."

[a] The English doctrine of "ancient lights" does not obtain in this country; and the legislature cannot vest in an adjoining proprietor the right to prevent his neighbor from building upon his own land such structure as he may see fit, provided it is not a nuisance.—Ingwersen v. Barry, 118 Cal. 342, 50 Pac. 536.

FOR AUTHORITIES FROM OTHER STATES:

Ancient lights: 46 Am. Dec. 583, note.

Easement of light and air: 7 Am. Dec. 49, 32 Am. Dec. 412, notes.

Acquisition of easements by adverse possession: 11 Am. Dec. 663, note.

§ 6. Creation and Existence in General.

[a] Right of way does not originate in mere convenience. It must spring from an express grant, or from an implied reservation, or from a user for a length of time sufficient to create a prescription or a bar under the statute of limitations, either of which is presumptive evidence of a grant.—Carey v. Rae, 58 Cal. 159.

[b] Right of way may be created by prescription, grant, statute or necessity.—Kripp v. Curtis, 71 Cal. 64, 11 Pac. 879.

[c] Easement must be founded upon grant by deed or writing, or upon prescription.—Emerson v. Bergin, 76 Cal. 201, 18 Pac. 264.

§ 7. Impossibility of Easement in One's Own Property.

[a] There can be no dominant and servient estate between two tracts owned by same person.—Quinlan v. Noble, 75 Cal. 252, 17 Pac. 69.

§ 8. Creation by Prescription.

[a] A grant of an easement will not be presumed from adverse enjoyment, unless such enjoyment was uninterrupted, and with the knowledge and acquiescence of the owner of the servient estate.—American Co. v. Bradford, 27 Cal. 360.

[b] The fact that an easement has been granted in land does not prevent the grantor from entering; consequently the statute of limitations will run in favor of one who enters and claims possession adversely to the grantor.—City and County of San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

[c] To establish a prescriptive right to an easement, the user must have been continuous, adverse, under claim of title, and with the knowledge and acquiescence of the owner of the servient estate.—Richard v. Hupp, 37 Pac. 920.

FOR AUTHORITIES FROM OTHER STATES:

Easement of lateral support, prescriptive right to: 7 Am. Dec. 62, 29 Am. Rep. 399, notes; 53 L. R. A. 900, note. See, also, 14 Cyc. 1145-1157; 17 Cent. Dig., cols. 1726-1760, §§ 13-34.

§ 9. —— Light and Air.

[a] The doctrine that a proprietor of land may by user acquire an easement over adjoining land for the passage of light and air does not prevail in this country, and merely owning the adjoining lot cannot give the proprietors such an easement.—Western Granite etc. Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192.

§ 10. —— Projecting Roof.

[a] Projection of roof over adjoining lot may become an easement by prescription.—Gillispie v. Jones, 47 Cal. 264.

§ 11. —— Pipe-lines.

[a] The continuous, uninterrupted use of a pipe-line by plaintiff with others under a claim of right will ripen into a permanent and several right to use the same.—Collins v. Gray (Cal. App.), 86 Pac. 983.

[b] A finding that for more than five years plaintiff and others used a pipe-line as often as required by them for irrigating purposes, held a sufficient finding of continuous use.—Collins v. Gray (Cal. App.), 86 Pac. 983.

§ 12. —— Right of Way.

[a] In order to maintain a right of way acquired by parol license, as against a purchaser from the one who gave the license, the one claiming such right of way must show a right based on prescription.—Barbour v. Pierce, 42 Cal. 657.

[b] The acquisition of a right of way by prescription is not affected by the fact that occasionally, when the ground was soft, the adverse users turned out of the way at a certain point, and made several distinct tracks there.—Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479.

[c] In order to acquire a right of way by prescription, the claimant must have been in the adverse, continuous, open, and peaceable occupancy thereof for five years under a claim of right, and not merely by the consent, permission, or indulgence, express or implied, of the owner of the alleged servient estate.—Thomas v. England, 71 Cal. 456, 12 Pac. 491.

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[d] Private right of way over land is an easement, and an interest in the land which may be acquired by prescription.—Patchett v. Pacific Coast Ry. Co., 100 Cal. 505, 35 Pac. 73.

[e] Failure to pay taxes does not affect the title to a right of way in adjoining land, acquired by use for the requisite period, where the right of way was not assessed separately from such land.—Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. 804.

[f] Where a land owner claimed a right of way over lands of another, the fact that a lessee of the dominant estate was at the same time the lessee of the servient estate did not interrupt the running of the statute of limitations in favor of the dominant estate.—Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361.

[g] Where plaintiff pre-empted government land, his right of sole possession and use was sufficient estate in him, without a patent, to start the statute of limitations running as to a right of way claimed in behalf of such lands over lands of another.—Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361.

[h] Prescriptive right to a private way cannot be acquired if the user is not adverse, but with the permission of the owners of the land over which it is claimed.—Franz v. Mendona, 131 Cal. 205, 63 Pac. 361.

[i] One who was allowed by silent permission of the owner to pass over his uninclosed land for five years, and who never, at any time, communicated to the owner a claim of a right of way over such land, has no prescriptive right thereto.—Clarke v. Clarke, 133 Cal. 667, 85 Am. St. Rep. 242, 66 Pac. 10.

[j] One in adverse possession of land may acquire a right of way over the same by prescription.—Cavanaugh v. Wholey, 143 Cal. 164, 76 Pac. 979.

FOR AUTHORITIES FROM OTHER STATES:

Ways, use which may be made of property subject to rights of: 59 Am. Rep. 64, note. See, also, 14 Cyc. 1154-1157; 17 Cent. Dig., cols. 1747-1758, §§ 27-33.

§ 13. Creation by Deed, Grant or Reservation.

[a] Right of way is interest in lands, to be conveyed only by an instrument in writing, which must describe the interest conveyed. If it is appurtenant to another tract it must be so described, together with the tract of land to which it is appurtenant.—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

[b] If there be two tracts of land, in one of which the owner or vendor reserves and in the other grants a right of way, each becomes the dominant tract in respect to the right of way secured across the other. (Per Crockett, J.)—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354.

[c] Reservation of an easement is equivalent to a grant by the grantee.—Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Neil v. McNear, 57 Cal. 424.

[e] Ordinarily, easement is created by contract between owners of different parcels of land, by grant express or implied.—McDanial v. Cummings, 83 Cal. 518, 23 Pac. 795.

[f] The word "road" is word of greater significance than word "way," and is uniformly applied to open and unobstructed roads, unless qualified by some other word, such as the adjective "private," and a deed granting a right of way over a "road" to be laid out should be construed as entitling the grantee to a way without gates or bars where there is nothing in the description or circumstances to indicate a different intention.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

[g] Under a deed expressly granting a right of way, and designating the exact piece of land over which the easement is to extend, no act is required of the grantee to show an acceptance by him.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

[h] An agreement by a turnpike company to give the owner of a ranch the right to use the road free of toll for all the purposes of the ranch, in consideration of his giving the company a right of way over the ranch, does not give the ranch owner an easement in the road.—Kellett v. Ida Clayton & G. W. Wagon Road Co., 99 Cal. 210, 33 Pac. 885.

[i] The grantee in a deed of right of way across a lot acquires no rights thereunder when he knows that the grantor had previously conveyed the lot to another, though the deed of the lot has not been recorded.—Clarke v. Clarke, 133 Cal. 667, 85 Am. St. Rep. 242, 66 Pac. 10.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1159-1165; 17 Cent. Dig., cols. 1761-1769, §§ 35-38; cols. 1774, 1775, § 41.

§ 14. Creation by Implication.

[a] Where an owner of land sells a lot described as bounding on a certain street or way, the purchaser acquires the right of the use of the way in front of his lot.—Breed v. Cunningham, 2 Cal. 361.

[b] Owner of building leased portion of it. There was access to the part reserved without going through the part leased. Held, that the lessor had no implied right of way to the part reserved through any portion of the lessee's premises.—Ramirez v. McCormick, 4 Cal. 245.

[c] The conveyance of a lot bounded by a street or alley as shown upon the map or plat referred to gives the grantee a right to the use of such street or alley.—Kittle v. Pfeiffer, 22 Cal. 484.

[d] In every deed of a part of the grantor's land, without express provision on the sub-

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ject, there is an implied grant of easements of necessity for the enjoyment of the part conveyed.—Cave v. Crafts, 53 Cal. 135.

FOR AUTHORITIES FROM OTHER STATES:

Grant of by implication: 23 Am. Rep. 446, note.

When easements pass by implication in conveyances: 40 Am. Rep. 537, note.

Implied grant by severance and sale of property: 34 Am. St. Rep. 708, note. See, also, 14 Cyc. 1166-1183; 17 Cent. Dig., cols. 1775-1818, §§ 42-62.

§ 15. —— Light and Air.

[a] Under the common law, as adopted in California, a grant by deed of premises does not carry with it an implied easement to light and air over contiguous land retained by the grantor.—Kennedy v. Burnap, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476.

[b] Grantee of land in a conveyance acquires no easement by implication to light and air passing over land, immediately contiguous thereto, retained by the grantor. Kennedy v. Burnap, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476.

FOR AUTHORITIES FROM OTHER STATES:

22 L. R. A. 536, note. See, also, 17 Cent. Dig., cols. 1802-1807, §§ 56-58.

§ 16. —— Ways of Necessity.

[a] Where one grants land to another, which is wholly surrounded by other land of the grantor, or partly by land of the grantor and partly by land of a stranger, "a way of necessity" arises in favor of the grantee over the land of the grantor.—Taylor v. Warnaky, 55 Cal. 350.

[b] The impassability of a road gives no right to an easement over the land of another. It confers a personal temporary right, but not one which is appurtenant to his estate.—Carey v. Rae, 58 Cal. 159.

[c] One cotenant cannot by grant of adjoining land held in severalty establish a way of necessity over lands held in common. McDonald v. McElroy, 60 Cal. 484.

[d] There can be no right way of necessity over lands in which the grantor is only a tenant in common.—McDonald v. McElroy, 60 Cal. 484.

[e] A right of way of necessity may be acquired over the land of another, although the road to which the way leads is not a county road, but a mere byroad open to the public.—Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479.

[f] Way of necessity may be designated by grantor and in event of his failure to do so, by grantee.—Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

[g] Conveyance of land entirely inclosed by other land carries right of way of necessity over grantor's land.—Kripp v. Curtis, 71 Cal. 64, 11 Pac. 879.

[h] Way of necessity exists only in cases of strict necessity.—Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

[i] Way of necessity exists when grantee has no means of access except over grantor's land.—Barnard v. Lloyd, 85 Cal. 132, 133, 24 Pac. 658.

[j] Where land allotted by order of the court in a proceeding for partition is so situated that one of the parties would be entitled to a way of necessity, if an allotment were made by deed from all the other tenants in common, the effect of the allotment by order of the court is to create the way of necessity. Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

[k] The easement of a way of necessity, resulting by operation of law from the fact that a parcel of land is cut off from the county road by other subdivisions of the original tract, attaches to that parcel as an appurtenance, and passes with each successive transfer of title, whether such transfer is by deed or by sale under execution. Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

[l] Fact that way might be acquired by condemnation does not affect the right of way of necessity.—Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

[m] It is unnecessary that there should be a reservation in terms of a way of necessity, which would confer no further right than would be conferred by operation of law without those words.—Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

[n] It is immaterial whether the owners of the land over which the way of necessity exists have designated a road or way; and if they have not, the owners of the dominant estate may designate it.—Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

[o] One claiming lands under a mortgage foreclosure sale, to which access cannot be had except over the lands of third persons, or over the homestead of the mortgagor, which was included in the mortgage, but was not sold, because the proceeds of the other lands were sufficient to pay the debt, is entitled to a way of necessity over such homestead, though the declaration of homestead was filed prior to the decree of foreclosure, and though Civil Code, sections 1240-1242, provide that a homestead can only be encumbered or conveyed by an instrument signed by both husband and wife, and is exempt from execution or forced sale. San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

FOR AUTHORITIES FROM OTHER STATES:

Easements by necessity, when exist: 36 Am. Rep. 415, note.

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Ways of necessity: 13 Am. Dec. 746, 85 Am. Dec. 675, 35 Am. Dec. 464, notes.

See, also, 14 Cyc. 1172-1176; 17 Cent. Dig., cols. 1792-1802, §§ 50-55.

§ 17. Right as Against Purchasers of Servient Tenement.

[a] Plaintiff's grantor purchased land which could only be reached by going over land of defendant, his grantor, or over that of strangers. There had been a way from plaintiff's land over defendant's land, and the latter, deeming it inconvenient to have this way open, had, prior to plaintiff's purchase, designated another way, and pointed it out to plaintiff as the way by which the land which he was about to purchase could be reached. Held, that the use of the way pointed out, to which plaintiff acquired a right, was sufficient notice of his right to purchasers of the servient estate.—Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

[b] Grantee of lands takes subject to easements existing at time of transfer.—Smith v. Corbit, 116 Cal. 591, 48 Pac. 725.

[c] The owner of three lots built a house on one, and constructed a sewer therefrom across the other lots to a public sewer in the street. He then sold the house and one lot to plaintiff, and the other lots to another person. Such purchaser borrowed money to pay the purchase price, and the deed was made to the lenders as security, but with power in such purchaser to sell. Such purchaser then sold one of such lots to plaintiff, the purchaser and such lenders joining in the deed. In a separate instrument, such purchaser granted to plaintiff an easement on the remaining lot for the perpetual maintenance of such sewer. Thereafter such purchaser sold such remaining lot to defendant, who, in erecting a building thereon, destroyed such sewer and refused to permit it to be reconstructed. Held that, plaintiff, when he purchased the first lot, acquired an easement for the sewer across defendant's lot for the benefit of such first lot, and, on the purchase of the second lot from defendant's grantor, plaintiff acquired such easement in favor of such second lot.—Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

[d] The execution of such grant by defendant's vendor furnished conclusive evidence that such vendor had knowledge of the quasi easement at the time he conveyed the second lot to plaintiff, and it was immaterial whether such lenders had knowledge thereof, as their interest was merely as security.—Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1807-1813, §§ 59, 60.

§ 18. Severance and Transfer of Right.

[a] Where a party uses a way over land belonging to another, by agreement with the owner of the land, and the land is sold to a third party without notice of the arrangement as to the right of way, the third party is not bound by the arrangement.—Barbour v. Pierce, 42 Cal. 657.

[b] Grant of a part of lands includes all such easements in remaining part as are necessary to reasonable enjoyment of part granted in form it assumes at time of transfer.—Smith v. Corbit, 116 Cal. 591, 48 Pac. 725.

[c] An owner of three lots who constructed a private sewer from his dwelling upon one of them across the other two lots to a street sewer had a quasi easement for the sewer on the other two lots for the benefit of the residence lot; and upon severance thereof by a devise of the other two lots to his widow, she took with the burden imposed upon them by her devisor, and an easement in them for the benefit of the dwelling-house lot was thereby created.—Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

FOR AUTHORITIES FROM OTHER STATES:

Continuance of easements on the severance of a heritage: 57 Am. Dec. 759, note; 14 L. R. A. 300, note. See, also, 14 Cyc. 1185, 1190; 17 Cent. Dig., cols. 1819, § 63.

§ 19. Duration.

[a] In an action for trespass on land a written instrument was introduced, by which plaintiff sold intervener certain standing timber, to be removed within four years. Plaintiff then granted a right of way, for logging purposes, through a creek and over the premises then owned by plaintiff, for a term of ten years. Finally the instrument provided that the party of the first part (plaintiff) "does hereby grant unto the said party of the second part the right of way, for logging purposes, over and through that certain tract of swamp and overflowed land" described in plaintiff's complaint. Held, that the last grant was not limited in time. Robinson v. Crescent City Mill Co., 93 Cal. 316, 28 Pac. 950.

FOR AUTHORITIES FROM OTHER STATES:

Extinguishment of easements by statute of limitations: 14 Am. St. Rep. 278, note. See, also, 17 Cent. Dig., cols. 1830-1834, §§ 70-72.

§ 20. Extinguishment in General.

[a] Legislature had power to pass section 811, Civil Code, prescribing how servitudes are extinguished.—Lux v. Haggin, 69 Cal. 294, 10 Pac. 674.

FOR AUTHORITIES FROM OTHER STATES:

Easements when revocable: 43 Am. Rep. 195, note. See, also, 14 Cyc. 1190-1194; 17 Cent. Dig., cols. 1834-1837, §§ 72½-74; cols. 1847-1853, §§ 80-82.

§ 21. —— By Nonuser or Abandonment.

[a] Where the grantor of a right of way and his successors in interest have always

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recognized the continuance of the easement, the fact that a railroad company built a railroad track and inclosed it with fences across the strip of land over which the right of way was granted, even if such act is considered hostile to the owner of the easement, would not operate to the advantage of the owner of the servient tenement, or permit him to claim that the right to enforce the opening of the road had been lost by adverse possession.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

[b] Easement acquired by deed is not lost by mere nonuser. The nonuser must be accompanied with an express or implied intention of abandonment, and the owner of the servient estate, acting upon the intention of abandonment and the actual nonuser, must have incurred expenses upon his own estate. The three elements, nonuser, intention to abandon, and damage to the owner of the servient estate, must concur in order to extinguish the easement.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

[c] The acts of the owner of a dominant tenement in case of nonuser, or to prevent him from claiming an easement acquired by grant, must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

[d] When an easement is acquired by deed no length of time of mere nonuser will operate to impair or defeat the right; and nothing short of a use by the owner adverse to the enjoyment of the easement, for the space of time requisite to create a prescriptive right, will restore the right granted. Currier v. Howes, 103 Cal. 431, 37 Pac. 521.

[e] Section 811 of the Civil Code, which provides that when a servitude is acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude, deals only with the extinguishment of servitudes resting upon prescriptive right, and not of one conferred by express grant from the United States to a prior appropriator.—Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453.

[f] Under Civil Code, section 811, subdivision 4, a finding that plaintiff had not lost right to use of private road by disuse held sustained by evidence.—Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078.

FOR AUTHORITIES FROM OTHER STATES:

18 L. R. A. 535, note. See, also, 14 Cyc. 1185-1187; 17 Cent. Dig., cols. 1841-1847, §§ 77-79.

§ 22. —— By Estoppel.

[a] Rule that grantee will not be permitted to resume easement granted, where his acts have led other persons to treat the servient state as free from the servitude, does not apply where no one has been misled to his prejudice by the acts of such grantee.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

§ 23. —— By Disclaimer of Easement.

[a] Where the owner of two adjoining mining claims, across one of which a water ditch extended to and upon the other, mortgaged the claim over which the ditch extended, and, in an action to foreclose the mortgage, subsequent mortgagees of the other claim were made parties defendant, and, instead of asserting their lien on the right to use the ditch in the former claim, disclaimed all interest in that claim, the judgment rendered against them on such disclaimer extinguished their lien on the easement.—Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091.

§ 24. Extinguishment of Right of Way of Necessity.

[a] Way of necessity only continues while necessity exists.—Kripp v. Curtis, 71 Cal. 65, 11 Pac. 879.

[b] The necessity ceases when another way has been acquired, or when, by the acquisition of other lands the owner can reach the public road without traversing the land of others.—Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

§ 25. —— By Judgment Establishing Way.

[a] When right of way is established by the judgment for benefit of owners, every other right of way ceases to exist.—Carey v. Rae, 58 Cal. 160.

§ 26. Actions to Establish—Pleading.

[a] Mode of pleading prescriptive right to easement stated.—Anderson v. Goff, 72 Cal. 76, 1 Am. St. Rep. 34, 13 Pac. 73.

[b] In pleading easement created by agreement it is not necessary to allege that agreement was written.—Emerson v. Bergin, 76 Cal. 202, 18 Pac. 264.

[c] A complaint to establish a way of necessity over lands is not insufficient because it alleges that defendant is the owner and entitled to possession of the lands over which the way is sought to be established, where it sets forth the ownership by the parties and plaintiff's right to the way. San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

§ 27. Evidence—Presumptions.

[a] Where a way of necessity once existed, it will be presumed to exist until some fact is shown establishing nonexistence.—Blum v. Weston, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778.

[b] Though an easement, like a right of way, may be created by a grant in gross attached to the person of the grantee, this is never presumed when it can be fairly construed to be appurtenant to the adjoining land of the grantee.—Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874.

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FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1196-1199; 17 Cent. Dig., cols. 1856-1866, §§ 88-93.

§ 28. —— Burden of Proof.

[a] One who claims a prescriptive right to a private way over the lands of another person has the burden of proof to establish all of the elements essential to constitute such right. He must prove a user which was adverse to the true owner and hostile to his title, and which was actual, continued, open, and under a claim of right, asserted in such manner that the owner might know of the claim.—Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10.

§ 29. —— Admissibility of Evidence.

[a] In case of a dispute concerning the existence and location of a right of way claimed as a way of necessity, the declarations of the original owner of both the dominant and servient estates, who designated the way to be used at the time of his conveyance of the dominant estate, are admissible. Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879.

[b] On an issue as to whether plaintiff had acquired a right of way over defendant's land by five years' use thereof, the deeds under which each holds are competent evidence to show the ownership of the tracts of land involved, and the dates of transfer. Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. 804.

[c] On an issue whether the owner of a parcel of land was entitled to a way of necessity over adjoining lands, testimony whether or not there was a well-defined road along a creek adjoining the land for which the way was claimed is admissible.—San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

[d] In an action to establish a way of necessity, evidence as to the most convenient way to reach the highway from the lands for which the way is claimed is admissible. San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

§ 30. —— Weight and Sufficiency.

[a] In an action to quiet title, a finding that a certain deed under which the defendant claimed did not carry with it an easement attached to the land conveyed, the right to maintain the water ditch in controversy, and to use for irrigation the waters flowing therein, held supported by the evidence. Riverside Land etc. Co. v. Jensen, 73 Cal. 550, 15 Pac. 131.

[b] Plaintiff owned two tracts of land, separated by land of defendant. For five years before defendant purchased the land plaintiff had used a road over it, connecting his tracts, and continued to do so for eight years thereafter, without asking defendant's permission, and without opposition on his part. Held, that the evidence sustained a finding that plaintiff had used the road under a claim of right, and not by permission of defendant, so as to perfect his easement by occupancy.—Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. 804.

§ 31. Trial.

[a] A finding that plaintiff had an interest in a pipe line located over defendant's land, and as to the extent thereof held a sufficient finding of an easement and plaintiff's ownership thereof to the extent claimed.—Collins v. Gray (Cal. App.), 86 Pac. 983.

II. EXTENT OF RIGHT, USE AND OBSTRUCTION.

RELATION BETWEEN OWNERS OF DOMINANT AND SERVIENT TENEMENTS, § 32.
EXTENT OF RIGHTS ACQUIRED, § 33.
—— RIGHT OF OWNER OF DOMINANT ESTATE TO RENTS AND PROFITS OF SERVIENT ESTATE, § 34.
ALTERATION, § 35.
—— ALTERATIONS RESULTING IN BENEFIT TO SERVIENT ESTATE, § 36.
OBSTRUCTION, § 37.
MAINTENANCE AND REPAIRS, § 38.
ACTIONS FOR INJURIES—INJUNCTION, § 39.
PLEADING, § 40.
EVIDENCE, § 41.
—— DAMAGES, § 42.
APPEAL AND ERROR, § 43.

§ 32. Relation Between Owners of Dominant and Servient Tenements.

[a] Easement cannot be held as tenancy. Swift v. Goodrich, 70 Cal. 106, 11 Pac. 561.

FOR AUTHORITIES FROM OTHER STATES:

Rights and obligations of parties to private ways: 95 Am. St. Rep. 318-330, note. See, also, 14 Cyc. 1200-1225; 17 Cent. Dig., cols. 1813-1818, §§ 61, 62; cols. 1898-1903, §§ 114-116.

§ 33. Extent of Rights Acquired.

[a] Grantee of easement has no right of entry upon, nor has he any right to possess the land as such. The fee of the soil and right of entry remain in the grantor subject to the easement.—San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

[b] Where an owner of land lays off an alley extending into such land, marking its boundaries by fences, and conveys lots bordering thereon with an express grant of right of way through such alley, the rights of purchasers are presumed to extend to the limits of the alley so designated.—Currier v. Howes, 103 Cal. 431, 37 Pac. 521.

[c] Where the owner of land establishes an alley extending across the rear of a lot subsequently conveyed, with a right of way "to and from said lot," through such alley, the right of way extends along the whole rear of such lot.—Currier v. Howes, 103 Cal. 431, 37 Pac. 521.

[d] Every easement includes "secondary easements," consisting of the right to do such things as are necessary for the full en-

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joyment of the easement; but this right is limited, and must be exercised in such reasonable manner as not to increase injuriously the burden upon the servient tenement. North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69.

[e] Rights acquired by prescription are stricti juris, and cannot extend beyond the user; and the extent of an easement so acquired is fixed and determined by the user under which it was gained.—North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69.

[f] The owners of a tract of land, which they had platted, and on which a lake is situate, conveyed a part thereof, with a reservation of the right to reclaim by drainage all or any portion of the land conveyed, or any other lands liable to overflow from the lake, and for that purpose to enter on the land conveyed, and construct a dam or ditch, and do anything necessary to reclaim any or all of such lands from overflow; the reclamation to inure to the benefit of the grantee. Held to reserve to the grantor and his grantees of adjoining tracts an easement over the land of the grantees for the purpose of constructing a ditch or other means of reclaiming the land, as well as the right to draw water from the grantee's land by a ditch constructed on their land, and to the grantee an easement on the lands of the grantor and his grantees for the continuance and maintenance of a drainage ditch existing at the time of the grant.—Hohenshell v. South Riverside Land etc. Co., 128 Cal. 627, 61 Pac. 371.

[g] The owner of a servient tenement held not limited in the number or character of the easements to which he may subject his land. Galletly v. Bockius (Cal. App.), 82 Pac. 1109.

[h] An owner of land subject to an easement of a right of way held entitled to make any use or disposition of the tract and right of way not inconsistent with the easement. Galletly v. Bockius (Cal. App.), 82 Pac. 1109.

[i] Under Civil Code, section 806, city by laying a certain water pipe over the lands of another in pursuance of a grant of an easement held to have limited the extent of its easement, and could not thereafter lay an additional pipe.—Winslow v. City of Vallejo (Cal. Sup), 84 Pac. 191.

[j] For the purpose of ascertaining the extent of an easement, the entire instrument creating the same is to be considered in the light of surrounding circumstances.—Winslow v. City of Vallejo (Cal. Sup.), 84 Pac. 191.

FOR AUTHORITIES FROM OTHER STATES:

Rights and obligations of parties to private ways: 95 Am. St. Rep. 318, note.

Private ways, uses which may be made of: 88 Am. Dec. 279, note. See, also, 14 Cyc. 1200-1203; 17 Cent. Dig., cols. 1868-1879, §§ 95-101.

§ 34. —— Right of Owner of Dominant Estate to Rents and Profits of Servient Estate.

[a] The owner of an easement is not entitled by reason of such ownership to a participation in the rents and profits arising from the land on which the easement is imposed. San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542.

§ 35. Alteration.

[a] The owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons; but, within the limits named, he may make repairs, improvements, or changes that do not affect its substance.—Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922.

[b] The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former; nor can the owner thereof commit a trespass upon the servient tenement beyond the limits fixed by the grantor.—North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69.

§ 36. —— Alterations Resulting in Benefit to Servient Estate.

[a] Where alteration in mode and manner of using easement is so substantial as to result in the creation and substitution of a different servitude from that which previously existed, it is immaterial that the alteration will benefit the servient estate, and convenience the dominant estate.—Allen v. San Jose Land etc. Co., 92 Cal. 138, 28 Pac. 215.

§ 37. Obstruction.

[a] An obstruction of a private way is a nuisance, being an obstruction to the free use of the property (Code Civ. Proc., sec. 731), and it is no defense to an action to enjoin it and for damages, brought under the statute, that a defendant has no interest in the land over which the way is claimed.—Hardin v. Sin Claire, 115 Cal. 460, 47 Pac. 363.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1211-1214; 17 Cent. Dig., cols. 1907-1914, §§ 121-128.

§ 38. Maintenance and Repairs.

[a] The owner of a dominant estate may do that which is necessary to enjoy the easement, and, as an incident thereto, keep the same in repair and fit for use.—(Cal. 186) Pico v. Colimas, 32 Cal. 578.

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[b] Owner of easement is bound to keep it n repair, and may enter servient tenement o do so.—Durfee v. Garvey, 78 Cal. 551, 21 ?ac. 302.

?OR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1209, 1210; 17 Cent. Dig., cols. 1903-1905, §§ 117-119.

39. —— Actions for Injuries—Injunction.

[a] The owner of a lot having a way ppurtenant may, by a mandatory injunction, ompel the removal of a stairway which obtructs such way.—Stallard v. Cushing, 76 ?al. 472, 18 Pac. 427.

[b] The owner of the servient estate is not ntitled to a mandatory injunction against he owner of the ditch to compel the restorng of local and unimportant irregularities n the bottom of the ditch which had been emoved by the owner of it.—Burris v. Peole's Ditch Co., 104 Cal. 248, 37 Pac. 922.

[c] An easement must be used in such a anner as to impose so slight a burden and amage as possible, under the application of he maxim, "Sic utere tuo ut alienum non aedas"; but where a tailrace of a hydraulic ine is an easement upon patented mining round, the fact that the running of the tailngs through the tailrace in the ordinary ourse of mining caused a small portion of he ground alongside of the ditch to cave own and wash away, and caused the tailrace o cut farther into the bedrock, but material r appreciable injury to plaintiff, the rule de inimis applies, and the owner of the patnted ground is not entitled to an injunction. acob v. Day, 111 Cal. 571, 44 Pac. 243.

OR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 1921-1926, §§ 134-137.

40. Pleading.

a] The defense of five years, adverse enyment of an easement must be pleaded in der that it may be available.—American Co. Bradford, 27 Cal. 360.

OR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1220-1222; 17 Cent. Dig., cols. 1928-1932, §§ 141, 142; cols. 1934, 1935, § 144.

41. Evidence.

a] In an action to enjoin defendant from terfering with plaintiff's use of a private ad, plaintiff's evidence held consistent with eory that he based a claim of right to the e of the road on a gift from the owner of e land, and not to show merely permissive e.—Franz v. Mendonca, 146 Cal. 640, 80 c. 1078.

R AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1222, 1223; 17 Cent. Dig., cols. 1932-1934, § 143.

§ 42. —— Damages.

[a] Tre destruction of the sewer and the refusal of the defendant to permit its reconstruction and maintenance upon his lot, which it appears could be done without injury to the lot or building erected thereupon, conclusively shows that plaintiff sustained damages, which it was the province of the court, sitting as a jury, to assess; and where the case is such as to warrant exemplary damages, the assessment of damages will not be disturbed upon appeal.—Jones v. Sanders, 138, 405, 71 Pac. 506.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1224; 17 Cent. Dig., cols. 1935-1937, §§ 145, 146.

§ 43. Appeal and Error.

[a] In an action by the owner of land claiming a right of way over adjacent land, to restrain the owner of the servient estate from obstructing the right of way, where the complaint alleged the plaintiff to be the owner of an open and unobstructed way for the use of all kinds of vehicles at all times, "without passing through any gate," and "without any obstruction thereon," and the allegation was denied by the answer, and the issue treated by all parties as one of fact, a decree granting the prayer of the complaint for an open, public thoroughfare will be affirmed upon appeal, where there is no specification of insufficiency of evidence to justify the decision, even if the deed introduced in evidence should be construed as granting only a private way.—Smith v. Worn, 93 Cal. 206, 28 Pac. 944.

FOR AUTHORITIES FROM OTHER STATES:

See 14 Cyc. 1225; 17 Cent. Dig., cols. 1939, 1940, § 149.

EAVESDRIP.

Rights and liabilities of adjoining land owners as to. See Waters and Watercourses, § 108.

EAVESDROPPING.

Competency of evidence procured by. See Criminal Law, § 138.

ECCENTRICITY.

Effect on testamentary capacity. See Wills, § 14.

EDUCATION.

Allowance out of estate of decedent for education of children. See Executors and Administrators, § 248.

Of wards. See Guardian and Ward, § 35.

Duty of parent as to education of child. See Parent and Child, § 3.

EDUCATIONAL INSTITUTIONS.

See Colleges and Universities; Schools and School Districts.

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EEL RIVER.

Construction of statute relating to fishing in. See Fish, § 6.

EFFECT OF EVIDENCE.

See Evidence, XIV.

Requisites of instructions relating to. See Criminal Law, § 411.

EFFICIENT CAUSE.

Of negligent injury. See Negligence, § 21.

EIGHT HOUR LAW.

Construction of. See California, § 44.
Validity of. See Constitutional Law, § 118.
As impairing obligation of contract. See Constitutional Law, § 179.

EJECTION OF PASSENGER.

From train or street-car. See Carriers, §§ 144-164.

EJECTMENT.

Include actions for recovery of specific real property, founded on right of possession and right to damages for being deprived thereof, whether proceeding according to common law or statutory forms; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; incidental recovery, in the same action or in a separate proceeding, for use and occupation, profits, damages, improvements, etc.; verdict and judgment and enforcement thereof by writ of possession or otherwise; review of proceedings; and costs in such actions.

I. RIGHT OF ACTION AND DEFENSES, §§ 1-75.
A. In General, §§ 1-26.
B. Title to Support Action, §§ 27-54.
C. Defense, §§ 55-75.
II. JURISDICTION, PARTIES, PROCESS AND INCIDENTAL PROCEEDINGS, §§ 76-88.
III. PLEADINGS AND EVIDENCE, §§ 89-157.
A. Pleading in General, §§ 89-127.
1. Complaint or Declaration, §§ 89-100.
2. Answer, Cross-Complaint, Reply and Denials and Admissions, §§ 101-110½.
3. Demurrer, Amended and Supplemental Pleadings and Motions, §§ 111-114.
4. Issues, Proof and Variance, §§ 115-127.
B. Evidence, §§ 128-157.
1. Judicial Notice, Presumptions and Burden of Proof, §§ 128-131.
2. Admissibility of Evidence, §§ 132-146.
3. Weight and Sufficiency of Evidence, §§ 147-157.
IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT AND REVIEW, §§ 158-196.
V. DAMAGES MESNE PROFITS, IMPROVEMENTS AND TAXES, §§ 197-214.
A. Damages and Mesne Profits, §§ 197-207.
B. Improvements and Taxes, §§ 208-214.

Right to bring ejectment pending suit for rent. See Abatement and Revival, § 24.
Right to bring ejectment pending suit to quiet title. See Abatement and Revival, § 25.
Abatement of ejectment suit by death of party. See Abatement and Revival, § 73.
By executor or administrator. See Executors and Administrators, § 207.
Forcible entry suits. See Forcible Entry and Detainer.
Suits to quiet title. See Quieting Title.
Actions for trespass. See Trespass.
Trespass to try title. See Trespass to Try Title.

I. RIGHT OF ACTION AND DEFENSES.

A. In General, §§ 1-26.
B. Title to Support Action, §§ 27-54.
C. Defense, §§ 55-75.

A. IN GENERAL.

NATURE AND REMEDY, § 1.
OTHER ADEQUATE REMEDY AS BAR, § 2.
PROPERTY WHICH MAY BE SUBJECT TO ACTION, § 3.
—— WATERCOURSES, § 4.
—— LAND UNDER WATER, § 5.
RIGHT OF PLAINTIFF TO POSSESSION, § 6.
—— NECESSITY FOR RIGHT, § 7.
OUSTER OF PLAINTIFF—NECESSITY, § 8.
—— SUFFICIENCY OF OUSTER, § 9.
—— TIME OF OUSTER, § 10.
POSSESSION BY DEFENDANT, § 11.
—— SUFFICIENCY OF POSSESSION, § 12.
—— NATURE OF ENTRY AND POSSESSION, § 13.
—— SCOPE OF POSSESSION, § 14.
—— POSSESSION BY AGENT, § 15.
CLAIMS OF TITLE OR ACTS OF OWNERSHIP OF UNOCCUPIED LANDS, § 16.
DEMAND OR NOTICE TO QUIT—NECESSITY, § 17.
—— WRONGFUL POSSESSION, § 18.
—— POSSESSION BY PERMISSION, § 19.
—— WAIVER OF RIGHT TO DEMAND OR NOTICE, § 19½.
JOINDER OF CAUSES, § 20.
PERSONS ENTITLED TO SUE, § 21.
—— EXECUTORS AND ADMINISTRATORS, § 22.
—— MUNICIPAL CORPORATIONS, § 23.
—— MORTGAGORS, § 24.
—— REMAINDERMEN, § 25.
PERSONS AGAINST WHOM ACTION MAY BE BROUGHT, § 26.

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§ 1. Nature of Remedy.

[a] Action of ejectment is merely possessory action, and is confined to cases where the claimant has a possessory title; that is, to say, a right of entry upon the lands. To support it four things are necessary, viz., title, lease, entry and ouster.—Payne v. Treadwell, 5 Cal. 310.

[b] In ejectment, the subject matter of the litigation is not the land itself, but the right of possession.—Porter v. Garrissino, 51 Cal. 559.

[c] A mortgagee who purchases the mortgaged premises at foreclosure sale is not precluded from bringing ejectment by the court's refusal to grant him a writ of assistance.—Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 12-15; 20 Cyc. 666; 17 Cent. Dig., cols. 1948-1953, §§ 1-6.

§ 2. Other Adequate Remedy at Bar.

[a] Right to writ of assistance does not bar right to maintain ejectment.—Trope v. Kerns, 83 Cal. 554, 23 Pac. 691.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 15; 17 Cent. Dig., cols. 1951, 1952, § 5.

§ 3. Property Which May be Subject to Action.

[a] A road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments.—Wood v. Truckee Turnpike Co., 24 Cal. 474.

[b] Ejectment will not lie for an incorporeal hereditament.—Mahon v. San Rafael Turnpike Co., 49 Cal. 269; Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032.

[c] Ejectment was brought by city for land claimed as street.—Eureka v. Armstrong, 83 Cal. 624, 22 Pac. 928, affirmed in 23 Pac. 1085.

[d] Ejectment may be maintained by a municipal corporation for possession of a street wrongfully possessed by an individual, whether the fee is owned by the corporation or the adjoining proprietor.—City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125.

[e] Where a street railway's use of a street under its franchise is interfered with by another railway company, ejectment is not the proper remedy.—Fresno St. R. Co. v. Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 15, 16; 17 Cent. Dig., cols. 1954-1956, §§ 7-11.

§ 4. —— Watercourses.

[a] Ejectment will not lie to recover possession of a watercourse.—Swift v. Goodrich, 70 Cal. 106, 107, 11 Pac. 561.

§ 5. —— Land Under Water.

[a] The state may maintain ejectment for a wharf constructed without authority beyond low-water mark.—Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634.

§ 6. Right of Plaintiff to Possession.

[a] Ejectment is a possessory action, and does not necessarily involve title. The party having the right to present possession is always entitled to recover.—(Cal. 1859) Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 50; 17 Cent. Dig., cols. 2051-2054, §§ 63, 64.

§ 7. —— Necessity for Right.

[a] Plaintiff must have a right to the possession of the land at the time of the commencement of the action.—Owen v. Fowler, 24 Cal. 192; Owen v. Morton, 24 Cal. 373; Hawxhurst v. Lander, 28 Cal. 331.

[b] To entitle plaintiff to recover, he must not only have a right of entry at the time of the trial, but must have had it when the suit was brought. Such right obtained pendente lite is not sufficient.—Kile v. Tubbs, 32 Cal. 332.

[c] In ejectment plaintiff must have a right of entry when the action is commenced, as well as when it is tried.—(Cal. 1873) Meeks v. Kirby, 47 Cal. 168.

[d] Plaintiff must have right to possession at commencement of suit.—Sauer v. Meyer, 87 Cal. 36, 25 Pac. 153.

§ 8. Ouster of Plaintiff—Necessity.

[a] To enable the plaintiff in ejectment to recover on prior possession he must allege and prove an actual ouster.—Payne v. Treadwell, 5 Cal. 310; Watson v. Zimmerman, 6 Cal. 46.

FOR AUTHORITIES FROM OTHER STATES:

13 L. R. A. 664, note. See, also, 15 Cyc. 51-55; 17 Cent. Dig., cols. 2054-2066, §§ 65-73.

§ 9. —— Sufficiency of Ouster.

[a] Where plaintiff claimed possessory rights to a tract of land, after an entry with full notice of plaintiff's rights during a temporary removal of an inclosure of the land, made for the purpose of replacing it with a better one, the action cannot be defended on the ground that the land was uninclosed. Sweetland v. Hill, 9 Cal. 556.

[b] If the owner of land used and occupied by another as a toll road is excluded from

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the same unless he pays toll, and then is allowed to use it only for the purpose of passing over it, the exclusion is a disseisin. Mahon v. San Rafael Toll Road Co., 49 Cal. 270.

[c] Where plaintiff is in possession, and defendant erects a house on the land, and incloses it all but a few acres, on which plaintiff's house stands, and assumes and exercises control over it, there is a sufficient ouster to enable plaintiff to bring an action of ejectment on the ground of prior possession.—Gruell v. Spooner, 71 Cal. 493, 12 Pac. 511.

[d] Where tenant in common sued by cotenant to be admitted into possession denies latter's title and right of entry, this is equivalent to ouster as of date of commencement of suit.—Plass v. Plass, 121 Cal. 133, 53 Pac. 448.

§ 10. —— Time of Ouster.

[a] An allegation of the exact time of the alleged ouster is not material, especially where there is no claim for or recovery of damages.—Collier v. Corbett, 15 Cal. 183.

§ 11. Possession by Defendant.

[a] To sustain ejectment, it must appear that defendant was in possession of the premises when the action was commenced.—Garner v. Marshall, 9 Cal. 268; Owen v. Fowler, 24 Cal. 192; Owen v. Morton, 24 Cal. 373; Buhne v. Corbett, 43 Cal. 264; Shaeffer v. Matzen, 59 Cal. 652; Partridge v. Shepard, 12 Pac. 351.

[b] It is indispensable to recovery in ejectment that defendant was, at commencement of action, in possession of some part of land sued for.—Dillon v. Center, 68 Cal. 564, 10 Pac. 176.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 51-55; 17 Cent. Dig., cols. 2054-2066, §§ 65-73.

§ 12. —— Sufficiency of Possession.

[a] It is not necessary to show actual, as distinguished from constructive, possession in defendant.—Crane v. Ghirardelli, 45 Cal. 235.

§ 13. —— Nature of Entry and Possession.

[a] An entry by a stranger on the estate of a deceased tenant in common with the consent of the administrator is not tortious, and a cotenant is not entitled to a judgment in ejectment for possession of all the land, but only for his undivided interest.—Carpentier v. Small, 35 Cal. 346.

§ 14. —— Scope of Possession.

[a] The mere fact of entry on a portion of public land, and building a house and corral, and even cutting hay on a part, no claim being made under the possessory act or under the United States pre-emption laws, will not extend the possession beyond the premises actually occupied.—Garrison v. Sampson, 15 Cal. 93.

[b] Under the rule that, to warrant a recovery in ejectment, plaintiff must prove that at the commencement of the suit defendant was in possession of some portion of the land to which plaintiff establishes a title, if plaintiff relies on a confirmed Mexican grant as his source of title, he must prove defendant's possession of some part of the premises included within the decree of confirmation. To show that the grant has been confirmed as to some other portion of the lands embraced in it is not enough; for confirming a portion of a grant to a purchaser of such portion from the grantee does not have the effect of confirming to the grantee and purchasers from him the entire grant.—Brown v. Brackett, 45 Cal. 167.

[c] If two owners in severalty of adjoining tracts by mutual consent inclose them by a fence around the exterior boundaries of both, the inclosure constitutes possession by each of the tract claimed by him, as against a mere intruder who brings ejectment; and it is immaterial whether the land is public or private.—Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

§ 15. —— Possession by Agent.

[a] In an action of ejectment, defendants in their sworn answer denied being or having been in possession of the lands claimed, though in another defense, separately pleaded, they set up that they were in charge, as employees of the United States, of a lighthouse on the premises. On the trial, plaintiff, relying on the answer to show possession, offered no evidence to show the possession of defendants. Held, that a nonsuit for failure to show possession in defendants was correct.—Buhne v. Corbett, 43 Cal. 264.

§ 16. Claims of Title or Acts of Ownership of Unoccupied Lands.

[a] Ejectment will only lie against a party out of possession, claiming title, when the premises are unoccupied, and with his claim he exercises acts of ownership, such as inclosure, cultivation, and the like.—Garner v. Marshall, 9 Cal. 268.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 56; 17 Cent. Dig., cols. 2066-2068, §§ 74, 75.

§ 17. Demand or Notice to Quit—Necessity.

[a] Demand of rent upon or after last day which lessee has to pay is essential to complete forfeiture and enable landlord to maintain ejectment.—Sauer v. Myer, 87 Cal. 37, 25 Pac. 153.

[b] One acquiring title to real property, who is not in possession, is entitled to be let into possession on demand, and, until such

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demand, he cannot maintain an action to obtain possession against a person who is lawfully in possession.—McNally v. Connolly, 9 Pac. 169.

[c] A demand is not necessary before bringing suit to recover land, where defendants deny plaintiff's title and set up title in themselves.—Webb v. Winter, 65 Pac. 1028.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 56; 17 Cent. Dig., cols. 2068-2075, §§ 76-80.

§ 18. —— Wrongful Possession.

[a] Where vendee is out of possession for five years after default in his payments, then re-enters, no demand is necessary.—Connolly v. Hingley, 82 Cal. 643, 23 Pac. 273.

§ 19. —— Possession by Permission.

[a] No notice to quit, or any demand of possession, is necessary from an heir before bringing ejectment to recover possession of lands against person holding them without title, although he had permissive occupancy of premises during lifetime of decedent from whom they were inherited.—Joy v. McKay, 70 Cal. 445, 11 Pac. 763.

§ 19½. —— Waiver of Right to Demand or Notice.

[a] Where defendant denies plaintiff's title or right of possession, notice to quit is not necessary.—McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14.

§ 20. Joinder of Causes.

[a] Distinct causes of action for separate pieces of land affecting all the parties, not requiring separate places of trial, may be joined.—Boles v. Cohen, 15 Cal. 151.

[b] Under the code, plaintiff in ejectment cannot join a claim for damages done by defendant to other property than that sued for. Furlong v. Cooney, 72 Cal. 322, 14 Pac. 12.

[c] Two actions of ejectment between same parties, for different pieces of property, may be consolidated.—Smith v. Smith, 80 Cal. 324, 21 Pac. 4, 22 Pac. 186.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 59; 17 Cent. Dig., cols. 2151-2153, §§ 123, 124.

§ 21. Persons Entitled to Sue.

[a] A petitioner in insolvency may maintain an action to recover possession of a homestead.—Moore v. Morrow, 28 Cal. 551.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 60; 17 Cent. Dig., cols. 2154, § 125.

§ 22. —— Executors and Administrators.

[a] Patent issued to administrator vests legal title in him and enables him to recover premises in his own name in ejectment suit.—Burling v. Thompkins, 77 Cal. 262, 19 Pac. 429.

§ 23. —— Municipal Corporations.

[a] City may maintain ejectment for dedicated property.—Napa v. Howland, 87 Cal. 85-88, 25 Pac. 247.

[b] A municipal corporation can maintain ejectment for the recovery of possession of a street which has been dedicated to public use by the owner of the fee.—City and County of San Francisco v. Grote, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127.

§ 24. —— Mortgagors.

[a] Mortgagor cannot maintain ejectment against mortgagee until debt is paid.—Peshine v. Ord, 119 Cal. 314, 51 Pac. 536, 63 Pac. 131.

§ 25. —— Remaindermen.

[a] Code of Civil Procedure, section 1452, authorizing heirs to sue for the recovery of real estate, held inapplicable to a remainderman who has no present right of possession.—Pryor v. Winter, 147 Cal. 554, 82 Pac. 202.

§ 26. Persons Against Whom Actions may be Brought.

[a] Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises.—Garner v. Marshall, 9 Cal. 268.

[b] Ejectment lies only against a party in possession.—Klink v. Cohen, 13 Cal. 623.

[c] The action of ejectment must be brought against the actual occupant of the premises, if there be one; but, if he be a tenant, his landlord may appear and defend in his name, or be substituted in his place.—Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

[d] An action of ejectment to recover land in the possession of an employee should be brought against the employer.—Hawkins v. Reichert, 28 Cal. 534.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 60; 17 Cent. Dig., cols. 2154-2156, § 126.

B. TITLE TO SUPPORT ACTION.

LEGAL TITLE IN GENERAL, § 27.
NECESSITY FOR TITLE OR INTEREST IN PLAINTIFF, § 28.
SUFFICIENCY OF TITLE IN GENERAL, § 29.
EASEMENT OR LICENSE, § 30.
—— FEE SUBJECT TO EASEMENT, § 31.
TITLE ACQUIRED AFTER ACTION BROUGHT, § 32.
ADVERSE OR PRIOR POSSESSION, § 33.
—— NECESSITY FOR PRIOR POSSESSION, § 34.
—— SUFFICIENCY OF POSSESSION IN GENERAL, § 35.

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—— SUFFICIENCY AS AGAINST INTRUDER, § 36.
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§ 27. Legal Title in General.

[a] Where party sues for lot in former pueblo of San Francisco, and deraigns title from city, he is prima facie entitled to recover.—Seale v. Mitchell, 5 Cal. 401.

[b] Pending proceedings to obtain a patent confirming a Mexican grant, plaintiff conveyed the premises, taking a mortgage, and subsequently commenced an action to foreclose, and before decree assigned the mortgage. Plaintiff obtained the patent, and at a sale of the premises under decree of foreclosure bid them off, and received a sheriff's deed therefor. Held, in ejectment, that the title was revested in plaintiff by said deed. Pioche v. Paul, 22 Cal. 105.

[c] Where the legal title held by plaintiff in ejectment is only opposed by a mere naked possession by defendant, plaintiff is entitled to the possession.—Shaeffer v. Matzen, 3 Pac. 95.

§ 28. Necessity for Title or Interest in Plaintiff.

[a] By the civil law a party cannot maintain a possessory action when he has no title, unless he has been evicted by force, fraud, violence, or artifice; but, if he has been thus evicted, he will be entitled to be restored to possession, without inquiring whether he has title. (Per Bennett, J.)—Sunol v. Hepburn, 1 Cal. 254.

[b] To recover in ejectment, plaintiff must show legal title at the time of beginning the suit.—Payne v. Treadwell, 5 Cal. 310.

[c] Though plaintiff cannot recover except on proof of title in himself, yet where the parties claim under conflicting title, and the only question is which of the two is good, the one having the best title must recover.—Busenius v. Coffee, 14 Cal. 91.

[d] One contracting for the purchase of land received the possession, with a bond for a deed on payment of the purchase money, containing a stipulation that the purchaser was in possession and entitled to the rents and profits. Held, in ejectment by a subsequent purchaser from the vendor with notice against the vendee remaining in possession, that no recovery could be had, though the purchase money was unpaid, since plaintiff, to recover, must show both a legal and equitable title or right of possession.—Willis v. Wozencraft, 22 Cal. 607.

[e] A city cannot maintain ejectment for recovery of possession of a street dedicated to the public by user, without showing ownership in the fee.—City and County of San Francisco v. Grote, 47 Pac. 938, 36 L. R. A. 502.

§ 29. Sufficiency of Title in General.

[a] Plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness or want of title in defendant.—Woodworth v. Fulton, 1 Cal. 295; Moore v. Tice, 22 Cal. 513; Cox v. Hayes, 7 Pac. 761.

[b] Plaintiff in ejectment, who owns an undivided interest in the demanded premises, to recover, if he holds an interest in common with others in the premises.—Mahoney v. Middleton, 41 Cal. 41.

[c] In an action of ejectment legal title will always prevail against equitable one if no equitable defense is pleaded.—Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Hartley v. Brown, 46 Cal. 201.

[d] Plaintiff must recover on strength of his own title and not on weakness of that of adversary.—Smith v. Smith, 80 Cal. 325, 21 Pac. 4, 22 Pac. 186.

[e] Plaintiff in ejectment must recover upon strength of his own title, and the presence or absence of title in defendants is not material.—Gage v. Downey, 94 Cal. 241, 29 Pac. 635.

[f] In an action of ejectment the plaintiff must rely upon the strength of his own title, no matter how weak the title of his opponent may be.—Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

[g] The plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's title; and where the plaintiff shows no title, the defendant in possession is entitled to judgment, regardless of whether he has acquired a prescriptive title by adverse possession or not.—Sousa v. Pereira, 132 Cal. 77, 64 Pac. 9.

[h] In ejectment, defendants' motion for a nonsuit is properly denied where it appears

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that plaintiffs bought the property from the owner, taking a bond for deed, under which they held possession, claiming title for more than two years before being ousted by defendants.—Stephens v. Hambleton (Cal.), 47 Pac. 51.

§ 30. Easement or License.

[a] Ejectment does not lie for a right of way, or other easement.—(Cal. 1864) Wood v. Truckee Turnpike Co., 24 Cal. 474.

[b] A grant by the legislature, authorizing the grantee to build and erect a wharf, and conveying the right "to the use and occupancy of the adjoining land," with a promise that "it shall be used for none other than wharf purposes" for a specified time, confers such an interest in the land as entitles the grantee to recover the possession of a party who intrudes on it and deprives him of the possession.—Frisbie v. McClernin, 38 Cal. 568.

[c] There can be no possession of an easement such as can be made basis for ejectment.—Swift v. Goodrich, 70 Cal. 106, 11 Pac. 561.

[d] Ejectment will not lie for mere easement except when right of entry exists and interest is tangible, so that possession can be delivered.—Southern Pacific Co. v. Burr, 86 Cal. 286, 24 Pac. 1033.

§ 31. —— Fee Subject to Easement.

[a] Ejectment lies to recover the possession of land occupied as a toll road, when the action is brought to recover the land itself, and not the right of way over it.—Mahon v. San Rafael Turnpike Road Co., 49 Cal. 269.

[b] The owner of the fee of land subject to an easement of a public highway may maintain ejectment against an intruder who takes possession of it, and uses it for other than road purposes.—(Cal. 1877) Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634.

[c] Owner of fee to soil of street or highway may maintain ejectment against mere intruder.—Weyl v. Sonoma V. R. R., 69 Cal. 206, 10 Pac. 510; Porter v. Pacific Coast Ry. Co., 18 Pac. 428.

[d] Ejectment cannot be maintained by an abutting owner against a railroad company operating its road on his half of a public street under permission from the city, he having no present right of possession, of which he has been deprived.—Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654.

§ 32. Title Acquired After Action Brought.

[a] A patent for land given to plaintiff after he has commenced suit in ejectment is not admissible in evidence to show his right to recover.—Hestres v. Brennan, 37 Cal. 385.

[b] In ejectment the admission in evidence of a patent of the United States issued to plaintiff after the commencement of the action, is erroneous.—Sacramento Sav. Bank v. Hynes, 50 Cal. 195.

§ 33. Adverse or Prior Possession.

[a] The prior possession of plaintiff, or parties through whom he claims, is sufficient evidence of title to support ejectment.—Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Hicks v. Davis, 4 Cal. 67; Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599; Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Nagle v. Macy, 9 Cal. 426; Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408.

[b] Possession, coupled with color of title, must prevail, except where a better title is shown in defendants.—Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597.

[c] Possession is evidence of seisin in fee, and no further or higher evidence is required, to enable a plaintiff in ejectment to recover, until defendant has shown an anterior possession, or has traced title from a paramount source.—Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

[d] Plaintiff's grantor, holding under a state patent, was in the actual possession of land, and was ousted by defendant. In an action to recover the possession, the defense was, that the land at the time of the state location was within the limits of a pending Mexican claim, and the patent therefore void. The court found that defendant was a qualified pre-emptor, and had entitled himself to the rights of a pre-emption claimant, provided the land was subject to pre-emption at the time of his entry. Held, that plaintiffs, by virtue of their prior possession, were entitled to recover; that defendant was a mere intruder; and that it was unnecessary to inquire into the validity of plaintiff's title.—Fletcher v. Mower, 56 Cal. 421.

[e] Facts held to establish plaintiff's prior possession.—Foot v. Murphy, 72 Cal. 105, 13 Pac. 163.

[f] Where an action of ejectment, commenced within the statutory period of limitation, is prosecuted to a final judgment for the plaintiff, and the defendant is evicted under a writ of possession issued thereunder, the latter, although he has remained in possession during the pendency of the action, and five years have elapsed from the time at which he first took possession until his eviction, does not acquire a new or independent title by prescription, which either he or his grantee can afterward enforce, notwithstanding his eviction under the judgment in ejectment.—Breon v. Robrecht, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 30-39; 17 Cent. Dig., cols. 1984-2010, §§ 30-41.

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§ 34. —— Necessity for Prior Possession.

[a] In this state a plaintiff, claiming as heir at law, can recover in an action of ejectment without an entry upon the premises after the death of his ancestor. It is sufficient that he show his title as heir to the premises demanded.—Soto v. Kroder, 19 Cal. 87.

[b] Where plaintiff has failed to establish a title, he cannot recover unless he shows a prior possession.—Polack v. McGrath, 32 Cal. 15; Page v. O'Brien, 36 Cal. 559; Wolfskill v. Malajowich, 39 Cal. 276; Stevens v. Quirk, 60 Cal. 161.

§ 35. —— Sufficiency of Possession in General.

[a] To constitute a possession sufficient to maintain ejectment, there must be an actual bona fide occupation, or possessio pedis, a subjection of it to the will and control of the possessor, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc.; and occupation of a portion of land marked by distinct boundaries will carry possession of the whole tract. It is not necessary that the property should be cultivated, nor is any particular kind of inclosure required. It is sufficient if it is subjected to his use in the manner indicated. Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599.

[b] Mere survey and marking lines of boundary, without inclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands.—Bird v. Dennison, 7 Cal. 297.

[c] What acts done on land will constitute such a possession as will enable a party to maintain an action of ejectment against one afterward entering may depend on the intent on which such acts were done, to be gathered from the acts themselves and other surrounding circumstances.—Hunton v. Schumaker, 21 Cal. 453.

[d] The fact that a person incloses land by a substantial inclosure sufficient to protect growing crops constitutes such prior possession as is requisite for recovery in ejectment. Polack v. McGrath, 32 Cal. 15.

[e] Where it appears that plaintiff inclosed land on which defendant was residing, and defendant removed his residence from the inclosure but continued to pasture his cattle therein, and would not permit plaintiff to use it for pasturage, prior possession sufficient to enable plaintiff to maintain the action is not shown.—Page v. O'Brien, 36 Cal. 559.

[f] Evidence that the defendants in an action of ejectment, and their predecessors, received all the rents of the property, and paid all taxes assessed against it, for over twenty years, and paid all street improvement assessments charged thereon, and that the predecessor of the defendants entered under an administrator's deed of the land, and always claimed to be the owner of the property, and that his claim was open and notorious, and generally known to the community, warrants the court in finding an ouster of alleged cotenants, and that they had notice of his claims of exclusive ownership, and that his possession was adverse to them.—Alvarado v. Nordholt, 95 Cal. 116, 30 Pac. 211.

[g] While T. was in possession of land, plaintiff, claiming under a deed from one in whom he did not even suppose there was title, entered and began to build a shanty, but T., when he learned of it, tore it down, and drove him off. A few days afterward, plaintiff again attempted to build the shanty, and slept there without bedding, but T. again tore it down before completion, and drove him off. Nothing further was done by plaintiff for three years, when he brought ejectment against T. Held, that plaintiff had no such title or possession as entitled him to maintain the action.—Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

§ 36. —— Sufficiency as Against Intruder.

[a] Where one in peaceable possession of land is ousted by a bare trespasser, who enters without claim of title, he may recover in ejectment on proof of prior possession, though such possession was not held for the time and in the manner required for a prescriptive title.—Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Potter v. Knowles, 5 Cal. 88.

[b] Possession gives a right of action against a mere trespasser, even where title may be shown to exist in another.—Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615.

[c] One who has built a fence of any kind around land, which, together with natural barriers, is sufficient to turn cattle, and has used it for pasturage, can maintain ejectment to recover it from a mere intruder, who enters without right or title.—Southmayd v. Henley, 45 Cal. 101.

[d] Where plaintiff's grantor, while in possession of the demanded premises, sold the same to plaintiff, who thereafter and up to the entry of defendant occupied the same as pastures for his cattle, and defendant shows no title or right of entry, plaintiff is entitled to recover.—Pierce v. Stuart, 45 Cal. 280.

[e] Code of Civil Procedure, section 325, providing that title by adverse possession cannot be established unless the party claiming it has occupied the land for five years, and paid all taxes thereon during that time, applies only to actions between the holder of the legal title and the party claiming adversely, and not to actions by an adverse claimant against a trespasser.—Shanahan v. Tomlinson, 103 Cal. 89, 36 Pac. 1009.

[f] Proof by plaintiff that his grantors held undisputed possession of the land in controversy for more than five years before they

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were dispossessed by defendant entitles him to recover against defendant in possession who offers no evidence in support of his right to the land, or the title of those under whom he claimed.—Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18.

[g] Where, in ejectment, defendant is found to be a mere trespasser, plaintiffs are entitled to possession of the entire property, though they own only an undivided one-half. McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27.

[h] Where plaintiff took possession of a river bed after a new channel had been cut by the river during a freshet, and cleared and cultivated such parts as were suitable therefor, pastured other parts not suitable for cultivation, on which grass grew, sold gravel from other parts, and timber and logs from parts on which they were lodged, rented the river bar for fishing purposes, and inclosed the whole tract by fences and natural barriers sufficient to turn stock, such acts of possession were sufficient to support a judgment for plaintiff as against another claiming only a possessory interest in the land.—Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

[i] Where one claims possession of state lands, natural barriers may be sufficient in place of an inclosure by fences.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

[j] On an issue whether one has had possession of certain state lands, he may avail himself of a barrier which also incloses other lands in his possession, but owned by other third persons, in addition to, and in the same inclosure with, the lands in controversy.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

[k] In an action to recover land, title to which is in the state, plaintiff may maintain his case, on proof of prior peaceable possession under a claim of right, as against all but the true owner.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

[l] In an action to recover possession of lands belonging to the state, plaintiff, claiming to have been in possession of the same, may maintain his case by proof of actual occupation and use, to the exclusion of use and occupation of others, though there were no barriers sufficient of themselves to turn stock.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

§ 37. —— Title to Support Possession.

[a] Where a plaintiff in ejectment seeks to recover upon prior possession, and does not show a compliance with the statute concerning possessory actions in this state, he can only recover upon proof of actual bona fide occupation.—Murphy v. Wallingford, 6 Cal. 648.

[b] A mere entry without color of title, accompanied by survey and marking of boundaries, is not sufficient.—Murphy v. Wallingford, 6 Cal. 648.

[c] Though an action of ejectment may be based upon prior possession, in case of wrongful eviction therefrom, yet, where such action is based on title, and the plaintiff offers proof of title, and does not prove an actual possession at the time of the defendant's entry, he must fail if he does not show a valid title or right of possession.—Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708.

§ 38. —— Constructive Possession Under Title.

[a] The act prescribing the mode of maintaining and defending possessory actions (Wood's Digest, p. 526) was intended for the benefit of actual settlers, and does not protect one who, for four months after location of his claim, does not reside on it, although he may have put improvements thereon.—Gird v. Ray, 17 Cal. 352.

[b] Where plaintiff's grantor had actual possession of public land, and inclosed it with a substantial fence, and by a valid deed conveyed it to plaintiff, the latter, though he himself never took actual possession of the land, but cultivated a portion of it through his employees, has constructive possession of the whole, and may maintain ejectment against an intruder on any part thereof.—Dodge v. Yates, 76 Cal. 251, 18 Pac. 323.

[c] A person may be in possession of land without a personal residence thereon, and without having personally cultivated it.—Dodge v. Yates, 76 Cal. 251, 18 Pac. 323.

§ 38½. —— Possession of Part of Entire Tract.

[a] Possession does not extend beyond occupation, without title or color of title under deed from grantor, having constructive possession.—Sunol v. Hepburn, 1 Cal. 255.

[b] In an action to recover the possession of land leased by plaintiff to defendant, it is not error to refuse to charge that, if plaintiff had a title by prior possession without written title, he could recover only that portion which is included in the inclosure. A party's possession is not confined to his actual inclosure.—Castro v. Gill, 5 Cal. 40.

[c] Where a party takes possession of a tract of land, and incloses it with a fence consisting of posts seven feet apart, and one board, six inches wide, nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed to the whole.—Baldwin v. Simpson, 12 Cal. 560.

[d] One who enters into the actual possession of part of a tract of land under a deed describing the entire tract, and claims the whole, acquires possession of the entire tract, as against one afterward entering without color of title.—McKee v. Greene, 31 Cal. 418.

[e] Where one sues in ejectment to recover land on the ground of prior possession, and shows an actual possession by inclosure of a portion only of the premises, he is en-

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titled to recover such portion.—Slaughter v. Fowler, 44 Cal. 195.

[f] B. took possession of the lot in controversy in 1858, and it continued in possession of his successive grantees until 1874, when it was sold to plaintiff's intestate under a probate order, to pay debts of a subsequently deceased grantee. In 1874 defendant fenced the north part of the lot, but recognized plaintiff's title to the remainder, and defendant's possession subsequent to that date was not such as would affect plaintiff's ownership. Held, that the title of plaintiff's intestate deraigned from B.'s adverse possession was unimpeachable.—Baum v. Roper, 132 Cal. 42, 64 Pac. 128.

§ 39. —— Superiority of Title by Possession.

[a] As between two parties who rely on possession solely, the presumption is in favor of the first possessor; and proof of possession by a claimant, however short, will entitle him to recover, unless the defendant can account for such possession, or show a prior possession or title in himself or a third person.—Potter v. Knowles, 5 Cal. 87.

[b] In ejectment, the general rule that the claimant must recover on the strength of his own title is so far modified that, when the owner of the true title neither objects nor consents to the possession of either party, the court regards the better right, as between the parties, to be vested in the first possessor and grantees claiming through him.—Hubbard v. Barry, 21 Cal. 321.

[c] Where the title rests in possession only, the party having the prior possession must prevail.—Ayres v. Bensley, 32 Cal. 620.

§ 40. —— Waiver of Right to Claim Possession.

[a] An occupant of public land who is ousted by a stranger will not be presumed to have abandoned his right to possession, where, after a contest for a year, he ceases to contend against a superior force maintaining an armed resistance.—Daubenbiss v. White, 31 Pac. 360.

§ 41. Interest in Public Lands.

[a] Where a person with intention to take up a tract of public land filed his affidavit of location, and ninety days thereafter hauled lumber on the ground for a house, which lumber was removed during the night, and the claimant driven off by a band of armed men on attempting to replace it the next day, he has no rights sufficient to maintain ejectment against those who drove him off.—Crowell v. Lanfranco, 42 Cal. 654.

[b] A person who is not a beneficiary under act of Congress July 1, 1870, by which the United States relinquished to the city of San Francisco, Point San Jose Military Reservation, in trust to grant and convey the same to the persons actually in possession or entitled to the possession thereof, cannot raise the question whether a grantee in a deed from the city was a beneficiary, and entitled as such to the conveyance; and the deed is conclusive evidence in the grantee's favor, against one having no claim to the title of the city.—Palmer v. Galvin, 72 Cal. 183, 13 Pac. 476.

[c] Where it appears that plaintiff has made a homestead entry on land according to law, he shows title to the whole tract as against the defendant, a mere trespasser in actual possession of all but a few acres, and is entitled to recover, under act of March 23, 1874, providing that every qualified homestead claimant residing on public lands, who shall have made his original entry in accordance with the United States laws, shall, from the date of such entry, be deemed to have title to and to be in possession of all the land described in such entry, as against trespassers, etc.—Whitaker v. Pendolia, 78 Cal. 296, 20 Pac. 680.

[d] Where the plaintiff, in an action of ejectment, claims under a valid patent of the United States, issued within six months prior to the commencement of the action, a plea of the statute of limitations cannot prevail. Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896.

[e] A plaintiff in ejectment must fail, where he claims under a swamp land patent from the state, which confers no title, where the field-notes of the government survey of the township and the corrected plat thereof show that there is not such tract of land as that described in the patent; and it is immaterial that such tract appears upon the original plat of the survey.—Harrington v. Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

§ 42. —— Entry, Certificate, or Warrant.

[a] A certificate of location of school or lieu land issued under act of April 27, 1863, is not evidence of legal title.—True v. Thompson, 42 Cal. 293.

[b] When the answer denies the allegations of the complaint, the mere findings by the court that, on a day named, before the commencement of the action, plaintiff paid to the receiver of public lands at a local land office the amount due the United States government for the demanded premises, and took his receipt therefor, having theretofore made the necessary proofs before the land officers, are not sufficient to show any title or right of entry in plaintiff.—Lynch v. Brigham, 47 Cal. 137.

[c] A certificate of purchase from the state of state lands is not void, though the application and affidavit are defective and such certificate is sufficient to maintain ejectment. Cucamonga Fruit etc. Co. v. Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359.

§ 43. —— Validity of Grant or Patent.

[a] If, after the death of the grantee of an unconfirmed Mexican grant, his heirs petition for and obtain a confirmation of the title to them, and the patent issues to them,

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they become vested with the legal title; and, if the administrator of the grantee sells the land under an order of the probate court, the patentees will prevail in ejectment against the purchaser at such sale, if defendant does not set up and establish an equitable defense.—Hartley v. Brown, 51 Cal. 465.

§ 44. —— Priority or Superiority of Interest or Title.

[a] Under act of Congress, September 28, 1850, section 4, vesting the undisposed swamp lands in California in the state, without any patent, the state has the right to dispose of the same prior to the issuing of the patent from the United States, so as to convey to the patentee a vested title as against a trespasser.—Owens v. Jackson, 9 Cal. 322.

[b] In ejectment for mining lands, the fact that the claims of the plaintiffs were first located is not, of itself, sufficient to entitle them to recover. And where defendants were, and had been for a long time, in possession of the ground, and actually working the mines, they were held not to be required to show anything beyond this, until a prior right was shown to exist in plaintiffs.—Pennsylvania Min. Co. v. Owens, 15 Cal. 135.

[c] The survey of land in making and recording an affidavit, in accordance with the possessory act of 1852, does not invest the claimant with a right to recover the land from one who was already in actual possession.—Hawxhurst v. Lander, 28 Cal. 331.

[d] Where pueblo lands are confirmed to a town, and the decree excludes from the confirmation certain rentals granted by the Mexican government within the exterior of pueblo, the confirmee cannot maintain ejectment as against those claiming under the excepted grants until they have been finally confirmed and located by the approved survey; nor can the action be maintained while an appeal to the supreme court is pending from an order of the district court confirming the survey of the excepted portions.—City of San Jose v. Uridias, 37 Cal. 339.

[e] Under the act of Congress of 1866, ceding swamp lands to the state, and requiring certification by the general land office over to the state before the lands would vest in the latter, one who took title to such lands from the state after the designation and selection thereof by the state cannot maintain ejectment against one holding a patent for the same from the United States issued prior to certification.—Wright v. Roseberry, 63 Cal. 252.

[f] A plaintiff in ejectment cannot recover upon proof of a homestead claim entered in the land department of the United States, and of a receiver's receipt for the land in controversy, where it appears that, prior to the filing of the homestead claim, the title to the land had passed from the United States by grant to a railroad company, within its primary limits, upon approval of a final government survey, made long prior to such filing.—Sousa v. Pereira, 132 Cal. 77, 64 Pac. 90.

§ 45. —— Grant of Railroad Lands.

[a] Act of Congress of July 1, 1862, granting to the Central Pacific Railroad Company a right of way two hundred feet wide on each side of its road, was a conclusive legislative determination that so much land was necessary to the use of the road, and gave an exclusive right of possession to the full width, and the company can maintain ejectment therefor against one who occupied without title before the grant.—Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032; Southern Pac. Co. v. Meyer, 24 Pac. 1033.

§ 46. Paper Title—Source of Title.

[a] A deed by the city authorities of land lying within the city limits, and held by the city as trustee for the parties in possession thereof, is conclusive in favor of the grantee in ejectment, against one who has no claim to the title of the city.—McCreery v. Sawyer, 52 Cal. 257.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 17, 18, 39-41; 17 Cent. Dig., cols. 2022-2034, §§ 47-55.

§ 47. —— Quitclaim Deed.

[a] Ordinary quitclaim deed is sufficient to enable the grantee to maintain ejectment if the grantor could have done so.—Sullivan v. Davis, 4 Cal. 291.

[b] A quitclaim deed is sufficient to enable the grantee to maintain an action of ejectment, if the grantor could have maintained such an action.—Downer v. Smith, 24 Cal. 114.

[c] A quitclaim deed will support ejectment. Lawrence v. Ballou, 37 Cal. 518.

[d] A quitclaim deed executed even prior to act of February 22, 1854, making quitclaim deeds conveyances, will enable the grantee to maintain ejectment if his grantor could.—Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867.

§ 48. —— Decree or Judgment or Deed Thereunder.

[a] Where a plaintiff in ejectment claims title through an attachment, if it appears that the officer to whom it was directed failed to comply with the requirements of Code of Civil Procedure, section 542, the omissions on the part of the officer in the action.—Schwartz v. Cowell, 71 Cal. 306, 12 Pac. 253.

§ 49. —— Validity of Instrument or Title.

[a] Actual possession of a small portion of a large tract of land, with a claim of title to the whole, will not, under the law of Mexico, entitle the party to maintain a possessory action, when it appears on the face of the papers under which he claims that his title is void.—Sunol v. Hepburn, 1 Cal. 254.

[b] A sale of land of the city of San Francisco by a portion of the board of commissioners of the funded debt does not pass a legal title upon which ejectment can be

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maintained.—Leonard v. Darlington, 6 Cal. 123.

[c] One who as agent has sold lands, received payment, and delivered a deed from which one lot is by mistake omitted, cannot, on discovery of the mistake, obtain a deed for that lot and eject the former vendee, who, without notice of the mistake, has gone into possession and made improvements.—Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764.

§ 50. —— Priority or Superiority of Instruments.

[a] Where both parties rely on a paper title, the possession of defendant cannot be disturbed, unless plaintiff shows a better title. Irwin v. Towne, 42 Cal. 326.

[b] Since plaintiff must recover on the strength of his own title, if both parties claim under a common grantor, a prior deed to plaintiff cannot be enlarged by a subsequent deed to defendant.—Cox v. Hayes, 7 Pac. 761.

§ 51. Equitable Title.

[a] Possession with an equitable title is as good as a legal title.—Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593.

[b] An equitable title is not available to plaintiff in ejectment.—(Cal. 1868) Felger v. Coward, 35 Cal. 650; (1874) Buhne v. Chism, 48 Cal. 467.

[c] Though owner of equitable title cannot maintain technical action of ejectment against owner of legal title, he may maintain action to establish his equitable right and be let into possession.—Murphy v. Crowley, 140 Cal. 149, 73 Pac. 820.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 15 Cyc. 43-45; 17 Cent. Dig., cols. 2034-2040, §§ 56-58.

§ 52. —— What Constitutes Equitable Title.

[a] A partnership mortgaged property to A, and subsequently mortgaged the same property to plaintiff. One of the partners conveyed his interest, the deed stating the interest to be sold subject to the mortgages; and the grantee sold it to defendant, the deed containing the same recital. The first mortgage was foreclosed, and defendant became the purchaser; taking a sheriff's deed and possession. The second mortgage was foreclosed, and plaintiff became the purchaser, and brought ejectment against defendant on his sheriff's deed. Held, that he could not maintain the suit, as his remedy against defendant, because of the recitals, in the deeds, was in equity.—Brown v. Winter, 14 Cal. 31.

[b] A party who has a right of entry upon lands, and who has entered by force of fraud, cannot be turned out of possession by an action of ejectment.—Depuy v. Williams, 26 Cal. 309.

[c] Defendant agreed in writing to convey to plaintiff an undivided interest in a mining claim, on the fulfillment of certain conditions by plaintiff, which conditions were duly performed, but defendant refused to convey as stipulated. Held, that plaintiff's appropriate remedy was by action for specific performance, and, as incidental thereto, a delivery of possession.—Felger v. Coward, 35 Cal. 650.

[d] Whatever may be the exact nature of the interest which a partner takes under a deed of land to the firm, he takes a sufficient interest to enable him to maintain ejectment against a mere intruder.—Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

§ 53. Title from Common Source.

[a] Where both parties claim title under the same grantor, it is sufficient to prove a title derived from him without proving his title, as neither party can deny such title.—(Cal. 1857) Ellis v. Jeans, 7 Cal. 409; (1871) Irwin v. Towne, 42 Cal. 326; (1873) Whitman v. Steiger, 46 Cal. 256; (1875) Speet v. Gregg, 51 Cal. 198; (1884) Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867.

FOR AUTHORITIES FROM OTHER STATES:

Ejectment where all the parties claim under a common source of title: 47 Am. St. Rep. 72, note. See, also, 15 Cyc. 47-50; 17 Cent. Dig., cols. 2042-2051, §§ 59-62.

§ 54. —— Superiority of Title.

[a] H. conveyed a certain tract of land to S., who conveyed to divers persons undivided interests therein. Other mesne conveyances of these interests were afterward made, and plaintiff in ejectment traced his title back through them to S. and H. Defendant claimed title under H. by a title subsequent to the conveyance to S., and unconnected with it or with any of the conveyances of undivided interests. Held, that plaintiff, having proved a valid deed of H. to S., and an unbroken series of valid conveyances of an undivided interest from S. down to himself, might recover the whole premises, without proving a valid title in any of the other undivided interests.—Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108.

[b] A title derived under a lien elder in its origin is prima facie superior to a title from a common source purporting to be derived under a lien junior in point of time, though the judicial sale under the latter may have preceded that under the former.—Littlefield v. Nichols, 42 Cal. 372.

C. DEFENSE.

IN GENERAL, § 55.
SUFFICIENCY OF TITLE IN GENERAL, § 56.
TITLE ACQUIRED SINCE ACTION BROUGHT, § 57.
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WANT OF SEISIN IN PLAINTIFF'S GRANTOR, § 60.
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ABATEMENT—PENDENCY OF OTHER ACTION OR PROCEEDING, § 73.
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§ 55. In General.

[a] An entry while the fence is removed for the rebuilding of a better one, with full notice of plaintiff's claim, cannot be defended on the ground that the land was uninclosed.—Sweetland v. Hill, 9 Cal. 556.

[b] In ejectment by the grantee in a quitclaim deed of the premises in controversy against his grantor, who was not shown to be the owner of the lot, it was held that the grantor might defend by showing that, subsequently to the execution of his deed, he was put in charge of the premises as agent of the true owner, and that he continued in possession as such agent.—Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111.

[c] It is no defense that plaintiff and defendant's grantors entered into a partnership to acquire lands and make improvements thereon, and that he had purchased the interest of his grantors, and no settlement of the partnership affairs had been made, especially where it appears that plaintiff filed on the land in his own name, and paid for it with his own funds; that it was the understanding of the partners that each should secure and own his own land; and that the improvements made by each claimant were not to be considered a part of the partnership property.—Burgess v. Rice, 74 Cal. 590, 16 Pac. 496.

[d] Act of Congress of July 1, 1862, granting to the Central Pacific Railroad Company a right of way two hundred feet wide on each side of its road, gave a conclusive right of possession to the full width. Held, in ejectment by the company against one who occupied without title before the grant, that the fact that the company offered to lease to such person for a nominal rent the land occupied by him does not affect its right of recovery.—Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032; Southern Pac. Co. v. Meyer, 24 Pac. 1033.

[e] In an action of ejectment by the grantee of land against the grantor, where the grantor sets up as a defense that the deed was intended as a mortgage, it is not necessary that he pay or offer to pay the amount of the alleged mortgage debt, which he admits to be due, in order to avail himself of such defense. Locke v. Moulton, 96 Cal. 21, 30 Pac. 957.

[f] Defendant claiming the right to retain possession as against the owner of land must establish such right as matter of affirmative defense.—F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214.

[g] A verbal understanding that a hired man who took charge of his employer's ranch was to remain in possession of the property, and to have a lien thereon until he was paid, is no defense to the owner's action for recovery of possession.—Todhunter v. Armstrong, 53 Pac. 446.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 61-79; 17 Cent. Dig., cols. 2076-2145, §§ 81-116.

§ 56. Sufficiency of Title in General.

[a] The Van Ness ordinance of the city of San Francisco, whereby the state relinquished and granted all its right, title, and claim to the lands, with certain exceptions, to the parties in the actual possession thereof on or before January 1, 1855, provided such possession was continued up to the introduction of the ordinance in the common council, or, if interrupted by an intruder or trespasser; had been, or might be, recovered by legal process, cannot be invoked by a defendant in ejectment, in possession on January 1, 1855, when the question at issue is whether he acquired such possession by an intrusion on the prior rights of plaintiff.—Keane v. Cannovan, 21 Cal. 291.

[b] The purchase of land at a sale on execution is no defense to an action of ejectment for the same, if the time for redemption has not expired.—McMinn v. O'Connor, 27 Cal. 238.

[c] A part of a tract of land was conveyed to a corporation, and afterward the grantor conveyed the entire tract to O., from whom, by mesne conveyances, plaintiff derived title. Defendants claimed that O, took the deed for their benefit; but it appeared that one of defendants, who was a grantee from O., and a director and superintendent of the corporation, had conspired with the other defendants to defeat the title of the corporation by this deed to O. Held, that the equitable claim of defendants, being founded on fraud, could not stop the flow to plaintiff of the legal title to that part of the land which had not been conveyed to the corporation.—Pekin Min. etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679.

[d] Outstanding title barred by statute is not such present, live and effective title as will defeat plaintiff's case.—Allen v. McKay & Co., 120 Cal. 339, 52 Pac. 828.

§ 57. Title Acquired Since Action Brought.

[a] Plaintiff cannot object to defendant's introducing deeds in evidence, on the ground

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that they were dated after the commencement of the action.—Moore v. Tice, 22 Cal. 513.

[b] A defendant in ejectment may show a title acquired after the commencement of the suit.—Tustin v. Faught, 23 Cal. 237.

[c] Defendant cannot, on the trial avail himself of a title acquired pendente life, unless it is set up by a supplemental answer.—Thompson v. McKay, 41 Cal. 221.

[d] A deed to defendant, executed subsequent to the commencement of the action, is admissible in evidence if a supplemental answer is filed, setting up the title acquired through the deed.—Roper v. McFadden, 48 Cal. 346.

§ 58. Former Adjudication.

[a] In an ordinary complaint in ejectment, a plea of former adjudication can have no place, the estoppel being available to plaintiff only to defeat a claim which defendant might or might not prefer.—Clink v. Thurston, 47 Cal. 21.

§ 59. Superiority of Title or Right of Possession.

[a] Defendant, claiming under an invalid executor's deed, may plead the executor's title, where plaintiff's right of action is based on mere prior possession.—Gregory v. Haynes, 13 Cal. 591.

[b] Right to possession under valid homestead entry by one who paid sums required is sufficient to defeat ejectment based upon mere prior possession.—Goodwin v. McCabe, 75 Cal. 587, 588, 17 Pac. 705.

§ 60. Want of Seisin in Plaintiff's Grantor.

[a] Where the plaintiff relies solely on the possession of his grantor, having no other title, the defendant will be allowed to show that the grantor of the plaintiff, prior to conveying to plaintiff, had abandoned the land.—Bird v. Lisbros, 9 Cal. 1, 70 Am. Dec. 617.

§ 61. Want of Ouster or Possession by Defendant.

[a] An answer by one of several defendants in ejectment, disclaiming all right, title, and interest in the premises, but containing a general denial of plaintiff's allegations, and averring that "he was and still is awfully seised and in possession" of the premises, is no defense to a demand for judgment for the possession and damages for the detention of the land. Being in possession, he is a necessary party to the action, and properly made a defendant with the others.—Pioche v. Paul, 22 Cal. 105.

[b] The possession of the premises at the time the action was brought being put in issue, the fact that defendant was seen in possession by plaintiff's agent, and claimed to be in possession, does not estop him from saying that he was not in possession when the action was commenced, notwithstanding plaintiff brought the action acting on information that his agent had obtained by sight and word of mouth from defendant.—Pope v. Dalton, 31 Cal. 218.

§ 62. Several Defenses.

[a] Defendant in ejectment cannot set up in the same case inconsistent lines of defense, such as that he is in by deed absolute, by a contract for a conveyance, and by license requiring a notice to quit.—Blum v. Robertson, 24 Cal. 127.

§ 63. Adverse or Prior Possession.

[a] Where plaintiff in ejectment shows title, and defendant relies on adverse possession and only shows an adverse possession of a part of the demanded premises, a judgment in favor of the latter for all the demanded premises is erroneous.—Hayes v. Martin, 45 Cal. 559.

[b] In ejectment, where defendant proves that for a series of years plaintiff did not assert his title to the land in possession of another, plaintiff cannot introduce evidence that he consulted with a person about recovering possession, if such consultation was not communicated to the person in possession. Sill v. Reese, 47 Cal. 294.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 2091-2096, §§ 94-98.

§ 64. —— Necessity for Title to Support.

[a] Where a party can show nothing but prior possession, that reliance may fail if it be shown that he voluntarily abandoned his possession without the purpose of returning. Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615.

§ 65. —— Sufficiency of Title to Support.

[a] Where defendants claimed under the statute of limitations, held, that there was no error of which plaintiffs could complain to instruct the jury, in effect, that plaintiffs were entitled to prevail on the strength of their paper title, unless defendants went into possession under a tax deed claiming title, and maintained such possession under claim of title openly, notoriously, and visibly, as against the whole world, for a sufficient length of time prior to the date when the act of 1878, amendatory of Code of Civil Procedure, section 325, took effect, to render the bar of the statute of limitations effectual.—Reynolds v. Lincoln, 73 Cal. 191, 14 Pac. 674.

§ 65½. —— Time of Possession.

[a] If a grantor subsequent to the conveyance holds continuous adverse possession of the premises for five years, he can set up the statute of limitations in defense to an action of ejectment by his grantee.—Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111.

[b] One who is brought in on motion of plaintiff, as an additional defendant, after the

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suit has been pending a long time, may claim the benefit of the statue of limitations up to the day he is made a party.—Lawrence v. Ballou, 50 Cal. 258.

[c] After foreclosure sale, but before execution of sheriff's deed, the mortgagor's interest in the land was attached. Judgment was not rendered till nine years later, and the land was sold a year after that. Four months after attachment, the judgment debtor, being still in possession, deeded the land to defendant, who thereupon took and kept possession, and paid taxes regularly thereafter. Held, that defendant could plead adverse possession running from the time he took possession, against plaintiff claiming under the sale in the attachment suit. This defense was not in effect a plea of outstanding title under the foreclosure sale, within the rule that in ejectment for lands purchased on execution against a debtor in possession when the lien attached defendant and his vendees cannot show that he had no title, or that the true title is outstanding.—Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120.

§ 66. Right to Show Outstanding Title.

[a] In ejectment, evidence is inadmissible to show that the fee of the land is in the government of the United States, or that the title is in a third party, as well as any attempt to impeach the deed from plaintiff's grantor.—Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597.

[b] In ejectment by a purchaser at a sheriff's sale against the judgment debtor in possession, the latter cannot show an outstanding title in another, to defeat the action.—(Cal. 1854) Redman v. Bellamy, 4 Cal. 247.

[c] Title in a third person is a good defense, though defendant does not connect himself with it.—(Cal. 1857) Welch v. Sullivan, 8 Cal. 165; (1863) Simson v. Eckstein, 22 Cal. 580; (1871) Cranmer v. Porter, 41 Cal. 463.

[d] In action of ejectment, where the plaintiff claimed by virtue of his prior possession, the defendant will not be allowed to show that a third party had an older and better claim to the land than that of plaintiffs.—Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

[e] A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person. Gregory v. Haynes, 13 Cal. 591.

[f] The execution cannot defeat the recovery of possession by the purchaser at the execution sale by setting up a title in some third person.—McDonald v. Badger, 23 Cal. 393, 83 Am. Dec. 123.

[g] That the plaintiff shows possession in himself, or a right of possession as between him and defendant at the time of defendant's entry, the latter will not be permitted to defend by showing title in a stranger.—Carleton v. Townsend, 28 Cal. 219.

[h] A mere intruder on real property, having no privity with the former owner, cannot set up, in defense to ejectment by such owner's grantee, any right which such owner may still have to the property under the statute of frauds.—Ryan v. Tomlinson, 39 Cal. 639.

[i] One who is in possession as a mere trespasser or intruder cannot protect himself by setting up an outstanding title in a stranger. (Cal. 1872) Southmayd v. Hurley, 45 Cal. 101.

[j] Defendant in ejectment may show a title outstanding in third parties, although he does not connect himself with such title, where plaintiff does not appear to have been on the land for thirty years, and has no claim of title except through his father who then died, and who does not appear to have been in possession of any particular parcel of the land.—Trenouth v. Gordon, 63 Cal. 379.

[k] It is no defense to an action by a settler on public land under the possessory act of 1852 that the title to the land is in the United States; the rule being that, the owner of the true title not objecting or consenting to the possession of either of the parties, the court regards the better right, as between the parties, to be vested in the first possessor.—Gray v. Dixon, 74 Cal. 508, 16 Pac. 305.

[l] Where the plaintiff in ejectment claimed title under a probate sale of the real property of an intermediate grantor, the fact that at the time of the sale there was an outstanding trust deed, made by the decedent to secure the payment of a debt, cannot be availed of by the defendant as an outstanding title, as against the plaintiff, where it appears that the property was reconveyed during the same year, which was eighteen years before the commencement of the action.—Baum v. Roper, 132 Cal. 42, 64 Pac. 128.

§ 67. —— What Constitutes Outstanding Title.

[a] A person under whom defendant claimed had been let into possession under a judgment in ejectment by him against a person who afterward conveyed to plaintiff. The judgment was afterward reversed. Held, that the possession of the person under whom defendant claimed was sufficient, until taken from him by due course of law, to break the force of the claim derived from the mere fact of plaintiff's grantor's prior possession; and hence defendant might set up the outstanding title in the person under whom he claimed, as against the present plaintiff.—Gregory v. Haynes, 13 Cal. 591.

[b] An outstanding title which will defeat an action of ejectment must be one that is subsisting and superior at the commencement of the action and at the trial.—(Cal. 1893) Robinson v. Thornton, 31 Pac. 936.

§ 68. —— Conveyance or Encumbrance.

[a] The transfer by plaintiff in ejectment of his title to the demanded premises during the

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pendency of the action does not affect his right to recover, which will inure to his grantee.—(Cal. 1867) Barstow v. Newman, 34 Cal. 90; (1873) Clink v. Thurston, 47 Cal. 21.

§ 69. —— Equitable Title in Third Person.

[a] Pending proceedings to obtain a patent confirming a Mexican grant, plaintiff in ejectment conveyed the premises, taking a mortgage, and subsequently commenced an action to foreclose, and before decree assigned the mortgage. Plaintiff obtained the patent, and at a sale of the premises, under decree of foreclosure, bid them off, and received a sheriff's deed therefor. Held, in ejectment, that the equitable rights of the assignee afforded defendants no ground for impeaching the deed.—Pioche v. Paul, 22 Cal. 105.

§ 70. Equitable Defenses.

[a] Under code or statutory provisions eliminating the distinction between legal and equitable forms of action, equitable defenses are available in actions to recover land to defeat a legal title.—Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764; Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; Pekin Min etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273; Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180.

[b] Perfect equity united with possession is, under our system, equivalent for all purposes of defense to a legal title.—Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593.

[c] A mere equitable title to land, if it is of such a character as entitles the holder to the possession in equity, is a sufficient defense, under the system of state practice, to an action for the possession brought even by the holder of the legal title.—Estrada v. Murphy, 19 Cal. 248; Meador v. Parsons, 19 Cal. 294; Lestrade v. Barth, 19 Cal. 660; Willis v. Wozencraft, 22 Cal. 607; Cadiz v. Majors, 33 Cal. 288; McCauley v. Fulton, 44 Cal. 355.

[d] Person in possession under a perfect equity may defend ejectment, though right to affirmative relief may be lost for any reason. Arguello v. Bours, 67 Cal. 451, 8 Pac. 49.

[e] Loss of right to affirmative relief from lapse of time or otherwise will not preclude owner of a perfect equity in possession from defending ejectment.—Arguello v. Bours, 67 Cal. 451, 8 Pac. 49.

[f] Vendee in possession under contract for sale may be ejected without offering to return money paid by him.—Oakland Paving Co. v. Tompkins, 72 Cal. 2, 12 Pac. 801.

[g] Equitable title may be set up as defense in ejectment suit if coupled with possession or right to possession.—Meeker v. Dalton, 75 Cal. 158, 16 Pac. 764.

[h] When the plaintiff in an action of ejectment is the owner of the legal title to the property, and the defendants rely upon an equitable defense, they must, in order to prevent a recovery, make out a complete equitable title and the right of possession thereunder.—Wallace v. Maples, 79 Cal. 433, 21 Pac. 860.

[i] Equitable title, such as entitles holder to possession in equity, is good defense to ejectment by holder of legal title.—Hyde v. Mangan, 88 Cal. 325, 26 Pac. 180.

[j] Defendant took possession of lands purchased from plaintiff, to be paid for in three payments. Two payments having been made, the period for the third payment was extended under an agreement that plaintiff was to be relieved from his obligations and defendant should forfeit all payments within sixty days after its maturity. Defendant refused to make the last payment because plaintiff's title was not good. Defendant had made valuable improvement upon the land. He refused to either pay or surrender possession. Held, that plaintiff could recover in ejectment, and whatever cause of action defendant had to recover the purchase money and the value of the improvements was no defense.—Haile v. Smith, 128 Cal. 415, 60 Pac. 1032.

[k] The legal title will prevail in an action of ejectment unless an equitable defense is pleaded and proved. The defendants cannot base any equitable defense under a contract of purchase which they have failed and refused to perform when a deed was tendered to them, and which they do not offer to perform.—Howard v. Hewitt, 139 Cal. 614, 73 Pac. 414.

[b] An equitable defense available against owner of legal title held available in ejectment brought by person having title quieted against such holder.—King v. Dugan (Cal. Sup.), 88 Pac. 925.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 71-77; 17 Cent. Dig., cols. 2115-2141, §§ 107-113.

§ 71. —— What Constitutes Equitable Defense in General.

[a] Defendant in ejectment holding pueblo lands in the city of San Francisco, merely by possession, may set up the invalidity of sales on execution against the city or plaintiff's title derived therefrom to defeat plaintiff's action.—Hart v. Burnett, 15 Cal. 530.

[b] Real estate belonging to a partnership can be treated as partnership stock only in equity proceedings, and therefore it is no defense in ejectment by the holder of the legal title that defendant has an equitable estate in the premises as a partner.—Lowe v. Alexander, 15 Cal. 296.

[c] Agreement to pay for improvements no defense to ejectment. Remedy is by action upon agreement.—Norris v. Hoyt, 18 Cal. 217.

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[d] An equitable defense set up in an action of ejectment must meet the present claim of plaintiff to the possession, and the equity presented must be of such a character that it may be ripened by the decree of the court into a legal right to the premises or such as will estop plaintiff from the prosecution of the action.—Lestrade v. Barth, 19 Cal. 660.

[e] Defendant in ejectment, relying solely on possession, may set up in defense the invalidity of a title to San Francisco city lands in the pueblo of Yerba Buena, acquired under a sale on an execution against the city.—Fulton v. Hanlow, 20 Cal. 450.

[f] Plaintiff in ejectment claimed under a state patent issued on a school warrant location. Defendant in possession admitting the lands to be public, and property of the United States, deraigned no title from this source. Held, that he could not contest the validity of the location, nor the efficacy of the patent.—Rhodes v. Craig, 21 Cal. 419.

[g] In ejectment the legal title must control. The plaintiff, establishing in himself the legal title, cannot be defeated by showing that such title was acquired by fraud or is held by him in trust. These are considerations for a court of equity, which will control the legal title in his hands so as to protect the just rights of others.—Clark v. Lockwood, 21 Cal. 220.

[h] Where defendant relies on an equitable title, the equity presented must be such that it may be ripened by the decree into a legal title, or such as would estop plaintiff from prosecuting the action in ejectment.—Blum v. Robertson, 24 Cal. 128.

[i] A person who had purchased and was in possession of a portion of "Suscol Rancho" prior to the rejection of the Vallejo claim to the same, and who refused to join with the co-terminous purchasers in an application for a patent under the Suscol right, and made no effort to avail himself of the privilege granted by that act, cannot, in ejectment against him by such co-terminous purchasers, convert them into trustees holding the legal title for his benefit.—Sheehy v. True, 45 Cal. 236.

[j] Defendant in ejectment, who is a stranger to the title, cannot object, where plaintiff derives his title from a municipal corporation, that plaintiff has not proved otherwise than by recitals in his deed, that he was one of the parties to whom the corporation was permitted by law to sell; nor where the corporation is authorized to sell its realty to certain persons or their assigns, and conveys to an assignee, who is plaintiff, will he, on the trial, be allowed to question the fact that plaintiff was such assignee.—Low v. Lewis, 46 Cal. 549.

[k] Lands granted to the city of San Francisco by Act of Congress, March 8, 1866, had been awarded to T. as successor of defendant R. having ejected plaintiff, this action was brought for possession, and defendant claimed that said deed was void, because neither plaintiff nor his predecessors had complied with certain requirements of said act. Held, that the defense was inadmissible, since the decree directing the city to convey to plaintiff necessarily adjudicated that all the requirements of the act had been fully complied with by plaintiff or his predecessors.—Forbes v. Reilly, 57 Cal. 302.

[l] In ejectment, an answer alleging that a mistake was made in drawing a deed from plaintiff to defendant, whereby the land sued for was excepted from its operation, is a defense.—Walker v. Brem, 67 Cal. 599, 8 Pac. 320.

[m] Where land intended to be conveyed is omitted from deed by mistake, grantee may set up facts as defense without praying for reformation.—Meeker v. Dalton, 75 Cal. 158, 16 Pac. 764.

[n] An agreement by plaintiff, in an action to recover land, to convey part of it to his attorneys when recovered in compensation for services is not a defense to the action, whether the agreement is void or not.—Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855.

[o] Plaintiff and his assignor, who were the owners of certain premises, contracted to convey the same to H., who executed a mortgage thereon to plaintiff for the price, and then conveyed the property to defendant. Before an action to recover the property, plaintiff tendered a deed to defendant, and on the trial waived all claim for damages, and offered to convey on payment of the purchase money, without interest, which was refused. Held, that plaintiff's contract to convey, which defendant had failed to perform and did not offer to perform, did not constitute an equitable defense to the action.—Howard v. Hewitt, 139 Cal. 614, 73 Pac. 414.

§ 72. —— Liens.

[a] A verbal contract partly performed, as where the party has entered into possession and in good faith made valuable improvements, may be set up, under our practice, as a defense to ejectment by the vendor.—Arguello v. Edinger, 10 Cal. 150.

[b] Defendant had a lease of certain premises with a right of purchase, and entered into possession. Afterward the owner directed his agent by letter to reform the lease, and to give defendant a bond on certain specified terms, which was done. Still later, on payment of a balance, the attorney of the owner made a deed to defendant. Afterward the owner conveyed to plaintiffs with notice of defendant's rights. Held, that defendant had a sufficient equitable title on which to defend in ejectment.—De Rutte v. Muldrow, 16 Cal. 505.

[c] A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an

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§ 34. —— Necessity for Prior Possession.

[a] In this state a plaintiff, claiming as heir at law, can recover in an action of ejectment without an entry upon the premises after the death of his ancestor. It is sufficient that he show his title as heir to the premises demanded.—Soto v. Kroder, 19 Cal. 87.

[b] Where plaintiff has failed to establish a title, he cannot recover unless he shows a prior possession.—Polack v. McGrath, 32 Cal. 15; Page v. O'Brien, 36 Cal. 559; Wolfskill v. Malajowich, 39 Cal. 276; Stevens v. Quirk, 60 Cal. 161.

§ 35. —— Sufficiency of Possession in General.

[a] To constitute a possession sufficient to maintain ejectment, there must be an actual bona fide occupation, or possessio pedis, a subjection of it to the will and control of the possessor, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc.; and occupation of a portion of land marked by distinct boundaries will carry possession of the whole tract. It is not necessary that the property should be cultivated, nor is any particular kind of inclosure required. It is sufficient if it is subjected to his use in the manner indicated. Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599.

[b] Mere survey and marking lines of boundary, without inclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands.—Bird v. Dennison, 7 Cal. 297.

[c] What acts done on land will constitute such a possession as will enable a party to maintain an action of ejectment against one afterward entering may depend on the intent on which such acts were done, to be gathered from the acts themselves and other surrounding circumstances.—Hunton v. Schumaker, 21 Cal. 453.

[d] The fact that a person incloses land by a substantial inclosure sufficient to protect growing crops constitutes such prior possession as is requisite for recovery in ejectment. Polack v. McGrath, 32 Cal. 15.

[e] Where it appears that plaintiff inclosed land on which defendant was residing, and defendant removed his residence from the inclosure but continued to pasture his cattle therein, and would not permit plaintiff to use it for pasturage, prior possession sufficient to enable plaintiff to maintain the action is not shown.—Page v. O'Brien, 36 Cal. 559.

[f] Evidence that the defendants in an action of ejectment, and their predecessors, received all the rents of the property, and paid all taxes assessed against it, for over twenty years, and paid all street improvement assessments charged thereon, and that the predecessor of the defendants entered under an administrator's deed of the land, and always claimed to be the owner of the property, and that his claim was open and notorious, and generally known to the community, warrants the court in finding an ouster of alleged cotenants, and that they had notice of his claims of exclusive ownership, and that his possession was adverse to them.—Alvarado v. Nordholt, 95 Cal. 116, 30 Pac. 211.

[g] While T. was in possession of land, plaintiff, claiming under a deed from one in whom he did not even suppose there was title, entered and began to build a shanty, but T., when he learned of it, tore it down, and drove him off. A few days afterward, plaintiff again attempted to build the shanty, and slept there without bedding, but T. again tore it down before completion, and drove him off. Nothing further was done by plaintiff for three years, when he brought ejectment against T. Held, that plaintiff had no such title or possession as entitled him to maintain the action.—Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

§ 36. —— Sufficiency as Against Intruder.

[a] Where one in peaceable possession of land is ousted by a bare trespasser, who enters without claim of title, he may recover in ejectment on proof of prior possession, though such possession was not held for the time and in the manner required for a prescriptive title.—Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Potter v. Knowles, 5 Cal. 88.

[b] Possession gives a right of action against a mere trespasser, even where title may be shown to exist in another.—Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615.

[c] One who has built a fence of any kind around land, which, together with natural barriers, is sufficient to turn cattle, and has used it for pasturage, can maintain ejectment to recover it from a mere intruder, who enters without right or title.—Southmayd v. Henley, 45 Cal. 101.

[d] Where plaintiff's grantor, while in possession of the demanded premises, sold the same to plaintiff, who thereafter and up to the entry of defendant occupied the same as pastures for his cattle, and defendant shows no title or right of entry, plaintiff is entitled to recover.—Pierce v. Stuart, 45 Cal. 280.

[e] Code of Civil Procedure, section 325, providing that title by adverse possession cannot be established unless the party claiming it has occupied the land for five years, and paid all taxes thereon during that time, applies only to actions between the holder of the legal title and the party claiming adversely, and not to actions by an adverse claimant against a trespasser.—Shanahan v. Tomlinson, 103 Cal. 89, 36 Pac. 1009.

[f] Proof by plaintiff that his grantors held undisputed possession of the land in controversy for more than five years before they

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were dispossessed by defendant entitles him to recover against defendant in possession who offers no evidence in support of his right to the land, or the title of those under whom he claimed.—Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18.

[g] Where, in ejectment, defendant is found to be a mere trespasser, plaintiffs are entitled to possession of the entire property, though they own only an undivided one-half. McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27.

[h] Where plaintiff took possession of a river bed after a new channel had been cut by the river during a freshet, and cleared and cultivated such parts as were suitable therefor, pastured other parts not suitable for cultivation, on which grass grew, sold gravel from other parts, and timber and logs from parts on which they were lodged, rented the river bar for fishing purposes, and inclosed the whole tract by fences and natural barriers sufficient to turn stock, such acts of possession were sufficient to support a judgment for plaintiff as against another claiming only a possessory interest in the land.—Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

[i] Where one claims possession of state lands, natural barriers may be sufficient in place of an inclosure by fences.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

[j] On an issue whether one has had possession of certain state lands, he may avail himself of a barrier which also incloses other lands in his possession, but owned by other third persons, in addition to, and in the same inclosure with, the lands in controversy.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

[k] In an action to recover land, title to which is in the state, plaintiff may maintain his case, on proof of prior peaceable possession under a claim of right, as against all but the true owner.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

[l] In an action to recover possession of lands belonging to the state, plaintiff, claiming to have been in possession of the same, may maintain his case by proof of actual occupation and use, to the exclusion of use and occupation of others, though there were no barriers sufficient of themselves to turn stock.—Smith v. Hicks, 139 Cal. 217, 73 Pac. 144.

§ 37. —— Title to Support Possession.

[a] Where a plaintiff in ejectment seeks to recover upon prior possession, and does not show a compliance with the statute concerning possessory actions in this state, he can only recover upon proof of actual bona fide occupation.—Murphy v. Wallingford, 6 Cal. 648.

[b] A mere entry without color of title, accompanied by survey and marking of boundaries, is not sufficient.—Murphy v. Wallingford, 6 Cal. 648.

[c] Though an action of ejectment may be based upon prior possession, in case of wrongful eviction therefrom, yet, where such action is based on title, and the plaintiff offers proof of title, and does not prove an actual possession at the time of the defendant's entry, he must fail if he does not show a valid title or right of possession.—Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708.

§ 38. —— Constructive Possession Under Title.

[a] The act prescribing the mode of maintaining and defending possessory actions (Wood's Digest, p. 526) was intended for the benefit of actual settlers, and does not protect one who, for four months after location of his claim, does not reside on it, although he may have put improvements thereon.—Gird v. Ray, 17 Cal. 352.

[b] Where plaintiff's grantor had actual possession of public land, and inclosed it with a substantial fence, and by a valid deed conveyed it to plaintiff, the latter, though he himself never took actual possession of the land, but cultivated a portion of it through his employees, has constructive possession of the whole, and may maintain ejectment against an intruder on any part thereof.—Dodge v. Yates, 76 Cal. 251, 18 Pac. 323.

[c] A person may be in possession of land without a personal residence thereon, and without having personally cultivated it.—Dodge v. Yates, 76 Cal. 251, 18 Pac. 323.

§ 38½. —— Possession of Part of Entire Tract.

[a] Possession does not extend beyond occupation, without title or color of title under deed from grantor, having constructive possession.—Sunol v. Hepburn, 1 Cal. 255.

[b] In an action to recover the possession of land leased by plaintiff to defendant, it is not error to refuse to charge that, if plaintiff had a title by prior possession without written title, he could recover only that portion which is included in the inclosure. A party's possession is not confined to his actual inclosure.—Castro v. Gill, 5 Cal. 40.

[c] Where a party takes possession of a tract of land, and incloses it with a fence consisting of posts seven feet apart, and one board, six inches wide, nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed to the whole.—Baldwin v. Simpson, 12 Cal. 560.

[d] One who enters into the actual possession of part of a tract of land under a deed describing the entire tract, and claims the whole, acquires possession of the entire tract, as against one afterward entering without color of title.—McKee v. Greene, 31 Cal. 418.

[e] Where one sues in ejectment to recover land on the ground of prior possession, and shows an actual possession by inclosure of a portion only of the premises, he is en-

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tenant of another, it is proper to join the latter as party defendant.—Moore v. Moore, 94 Pac. 90.

§ 81. —— Joinder of Parties.

[a] An executor, and those who are tenants in common with him, are properly joined as plaintiffs in an action for the possession of real property.—Touchard v. Keyes, 21 Cal. 202.

[ab] Acts of ouster committed, and possession thereby acquired, by one person with the knowledge and consent of another, for their joint benefit, are the acts and possession of both, so that ejectment may be maintained against both.—Treat v. Reilly, 35 Cal. 129.

[b] Where possession is held by tenants, landlord may be joined as defendant.—Oakland Gas Light Co. v. Dameron, 67 Cal. 663, 8 Pac. 595.

§ 82. —— Election Between Defendants.

[a] Plaintiff in ejectment may elect to sue one or more defendants.—Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597.

§ 83. —— Notice to Landlord, and Leave to Defend.

[a] In ejectment against a tenant, where the landlord appears to defend, his appearance and substitution should be entered of record on notice to the parties.—Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

[b] Where, in ejectment against a tenant, the landlord has been allowed to appear and to be substituted, his right to conduct the proceedings extends to the final disposition of the case, on appeal or otherwise.—Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

[c] A landlord has a right to defend in the name of the tenant in an action of ejectment. —(Cal. 1867) Dimick v. Deringer, 32 Cal. 488.

[d] In actions of ejectment, even though commenced prior to the adoption of section 379 of the Code of Civil Procedure, where the defendant answers averring that he is the tenant of one who asks permission to defend the action, the latter, as landlord and owner, will be permitted to defend, as a matter of course, on notice and motion.—Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

[e] In an action of ejectment against a tenant, where his landlord intervenes, he may set up any equitable defenses which he might have to the action.—Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 2177-2180, § 144.

§ 84. —— Intervention.

[a] The purchasers of defendant's title at sheriff's sale may be allowed to defend, if they rely wholly on defendant's title and do not deny his possession.—McFadden v. Wallace, 38 Cal. 51.

[b] A person unconnected with the right of possession asserted by plaintiff or by defendant, but asserting a title paramount to both, cannot intervene.—Porter v. Garissino, 51 Cal. 559.

[c] If, in an action of ejectment, a third party intervenes, and his petition to be allowed to intervene does not state facts sufficient to entitle him to do so, and, without making the objection, the plaintiff and intervener agree upon the facts, and stipulate that the claim of the intervener shall be determined upon the legal effect of the stipulated facts, the plaintiff cannot afterward raise the objection that the case is not one in which an intervention can be made, or that the pleadings are insufficient for that purpose.—Donner v. Palmer, 51 Cal. 629.

[d] A third person cannot intervene in ejectment to get the court to quiet his title, as against the plaintiff, to another tract of land not in dispute between the plaintiff and defendant.—Rosecrans v. Ellsworth, 52 Cal. 509.

[e] A person who does not claim to have derived title from both plaintiff and defendant in ejectment, but asserts title in himself paramount to both, cannot intervene in such action.—Reay v. Butler, 7 Pac. 669.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 85, 86; 17 Cent. Dig., cols. 2181-2184, § 145.

§ 85. —— Substitution.

[a] Where, in an action of ejectment, a new plaintiff is substituted in place of the original, the issues are not changed, but the title to be tried is the title of the original plaintiff, and the new plaintiff cannot deraign an independent title, but must rely on the title which the first plaintiff had at the commencement of the action.—Barrett v. Birge, 50 Cal. 655.

[b] Court could substitute landlord in action of ejectment prior to adoption of section 379, Code of Civil Procedure.—Reay v. Butler, 69 Cal. 574, 111 Pac. 463.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 87; 17 Cent. Dig., cols. 2184-2186, § 146.

§ 86. Estrepement.

[a] In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action.—Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

§ 87. Notice of Lis Pendens.

[a] Prior to May 1, 1872, on which date the act of March 2, 1872, took effect, the provisions of the Practice Act in relation to filing

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notice of the pendency of actions did not apply to the action of ejectment.—Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 89; 17 Cent. Dig., cols. 2191, § 150.

§ 88. Appointment of Receiver.

[a] Receiver may be appointed in ejectment suit after judgment and during pendency of appeal.—Garniss v. Superior Court, 88 Cal. 417, 26 Pac. 351.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 90; 17 Cent. Dig., cols. 2193, 2194, § 153.

III. PLEADINGS AND EVIDENCE.

A. Pleading in General, §§ 89-127.
   1. Complaint or Declaration, §§ 89-100.
   2. Answer, Cross-complaint, Reply and Denials and Admissions, §§ 101-110½.
   3. Demurrer, Amended and Supplemental Pleadings and Motions, §§ 111-114.
   4. Issues, Proof and Variance, §§ 115-127.

B. Evidence, §§ 128-157.
   1. Judicial Notice, Presumptions and Burden of Proof, §§ 128-131.
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A. PLEADING IN GENERAL.

1. Complaint or Declaration.

FORM AND REQUISITES IN GENERAL FORM, § 89.
— REQUISITES IN GENERAL, § 89½.
— ALLEGATION OF TENDER OF DEED BY VENDOR, § 90.
DESCRIPTION OF PROPERTY—DESCRIPTION BY NAME, QUANTITY AND TRACT, § 90½.
— DESIGNATION OF BOUNDARIES, § 91.
— DESCRIPTION OF REFERENCE TO DOCUMENTS, PLATS, OR RECORDS, § 92.
TITLE, ESTATE, AND POSSESSION OF PLAINTIFF, § 93.
— GRANT, SALE, OR FORECLOSURE, § 94.
— ESTATES OF DECEDENTS, § 95.
— POSSESSION AND RIGHT TO POSSESSION, § 96.
— TIME OF TITLE OR RIGHT TO POSSESSION, § 97.
OUSTER AND POSSESSION OF DEFENDANT—NECESSITY AND SUFFICIENCY IN GENERAL, § 97½.
— TIME OF OUSTER, § 98.
DEMAND AND NOTICE, § 99.
EFFECTS CURED BY ANSWER, § 100.

89. Form and Requisites in General—Form.

[a] In a complaint in ejectment parties may ask, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action, but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought.—Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

[b] Complaint in ejectment may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial.—Boles v. Cohen, 15 Cal. 150.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 15 Cyc. 90, 91; 17 Cent. Dig., cols. 2194-2201, §§ 154-157.

§ 89½. —— Requisites in General.

[a] Where the allegations of a complaint in the district court are that the plaintiff was in possession, and lawfully entitled to the possession, at the time he was evicted by the defendant, held, that the complaint must be treated as a declaration in ejectment.—Ramirez v. Murray, 4 Cal. 293.

[b] Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof.—Payne v. Treadwell, 5 Cal. 310.

[c] A complaint in ejectment, with general averments in the usual form, is sufficient, without a specific averment of the facts. To set out the facts connected with the title and the wrongful acts of the defendant would produce confusion without benefit.—Garrison v. Sampson, 15 Cal. 93.

[d] A complaint in ejectment, averring that plaintiff was in the actual possession of the premises by inclosure and cultivation, that defendants, on a certain day, entered upon the same, and ousted the plaintiff, and that defendant is still in possession, is sufficient.—Boles v. Weifenback, 15 Cal. 144.

[e] Complaint in ejectment averring prior possession in plaintiff, entry and ouster by defendant, and that he is still in possession, sufficient.—Boles v. Cohen, 15 Cal. 150.

[f] Complaint should only aver that on some day designated plaintiffs were possessed of the land, describing it; that, while thus possessed, defendant entered upon the same and ousted them, and has ever since withheld the possession from them, to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster.—Coryell v. Cain, 16 Cal. 567.

[g] A complaint in ejectment which avers that the plaintiffs the the owners in fee as tenants in common of the premises, and that the defendants are in possession and withhold it from the plaintiffs, is sufficient, and an allegation of lawful right in the plaintiff,

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and that "unlawfully" and "wrongfully" he withholds the possession, will not vitiate the pleading.—Payne v. Treadwell, 16 Cal. 220.

[h] A complaint which avers that on a certain day plaintiff was, and ever since has been, and still is, owner in fee simple, seised and possessed, etc., and that on a day there after named, and while plaintiff was so the owner in fee simple, defendants entered and ousted him, and from thence hitherto have and do withhold the same, is good, unless demurred to on the ground that it is ambiguous, unintelligible, and uncertain.—Brown v. Martin, 25 Cal. 82.

[i] A complaint is sufficient if it avers that plaintiff owns land, and that defendant is in possession adversely to him, and withholds the same.—Keller v. Ruiz De Ocana, 48 Cal. 638.

[j] In ejectment for nonpayment of the purchase price under contract of sale, where the complaint states facts constituting a cause of action, it is not demurrable because it also states facts which give defendant an opportunity to redeem, and to avoid the effect of a judgment of restitution by performing the contract.—Kerns v. Dean, 77 Cal. 555, 19 Pac. 817.

[k] In ejectment, a complaint alleging that plaintiff is seised in fee of the realty, and defendant is in possession, and against plaintiff's will detains and withholds the possession thereof, is sufficient on demurrer.—(Cal. 1891) Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968.

[l] In the complaint of the harbor commissioners in the action of ejectment, it was not necessary to specify the use to which the commissioners propose to put the premises when recovered. That question does not concern a defendant who has no right to the possession or control of the property.—People v. Mullender, 132 Cal. 217, 64 Pac. 299.

[m] Where a complaint in ejectment by a vendor against a vendee avers ownership in the plaintiff, the making of a contract for the sale thereof to defendant, the payment of a part of the contract price by defendant, his entry into possession, the tender of a deed, demand and refusal of payment, notice of rescission of contract by plaintiff, tender to the defendant of the money paid with interest, and demand of possession, which was refused, it is sufficient.—Gates v. McLean, 9 Pac. 938.

§ 90. —— Allegation of Tender of Deed by Vendor.

[a] A complaint in ejectment by a vendor against a purchaser need not set out the deed tendered to the defendant, and the averment that he tendered a good and sufficient deed of grant, bargain, and sale to the property shows a compliance with his part of the agreement.—Haile v. Smith, 113 Cal. 656, 45 Pac. 872.

§ 90½. Description of Property—Description by Name, Quantity, and Tract.

[a] Where a declaration describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence.—Castro v. Gill, 5 Cal. 40.

[b] A tract of land known by a particular name may be described by such name in the complaint.—Hildreth v. White, 66 Cal. 542, 6 Pac. 454.

§ 91. —— Designation of Boundaries.

[a] A description by metes and bounds is required in ejectment only so far as is necessary to identify with certainty the property. In this case, a reference to the corner of the streets, the number of feet on each street, the running back to an alley, and the reference to the plot of the town where it was laid out, were held to indicate sufficiently the bounds of the premises.—Doll v. Feller, 16 Cal. 432.

[b] Section 58 of the Practice Act, that, "in an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint," is directory only, for a failure to comply with which the complaint is liable to a special demurrer; but, if the complaint describes the premises sufficiently otherwise to identify them according to the general rules on this subject, the plaintiff may, after verdict, take judgment, and the court cannot set it aside on motion of defendant on account of this defect of pleading.—Whitney v. Buckman, 19 Cal. 300.

[c] A complaint in ejectment described the southwest corner as "the source of W. creek." Held, that a demurrer could not be sustained on the ground of insufficiency or uncertainty, as the possible facts of the nonexistence of such a creek, or of the existence of several sources of it, could not be presumed, but must be shown by proof at the trial.—Carpentier v. Grant, 21 Cal. 140.

[d] A description is sufficient which calls for a lot of land one hundred varas square, bounded on three sides by well-known streets on the plat of the city properly laid out, and on the other by the unsurveyed lands.—Garwood v. Hastings, 38 Cal. 216.

[e] A complaint in ejectment sufficiently describes the property as two hundred and eight chains twenty links east of the corner to townships 1 and 2 north, ranges 4 and 5 west, Mount Diablo meridian, where the starting point is the only one answering to that description.—Sherman v. McCarthy, 57 Cal. 507.

[f] A complaint sufficiently describes the land in controversy by calling for a well-ascertained beginning point, from whence the land is to be run to a designated monument, a "station fence post," and then giving the course of every other call in the description. Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

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[g] Where, in ejectment, the land is described as being in S. township, S. C. county, California, and bounded on the northeast by Bay avenue, on the southeast by the land of M. E. Land, and on the southwest and northwest by S. creek, the description is sufficient on special demurrer.—Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968.

[h] A complaint in ejectment, in describing the land sued for, need not specify the character in which a surveyor mentioned in such description established lines referred to. Pierce v. Hilton, 102 Cal. 276, 36 Pac. 595.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 92-95; 17 Cent. Dig., cols. 2202-2210, §§ 158-164.

§ 92. —— Description by Reference to Documents, Plats, or Records.

[a] A complaint in ejectment for a portion of a rancho, describing the land sued for as "tracts A and B, as designated on the map accompanying the referee's report in the partition suit of said rancho," in the superior court, is not bad for insufficiency of description.—Pierce v. Hilton, 102 Cal. 276, 36 Pac. 595.

§ 93. Title, Estate, and Possession of Plaintiff.

[a] A complaint alleging that plaintiff was the owner and entitled to possession of certain land sued for, that defendant was a tenant at will and refused to surrender possession after notice, etc., held to state a cause of action in ejectment.—Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

[b] The allegation of possession at the time of the ouster complained of is a sufficient allegation of title to sustain the declaration.—Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578.

[c] The declaration must allege title or at least actual possession, not merely occasional use, by the plaintiff, and a continued adverse holding by the defendant.—Steinback v. Fitzpatrick, 12 Cal. 295.

[d] A plaintiff in ejectment may state his title in general terms in his complaint, but, if he undertakes to set forth the particular facts on which it rests, he must allege all that he could have been called upon to prove under his general averment, in order to recover.—Castro v. Richardson, 18 Cal. 478.

[e] An allegation that on a day named the plaintiff "was possessed of certain lands therein described, which said premises the said plaintiff claims in fee simple absolute," followed by a further allegation that he, "being possessed thereof, and being so the owner thereof as aforesaid," the defendant entered, etc., must be construed to amount to an averment of title in fee simple absolute.—Marshall v. Shafter, 32 Cal. 176.

[f] An allegation that plaintiff is the owner of land sued for is substantially an allegation of seisin in fee.—Garwood v. Hastings, 38 Cal. 216.

[g] A complaint by an executor is not necessarily defective because it does not allege title in testator, as neither title nor right of possession may have been in the testator at the time of his death, but may have been afterwards acquired by the executor in his representative capacity.—Salmon v. Wilson, 41 Cal. 595.

[h] Where plaintiff contracted to sell land, and has received the purchase money, and the contract is rescinded, he must allege repayment, or tender of the amount, in an action of ejectment to recover the land.—Bohall v. Diller, 41 Cal. 532.

[i] Allegation that plaintiff is "owner" is of an ultimate fact and sufficient when not stated as conclusion from other facts.—Herser v. Miller, 77 Cal. 193, 19 Pac. 375.

[j] Where the complaint in ejectment simply sets forth a deraignment of title, and then alleges that "while plaintiff was the owner, and entitled to possession, as hereinbefore mentioned and set forth, the defendant entered," the allegation as to ownership will be disregarded, as stating a mere conclusion. Hutchinson v. McNally, 23 Pac. 132.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 95-97; 17 Cent Dig., cols. 2211-2221, §§ 165-174.

§ 94. —— Grant, Sale, or Foreclosure.

[a] In an action to recover the possession of real estate, the title thereto may, and ought to, be pleaded without alleging seriatim the chain of conveyances by which it is to be proved.—(Cal. 1860) Coryell v. Cain, 16 Cal. 567.

§ 95. —— Estates of Decedents.

[a] Plaintiff claiming under a will must aver and prove its probate.—Castro v. Richardson, 18 Cal. 478.

[b] The complaint having alleged that the homestead was set apart to the widow, and that plaintiff, as devisee under decedent's will, and as owner of the land, became and was entitled to possession on her death, the possibility that the homestead was set off to the family for a time extending beyond the widow's death is precluded.—Hutchinson v. McNally, 85 Cal. 619, 24 Pac. 1071, reversing (1890) 23 Pac. 132.

[c] A complaint alleged that the land was devised to plaintiff; that it was the homestead of decedent and his wife, and was selected from the separate property of decedent without his consent; that, after decedent's death, an order was made setting off said homestead to decedent's widow, and that she continued in possession until after her death. By Civil Code, section 1265, a homestead in the separate properly of the husband can be set apart to the widow for a limited period,

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not longer than during her life. Held, that the complaint was not demurrable on the ground that it did not show that the homestead to which plaintiff's estate was subject had ceased to exist at the time the action was brought, as it would not be presumed against plaintiff that the court set apart the homestead for a longer time than that allowed by law.—Hutchinson v. McNally, 85 Cal. 619, 24 Pac. 1071, reversing (1890) 23 Pac. 132.

§ 96. —— Possession and Right to Possession.

[a] In a possessory action it is sufficient for the plaintiff to state that he was lawfully entitled to the possession of the premises without setting out the evidence of his right.—Gladwin v. Stebbins, 2 Cal. 103.

[b] In an action of ejectment, the plaintiff need not aver title. An averment of prior possession and an ouster is sufficient, for prior possession is evidence of title, and cannot be made to yield to mere color of title.—Norris v. Russell, 5 Cal. 249.

[c] The mere averments in a complaint that the plaintiffs have lawful title as owners in fee simple of the premises, and that the defendant is in possession, and unlawfully withholds the same, are insufficient to maintain an action of ejectment.—Payne v. Treadwell, 5 Cal. 310.

[d] The allegation of possession in an action of ejectment is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining.—Smith v. Doe, 15 Cal. 100.

[e] In ejectment of a landlord against a tenant at sufferance, the complaint need not state the tenancy and its termination.—McCarthy v. Yale, 39 Cal. 585.

[f] An allegation that plaintiff assumed and did exercise acts of control over a portion of land is not equivalent to an amendment that he had actual possession of the land or any part of it.—Brennan v. Ford, 46 Cal. 7.

§ 97. —— Time of Title or Right to Possession.

[a] A complaint which alleges ownership in fee in plaintiff, and an ouster by defendant on a day named, before commencement of the action, is sufficient, without further alleging that plaintiff was the owner in fee at the commencement of the action.—(1884) Salmon v. Symonds, 24 Cal. 260; (1885) Allen v. Holt, 7 Pac. 421.

§ 97½. Ouster and Possession of Defendant — Necessity and Sufficiency in General.

[a] A complaint against several defendants is not defective because it alleges that defendant committed the ouster.—Fay v. McKeever, 59 Cal. 307.

[b] A complaint which avers that "defendants are in possession of said lands and the whole thereof, withhold the possession of the same from plaintiff, and exclude him from the same," sufficiently alleges an ouster by defendants, in the absence of special demurrer.—Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867.

[c] A complaint otherwise sufficient is not vitiated by an allegation that the entry was made willfully, fraudulently, maliciously, and forcibly.—Hildreth v. White, 66 Cal. 549, 6 Pac. 454.

[d] A complaint in ejectment alleging the leasing of the premises to defendant; that the lease had expired; and that defendant refused to vacate the premises, and "has withheld, and still withholds, the possession thereof from the plaintiff,"—sufficiently avers that defendant is in possession.—McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 98, 99; 17 Cent. Dig., cols 2221-2224, §§ 175-179.

§ 98. —— Time of Ouster.

[a] In the modified form in which ejectment is known under our practice, the allegation of the time of ouster is material only on the question of mesne profits; therefore it is no objection that it is laid before the plaintiff had a good legal title.—Yount v. Howell, 14 Cal. 465.

[b] Complaint in ejectment need not state the exact time of the alleged ouster, especially when no claim is made for damages and no recovery had for them.—Collier v. Corbett, 15 Cal. 183.

[c] A complaint in ejectment, filed December 4, 1889, which alleges that on December 20, 1888, plaintiff was the owner and in possession of the premises sued for, and "that on the twenty-fourth day of December, 1889, plaintiff being so seised and possessed, defendant wrongfully entered and ousted plaintiff from the possession thereof, and now witholds wrongfully the possession," is not objectionable on general demurrer as alleging ouster subsequent to the filing of the complaint, as it is evident that this was a clerical error merely, and is inconsistent with the allegation that defendant "now withholds," etc.—Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109.

§ 99. Demand and Notice.

[a] Where a vendee of land, having entered under a bond for a deed and a contract that if he failed to pay interest, the vendor might take possession without process of law, subsequently makes default in the payment of the interest, and notifies the vendor that he claims an adverse title, and records an instrument declaring that he surrenders to the vendor the bond for a deed, and all rights conferred thereby, a complaint by the vendor to recover the land need not aver a demand and refusal.—Coates v. Cleaves, 92 Cal. 427, 28 Pac. 580.

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FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 99; 17 Cent. Dig., cols. 2224, 2225, § 180.

§ 100. Defects Cured by Answer.

[a] A complaint in ejectment, defective for failure to allege that plaintiff was entitled to possession at the commencement of the action, is cured by a denial in the answer that plaintiff was entitled to possession.—Vance v. Anderson, 113 Cal. 532, 45 Pac. 816.

2. Answer, Cross-complaint, Reply and Denials and Admissions.

ANSWER—FORM AND REQUISITES IN GENERAL, § 101.
—— GENERAL ISSUE, § 102.
—— SPECIAL PLEAS, § 102½.
—— EQUITABLE TITLE AND DEFENSES, § 103.
—— ANSWER OF INTERVENER, § 104.
—— WANT OF TITLE OR RIGHT TO POSSESSION IN PLAINTIFF, § 105.
—— LIMITATION AND LACHES, § 106.
DISCLAIMER—REQUISITES AND SUFFICIENCY IN GENERAL, § 107.
CROSS-COMPLAINT, § 108.
REPLY, § 109.
DENIALS AND ADMISSIONS IN PLEADING, § 110.
—— POSSESSION AND OUSTER, § 110½.

§ 101. Answer—Form and Requisites in General.

[a] Answer to complaint in ejectment should contain matter constituting legal or equitable defense.—Hoffman v. Remant, 72 Cal. 2, 12 Pac. 804.

[b] An answer averring a tender of the purchase money on or about a certain date is sufficient as against a general demurrer, in the absence of a special demurrer for uncertainty; and it is sufficient that the answer shows a tender of the purchase money while the plaintiff was treating the agreement in force, though the tender was made after the date fixed by the contract.—Haile v. Smith, 113 Cal. 656, 45 Pac. 872.

[c] In an action of ejectment, where the defendants in their answer merely deny that they unlawfully entered upon the lands described in the complaint, or that they unlawfully withhold possession thereof from plaintiff, such answer admits the possession by the defendants of lands within the tract described in the complaint.—Los Angeles etc. Co. v. Thompson, 117 Cal. 594, 49 Pac. 714.

[d] An answer in an action of ejectment which does not deny the plaintiff's ownership, but denies that he was at any time in the possession, or entilted to the possession, of the land and premises in controversy, and sets up a contract under which the defendants were lawfully in possession, presents a sufficient defense to the action.—Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

[e] Answers, though not denying the possession of the plaintiff, which denied that the plaintiff was at any time the owner of any right, title, or interest in or to the premises, or any part or parts thereof, and denied that the defendants had no estate, right, title, or interest in the lands, and affirmatively alleged that at the commencement of the action two of the defendants named owned, and still own, the title in fee to the premises, raised issues upon which the defendants were entitled to be heard.—Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 99; 17 Cent. Dig., cols. 2225-2235, §§ 181-189.

§ 102. —— General Issue.

[a] An answer that the defendant "is not guilty if the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof," amounts to a general denial only, and, when the complaint is sworn to, raises no issue.—Schenk v. Evoy, 24 Cal. 104.

[b] In ejectment, the recitals in the answer of the series of facts through which defendant claims a right to the land, are mere averments of evidence, and amount to no more than a general denial.—Clink v. Thurston, 47 Cal. 21.

[c] In an action of ejectment, an answer by a defendant affirmatively setting up title in himself in detail is to be construed as a general denial of the plaintiff's title, and not as a cross-complaint requiring an answer from the plaintiff.—Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

§ 102½. —— Special Pleas.

[a] A plea of a former recovery in ejectment against one of the several plaintiffs is bad if pleaded as a general defense to the whole action.—Anderson v. Fisk, 36 Cal. 625.

[b] After pleading the general issue, the defendant need not set up title in himself.—Bruck v. Tucker, 42 Cal. 346.

§ 103. —— Equitable Title and Defenses.

[a] Where the defendant in an action of ejectment relies upon a verbal contract for the sale of the land, accompanied with acts of part performance sufficient to take the contract from the operation of the statute of frauds, an answer disclosing such contract is not demurrable.—Arguello v. Edinger, 10 Cal. 150.

[b] An equitable defense in an action of ejectment must be distinctly pleaded.—Estrada v. Murphy, 19 Cal. 248; Lestrade v. Barth, 19 Cal. 660; Cadiz v. Majors, 33 Cal. 288; McCauley v. Fulton, 44 Cal. 355.

[c] If a defendant in an action of ejectment desires to avail himself of an equitable defense as a bar, he must set it up with the same particularity that is observed in a bill in equity.—Downer v. Smith, 24 Cal. 114.

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[d] An equitable title set up in the answer in ejectment must be sufficiently pleaded to warrant the court in granting a decree which will stop the further prosecution of the action.—Downer v. Smith, 24 Cal. 114; Blum v. Robertson, 24 Cal. 127.

[e] The party relying upon an equitable estoppel in pais in an action at law must inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet, and to do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity.—Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157.

[f] Whether an answer in ejectment states a case within the equity jurisdiction of the court or not must be determined by the answer itself.—Bodley v. Ferguson, 30 Cal. 511.

[g] Where defendant relies on an equitable defense, he must set up the facts fully in his answer.—Tormey v. True, 45 Cal. 105.

[h] An equitable defense in an action of ejectment should contain, in substance, the elements of a bill in equity.—Kentfield v. Hayes, 57 Cal. 409.

[i] Where defendant in ejectment relies upon equities as a defense, he must set forth the facts on which he relies in the answer as fully as it would be necessary to state them in a bill of equity praying a decree for a conveyance of the legal title.—Arguello v. Bours, 67 Cal. 447, 8 Pac. 49.

[j] An answer denying generally all material allegations of the complaint, and after using the words, "further answering, by way of cross-complaint," setting up matters constituting an equitable defense, is good on general demurrer; the character of the pleading being determined by the court, by the facts alleged, and not by what it might be called by the pleader.—Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764.

[k] Defendant set up in his answer that the deed under which plaintiff claimed was only a mortgage, and that the debt had been fully paid; but he did not ask for any affirmative relief from the mortgage. Held, that the answer was in effect only a denial of plaintiff's title; that whether the debt had been paid or not was immaterial; and that plaintiff was not entitled to proceed first with the trial of the question as to whether the deed was a mortgage, on the ground of an equitable defense.—Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186.

§ 104. —— Answer of Intervener.

[a] Where, after defendant has answered raising issues on the question of title, his attorney appears for a person not made defendant, and by stipulation the answer is considered as the answer of this latter person, he must connect himself by evidence with the title of the original defendant before he can introduce evidence as to the issues.—Baldwin v. Bornheimer, 48 Cal. 433.

§ 105. —— Want of Title or Right to Possession in Plaintiff.

[a] The averment of forfeiture is a legal conclusion upon which no issue can be taken. The facts should be taken so as to enable the court to determine whether the forfeiture did accrue.—Dutch Flat Water Co. v. Mooney, 12 Cal. 534.

[b] Where, in an action of ejectment, the complaint did not directly aver a seisin or ownership of the premises by plaintiff, but alleged that the plaintiff, by location, survey, and certain other acts, acquired possession; and the answer denied these acts, except the survey, and denied that plaintiff acquired possession by location "or in any other manner," held, that the allegation of any prior possession was sufficiently denied by the answer.—La Rue v. Oppenheimer, 20 Cal. 517.

[c] An answer in ejectment should aver possession and title in defendant to the lands demanded adverse to plaintiff's claim.—Anderson v. Fisk, 36 Cal. 625.

[d] In an action of ejectment, where the answer denies the averments of the complaint with respect to the plaintiff's ownership and right of possession, further allegations therein with respect to the ownership of the grantors of the plaintiff are immaterial and need not be denied.—Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88.

[e] Defendant set up in his answer that the deed under which the plaintiff claimed was only a mortgage, and that the debt had been fully paid; but he did not ask for any affirmative relief from the mortgage. Held, that the answer was in effect only a denial of plaintiff's title; that whether the debt had been paid or not was immaterial.—Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

[f] In ejectment, a portion of defendant's answer, alleging that plaintiffs' claim of title arises from a pretended entry of the land in the United States land office as a placer mining claim, and a certificate of purchase based thereon, which they induced the local land office to issue to them by means of false affidavits and testimony, and that defendant had filed a protest against the allowance of the entry in the general land office, is properly stricken out, since it does not show that any question as to the validity of plaintiffs' entry and purchase was then pending and undecided in the land office.—McTarnahan v. Pike, 91 Cal. 540, 27 Pac. 784.

[g] An answer in ejectment denying "that said plaintiff on said second day of January, 1899, or at any other time, was possessed or entitled to the possession of said land and premises," is a sufficient denial of plaintiff's possession or right of possession.—Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

[h] Where the complaint in ejectment alleges title in fee in plaintiff, and the answer denies such title, allegations in the answer

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setting forth various links in plaintiff's title, and declaring them defective, are properly struck out as surplusage.—Nelson v. O'Brien. 139 Cal. 628, 73 Pac. 469.

§ 106. —— Limitations and Laches.

[a] A plea of the statute of limitations which states that plaintiff was not seised or possessed of the land within five years before the commencement of the action is fatally defective in not stating that neither plaintiff, his predecessor, nor grantor was thus possessed.—Sharp v. Daugney, 33 Cal. 505.

§ 107. —— Disclaimer—Requisites and Sufficiency in General.

[a] A disclaimer of title and possession in ejectment does not authorize a judgment by confession, for it does not confess possession which is necessary to found a judgment upon. Noe v. Card, 14 Cal. 576.

[b] The defendant in ejectment, wishing to defend as to part only of the premises, and to obtain a proportionate reduction in the damages awarded as mesne profits, should frame his defense accordingly, specifying the portion of the lot for which it was intended to defend, and disclaiming as to the balance; otherwise he has no remedy, though the finding be against him for the whole.—Guy v. Hanly, 21 Cal. 397.

[c] Disclaimer is unknown in actions of ejectment.—Ellis v. Jeans, 26 Cal. 272.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 102; 17 Cent. Dig., cols. 2237-2239, §§ 193-196.

108. Cross-complaints.

[a] Defendants in ejectment, who are the executors of the estate of the grantor of the plaintiff, cannot claim a decree annulling the deed of the testator to the plaintiff, on the ground that it is fraudulent and void as against creditors of the estate, except upon the allegations of a cross-complaint praying for affirmative relief.—Hills v. Sherwood, 48 Cal. 386.

[b] Where defendant in ejectment alleges equities as a defense in a cross-bill, and bases on them a prayer for equitable relief, he must set forth the facts as fully as it would be necessary to state them in a bill in chancery, praying a decree for a conveyance of the legal title.—Arguello v. Bours, 67 Cal. 17, 8 Pac. 49.

[c] Cause of action against vendee for recovery of money paid on failure of vendor's title cannot be set up by way of cross-complaint.—Hoffman v. Remant, 72 Cal. 4, 12 Pac. 804.

[d] Facts set up in pleading, and not name even it, determine its character as an answer or cross-complaint.—Meeker v. Dalton, 50 Cal. 154, 16 Pac. 764.

[e] Defendant may set up contract to convey as defense and have it specifically enforced by way of cross-complaint.—Nunez v. Morgan, 77 Cal. 431, 19 Pac. 753.

[f] In an action of ejectment a cross-complaint to quiet the title of the defendant is unnecessary, and matter of defendants' title constituting a defense should not be pleaded as a cross-complaint; and any attempt to make allegations by way of a cross-complaint to quiet title constitutes a mere answer to plaintiff's complaint. The character of the pleading is to be determined by the court regardless of what defendants call their pleading.—Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637.

[g] Under Code of Civil Procedure, section 442, providing that a defendant who seeks affirmative relief affecting the property to which the action relates may file a cross-complaint setting up the relief asked, a cross-complaint may be filed, in ejectment by a city for possession of a street, to reform deeds to land, the description in which is claimed to show a dedication of the land in controversy.—City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125.

[h] Where a plaintiff brings one action of ejectment for two separate parcels of land, defendant may, in one cross-complaint, seek affirmative relief as to each parcel separately, under Code of Civil Procedure, section 442, providing that a defendant who seeks affirmative relief affecting the property in suit may file a cross-complaint therefor.—City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125.

[i] A cross-complaint in ejectment, alleging title in defendant, and asking that it be quieted against plaintiff, is unnecessary, and may be struck out without injury to defendant.—Nelson v. O'Brien, 139 Cal. 628, 73 Pac. 469.

[j] Under Code of Civil Procedure, section 442, defendant in ejectment held entitled to file a cross-complaint.—Martin v. Molera, (Cal. App.), 87 Pac. 1104.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 104; 17 Cent. Dig., cols. 2240, 2241, § 198.

§ 109. Reply.

[a] An averment in an answer that plaintiff's grantor had made a prior sale to defendant amounts only to a denial of plaintiff's title, and need not be replied to. Thompson v. Thompson, 52 Cal. 154.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 104; 17 Cent. Dig., cols. 2241-2243, §§ 199, 200.

§ 110. Denials and Admissions in Pleadings.

[a] Where a complaint avers ownership in plaintiff and ouster by defendant, and the answer admits possession, avers fee in defendant, and deraigns title from an administrator's sale, the answer amounts to an admission of plaintiff's title if the sale was void.—Pryor v. Madigan, 51 Cal. 178.

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[b] In ejectment for two and twelve one hundredths acres of land plaintiffs alleged they were owners, and that defendant excluded them from possession. Defendant's answer denied every allegation "except as hereinafter stated," and then admitted defendant was in possession of one and sixty-five one hundredths acres, and that he withheld the same from plaintiffs; but denied the possession or withholding of the remainder. Held, that the answer did not admit that plaintiffs owned forty-seven one hundredths of an acre of the land.—Stites v. Gater, 45 Pac. 185.

[c] In ejectment a cross-complaint alleging possession in defendants which is not denied by plaintiff is a sufficient proof of ouster.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

[d] In ejectment, defendant's denial of plaintiff's title and right of possession, is an admission of the ouster of plaintiff by defendant.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

§ 110½. —— Possession and Ouster.

[a] A denial that the defendant unlawfully possessed is no denial, and consequently is an admission of the material allegation that he was in possession.—Burke v. Table Mountain Water Co., 12 Cal. 403.

[b] Where a complaint in ejectment avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, though the allegation of possession be immaterial, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact, not in issue by the pleadings, but affecting the whole case; and hence it is not necessary to show that defendant was in possession when suit was commenced.—Powell v. Oullahan, 14 Cal. 114.

[c] An answer, filed twelve days after the complaint, which avers that the defendant is not in possession of the land claimed by the plaintiff, and that he does not withhold, nor has he ever withheld, the same, etc., is not a sufficient denial of the charge that he was in possession at the time when the action was brought, and therefore that allegation must be taken as confessed.—Schenk v. Evoy, 24 Cal. 104.

[d] If, in ejectment, the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action is not admitted by the pleadings, although it be not specially denied.—Hawkins v. Reichert, 28 Cal. 534.

[e] Where five years' adverse possession is pleaded, and the parties stipulate that plaintiff was never in possession, but the stipulation admits title to have been in plaintiff, it will be construed as referring to actual possession.—City and County of San Francisco v. Fulde, 37 Cal. 349, 99 Am. Dec. 278.

[f] Where an answer puts in issue plaintiff's title and right of possession, but does not deny that defendant was in possession, it amounts to an admission of ouster.—Salmon v. Wilson, 41 Cal. 595.

[g] Where, in ejectment, the answer admits the possession by the defendant of a portion of the premises, the plaintiff need not prove it.—McCreery v. Everding, 44 Cal. 284.

[h] If, in ejectment, the parties are tenants in common, and the defendant in his answer denies the plaintiff's title and right of entry, the denial is proof of an ouster.—Spect v. Gregg, 51 Cal. 198.

[i] In ejectment by a widow, who had sold her interest in community property, and by her daughter, to get possession of their homestead right, defendant cannot contend that he has not contested the right of the daughter to possession as a tenant in common with him, so that there has been no ouster, when the complaint avers title in plaintiffs and ouster by defendant, and the answer denies every material allegation of the complaint, and pleads the statute of limitations, and when the agreed statement of facts admits that on a given date the widow, on behalf of herself and daughter, demanded of defendant that they be let into possession, but that defendant refused, and has since withheld possession from plaintiffs.—Phelan v. Smith, 100 Cal. 158, 34 Pac. 667.

[j] In ejectment, if the defendant in his answer admits acts amounting to an ouster, but denies plaintiff's title or right to possession, plaintiff is not bound to prove ouster, and, if he prove title and right to possession in himself, is entitled to recover.—Ketchum v. Barber, 12 Pac. 251.

[k] In an action in the nature of ejectment, where the evidence tends to prove that defendants were in possession of the premises when the action was commenced, an answer denying plaintiff's title and right of possession is sufficient evidence of ouster.—Moore v. Moore, 34 Pac. 90.

3. Demurrer, Amended and Supplemental Pleadings and Motions.

DEMURRER, § 111.
AMENDED PLEADINGS, § 112.
SUPPLEMENTAL PLEADINGS, § 112½.
MOTIONS FOR JUDGMENT ON THE PLEADINGS, § 113.
MOTIONS TO STRIKE OUT, § 114.

§ 111. Demurrer.

[a] The defense of the statute of limitations cannot be made by a demurrer which states in general terms that the complaint does not state facts sufficient to constitute a cause of action, but it must distinctly state the statute.—Brown v. Martin, 25 Cal. 82.

[b] The specification in a special demurrer to a complaint for uncertainty, in that it could not be ascertained therefrom "what was the character of the alleged possession

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of plaintiff of the property described," though not very clear, is sufficient to put the plaintiff upon notice that the complaint is objected to for not specifically alleging actual possession.—Knowles v. Crocker Estate Co., 125 Cal. 264, 57 Pac. 998.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 107, 108; 17 Cent. Dig., cols. 2249-2251, § 204.

§ 112. Amended Pleadings.

[a] If a defendant in ejectment desire to set up a title acquired pending the action, he can do so only by amending his answer, and averring that the title was acquired since the commencement of the action.—Reily v. Lancaster, 39 Cal. 354.

[b] In ejectment, there is no error in denying an application to amend the answer by setting up a judgment of a county court as a bar to the action; such courts having jurisdiction of no action, a judgment in which would bar an action in ejectment.—Kirsch v. Smith, 64 Cal. 13, 27 Pac. 942.

[c] Plaintiffs may be permitted to amend the number of the range described in their complaint. Such amendment corrects a mistake, and does not substitute a new cause of action.—Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24.

[d] Where defendant settled on land under application to purchase, and plaintiff applied for and secured the same land by fraudulently representing that defendant had abandoned it, in ejectment by plaintiff it was not error to allow defendant to amend his cross-complaint by pleading a tender of the purchase price, and offer to deposit in court, as Code of Civil Procedure, section 473, permits amendments of pleadings in conformity with justice.—Crosby v. Clark, 132 Cal. 1, 63 Pac. 1022.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 108-111; 17 Cent. Dig., cols. 2251-2261, §§ 205-214.

§ 112½. Supplemental Pleadings.

[a] In an action of ejectment, a title acquired by the defendant pending the suit should be set up by a supplemental answer. McMinn v. O'Connor, 27 Cal. 238.

[b] Title acquired by defendant pendente lite, and other matters of defense arising subsequent to the commencement of suit, must be set up by a supplemental answer. Moss v. Shear, 30 Cal. 468.

[c] A title acquired by sheriff's deed executed after the commencement of an action of ejectment can only be made available by defendant by setting it up by supplemental answer.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

[d] Supplemental answer will be presumed to have been filed by leave of court.—Roper v. McFadden, 48 Cal. 346.

§ 113. Motions for Judgment on the Pleadings.

[a] A motion for a judgment on the pleading will not be granted where the answer raises an issue as to some portion of the property, though such answer may be demurrable for uncertainty.—Chester v. Field, 87 Cal. 422, 25 Pac. 493.

[b] Where the complaint in ejectment alleged that the plaintiff was seised in fee of the premises, and that defendant was in the unlawful and wrongful possession thereof, and wrongfully withheld the possession from plaintiff, and defendant denied merely that his possession and withholding were wrongfully and unlawful, it was proper to find for plaintiff.—F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 112; 17 Cent. Dig., cols. 2264, 2265, § 218.

§ 114. Motions to Strike Out.

[a] Averments in a complaint in an action of ejectment, which are immaterial or matters of evidence, should be stricken out as irrelevant, even where they consist of a deraignment of title.—Larco v. Casaneuava, 30 Cal. 560.

4. Issues, Proof and Variance.

ISSUES, § 115.
ISSUES AS TO TITLE, POSSESSION OR RIGHT TO POSSESSION, § 116.
NECESSITY OF PROOF OF TITLE, POSSESSION OR RIGHT TO POSSESSION—SOURCE AND VALIDITY OF TITLE, § 117.
—— NATURE AND EXTENT OF TITLE, § 118.
—— TIME OF TITLE OR RIGHT OF POSSESSION, § 119.
PARTICULAR ELEMENTS OR REQUISITES IN DERAIGNMENT OF TITLE, § 120.
NECESSITY OF PROOF OF TITLE IN ALL COPLAINTIFFS, § 121.
EVIDENCE ADMISSIBLE UNDER THE PLEADINGS, § 122.
TITLE IN GENERAL, § 123.
—— LIMITATION AND ADVERSE POSSESSION, § 124.
—— POSSESSION AND RIGHT TO POSSESSION, § 125.
—— EQUITABLE DEFENSES, § 126.
STIPULATIONS, § 127.

§ 115. Issues.

[a] Denial that plaintiff had herself signed a notice to quit held not to put in issue the service of such notice.—Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cent. Dig., cols. 2266-2268, § 220.

§ 116. Issues as to Title, Possession or Right to Possession.

[a] When the possession of the premises is put in issue by the answer of the defendant

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in an action of ejectment, the possession of the premises at the time the action was commenced becomes a material issue, which the plaintiff is bound to prove before he is entitled to recover.—Pope v. Dalton, 31 Cal. 218.

[b] The allegations as to time of seisin or ouster are not material, and the denial of them raises no issue, except where the mesne profits are in question.—Kidder v. Stevens, 60 Cal. 414.

[c] In ejectment answer held to raise the issue of the right to possession on the date of the filing of the complaint.—McGillivray v. Miller (Cal. App.), 84 Pac. 778.

§ 117. Necessity of Proof of Title, Possession or Right to Possession—Source and Validity of Title.

[a] If the defendant in ejectment relies on a deed claimed to have been given to him by the plaintiff, but lost, he must prove, not only the existence of the deed, but its contents.—Sais v. Sais, 49 Cal. 264.

[b] Where both parties claim title from same source, plaintiff need not prove conveyance to person having source of title.—Frink v. Roe, 70 Cal. 305, 306, 11 Pac. 820.

[c] Where it appears by the verified answer that both parties claim title through a common source, the plaintiff need not prove title in his grantor.—McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 114-118; 17 Cent. Dig., cols. 2269-2281, §§ 222-228.

§ 118. —— Nature and Extent of Title.

[a] Possession, coupled with color of title, must prevail, except where a better title is shown in the defendants; and, where a plaintiff in ejectment pleads a fee-simple title, he is not compelled to prove the same; but can properly rely upon prior possession, if he choose to do so.—Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597.

[b] A plaintiff who bases his claim to property, or its possession, upon a legal title, cannot recover on the strength of an equitable title.—(Cal. 1867) Seaton v. Son, 32 Cal. 481.

§ 119. —— Time of Title or Right of Possession.

[a] Plaintiff in ejectment need only prove his right to possess and occupy at the beginning of the suit, and a variance between the proof and the allegation, both, however, fixing a date prior to suit brought, is immaterial.—Stark v. Barrett, 15 Cal. 361.

§ 120. Particular Elements or Requisites in Deraignment of Title.

[a] One deraigning title to property through a corporation must prove the legal existence of the corporation, as the recitals in deeds that the grantor was a corporation do not prove such corporate existence as against one claiming the property through another source of title.—Sonoma County Water Co. v. Lynch, 50 Cal. 503.

§ 121. Necessity of Proof of Title in all Coplaintiffs.

[a] Where a suit in ejectment is brought by four persons, and title is only shown as to three of them, judgment for all four will not be given.—Tormey v. Pierce, 42 Cal. 335.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 114; 17 Cent. Dig., cols. 2282, 2283, § 229.

§ 122. Evidence Admissible Under the Pleadings.

[a] Under general denial defendant may prove any fact which shows or tends to show that plaintiff had no right of entry when suit was brought.—Sparrow v. Rhoades, 76 Cal. 210, 9 Am. St. Rep. 197, 18 Pac. 245.

[b] A new plaintiff was substituted for the original plaintiff, who had conveyed to him pending the suit, by an order which declared that all the allegations and denials of the pleadings should apply to such new plaintiff. Among the allegations of the complaint to which the new plaintiff was thus committed was one that plaintiff at the time the action was brought was entitled to the possession of the land in dispute. Held, that it was error to admit in evidence the deed from the original plaintiff to the new one, as it was irrelevant to any issue made by the pleadings. Northern Ry. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273.

[c] Under general denial defendant may show that deed by which plaintiff claims title is a mortgage and gives him no title. Hyde v. Mangan, 88 Cal. 325, 26 Pac. 180.

[d] In ejectment certain evidence held to constitute an equitable defense not admissible where not pleaded.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 119-123; 17 Cent. Dig., cols. 2283-2297, §§ 230-236.

§ 123. —— Title in General.

[a] Where party in ejectment relies upon documentary evidence of title and prior possession, if he fail in the former, he may still rely upon the latter. The failure to prove the paper title does not impair the just force and effect of the possession.—Morton v. Folger, 15 Cal. 275.

[b] Under an allegation of seisin in a complaint in ejectment, the plaintiff may establish any interest in the premises entitling him to possession.—Stark v. Barrett, 15 Cal. 361.

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[c] Plaintiff in ejectment describing property as a pre-emption claim, is not precluded from relying on any other title.—Coryell v. Cain, 16 Cal. 567.

[d] In ejectment under a denial of the plaintiff's possession, at the time of the alleged entry by the defendant, the latter may show that before his entry the plaintiff's previous title had been lost by abandonment or forfeiture.—Bell v. Brown, 22 Cal. 671.

[e] When a complaint in ejectment makes no mention of tax deeds as the foundation of the plaintiff's title, which are afterward offered in evidence, the defendants under the general denial of their answer may introduce any evidence, allowed by statute, to show the invalidity of the tax deeds, or the title acquired under them.—Roberts v. Chan Tin Pen, 23 Cal. 259.

[f] In an action of ejectment, when the plaintiff avers that he is owner of the premises, and the answer denies the fact, the defendant may show that the plaintiff has executed a deed to a third party before bringing the suit, although the defendant does not connect himself with the title of the third party.—Dyson v. Bradshaw, 23 Cal. 528.

[g] When the plaintiff in an action of ejectment proves his title by a patent granting the premises in controversy as "swamp and overflowed," the defendant cannot show that they are dry and fit for cultivation, if he has not brought, or offered to bring, himself into relations with the state or the United States.—Carder v. Baxter, 28 Cal. 99.

[h] Upon trial of an action of ejectment, the defendant cannot prove a conveyance of the land by the plaintiff after the commencement of the action, unless such defense is set up by the original or supplemental answer. Moss v. Shear, 30 Cal. 467.

[i] Proofs will not be admitted under an answer in ejectment setting up title to only a portion of the demanded premises, unless it particularly describes such portion.—Anderson v. Fisk, 36 Cal. 625.

[j] In an action by a divorced wife against the administrator of the estate of her deceased husband to recover the possession of certain land which was formerly community property, and on which the husband during the marriage had filed a declaration of homestead, the judgment-roll in the action of divorce setting aside the land to the husband, together with a stipulation filed therein authorizing such disposition, and the will of the husband devising the land to third persons, are admissible in evidence under the general issue.—Stockton v. Knock, 73 Cal. 425, 15 Pac. 51.

[k] Under general denial defendant may show that deed from him to defendant, under which latter claims title, was void.—Sparrow v. Rhoades, 76 Cal. 211, 9 Am. St. Rep. 197, 18 Pac. 245.

[l] Under a denial of the title and ownership of the plaintiff the defendant may show, as a defense to an action of ejectment based upon the deed, that it was intended as a mortgage, without being required to plead an equitable defense.—Locke v. Moulton, 97 Cal. 21, 30 Pac. 957.

[m] Where a complaint stated a cause of action in ejectment, evidence of plaintiff's title was properly admitted, though the action was designated in the complaint as forcible entry and detainer.—Hayden v. Collins, 147 Cal. 259, 81 Pac. 1120.

§ 124. —— Limitation and Adverse Possession.

[a] In ejectment, plaintiff, under an averment of ownership in fee and of right to the possession at the commencement of the action, may prove that his grantor had been in adverse possession for more than five years before the commencement of the action.—Gillespie v. Jones, 47 Cal. 259.

[b] If the plaintiff in ejectment relies, to recover, only on the fact that the secretary of the interior awarded him the land as pre-emptor in a contest with the defendant, and that he paid for the land and obtained the receipt of the receiver of the local land office, and that he had cultivated and improved a part of the land, the defendant may prove that, when the plaintiff entered on the land, a large portion of it was, and ever since has been, in the adverse possession of the defendant or his grantors.—Conlan v. Quinby, 51 Cal. 412.

[c] If in ejectment the answer of the defendant is a mere denial of the allegations contained in the complaint, the defendant is not entitled to prove that he has been for five years in the adverse possession of the demanded premises.—McCreery v. Duane, 52 Cal. 262.

[d] In ejectment, where defendant pleads the statute of limitations by reference to the Code section relied on, as authorized by Code of Civil Procedure, section 458, he may show all facts necessary to constitute adverse possession under such section.—Hagely v. Hagely, 68 Cal. 348, 9 Pac. 305.

[e] Code of Civil Procedure, section 437, provides an answer must contain a denial of the allegations of the complaint and statement of any new matter constituting a defense or counterclaim. Held, that in a suit for possession of realty a claim of title by prescription, in order to be taken advantage of, should be pleaded.—Allen v. McKay & Co., 70 Pac. 8.

§ 125. —— Possession and Right to Possession.

[a] Under allegation of ouster a holding over by the defendant may be shown.—Garrison v. Sampson, 15 Cal. 93.

[b] In an action of ejectment, it is not requisite to the admission of evidence in favor of the plaintiff for the purpose of proving

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fraud in the entry of the defendant that such fraud should be alleged in the complaint. Depuy v. Williams, 26 Cal. 309.

[c] Where the strict legal title is not involved, and the plaintiff relies upon a right to recover premises founded upon a naked possession, the defendant may, under a simple denial of the plaintiff's right of possession, without pleading abandonment, prove abandonment by the plaintiff before the defendant's entry.—Willson v. Cleaveland, 30 Cal. 192.

[d] Where the plaintiff in an action to recover possession of land relies on a prior possession, he may introduce in evidence a judgment he recovered against a third party before the defendant's entry, and the acts of the officer thereunder, putting him in possession.—Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181.

[e] Under a general denial, defendant may prove any fact going to show that plaintiff had no right of entry at the time the action was commenced.—Semple v. Cook, 50 Cal. 26.

[f] A right of possession in a defendant in ejectment, as administrator of an estate, may be proved under denials in the answer, that the plaintiffs are the owners or entitled to the possession of the demanded premises. Burgel v. Prisser, 89 Cal. 70, 26 Pac. 787.

[g] Where the complaint merely alleges plaintiff's ownership and right to possession, and that defendant is in possession, and refuses to surrender the same, and the answer denies the ownership and right to possession, defendant may prove any facts showing that plaintiff had no right of entry or possession when the action was commenced.—Jacob v. Carter, 36 Pac. 381.

§ 126. —— Equitable Defenses.

[a] Where defendant relies on an equitable title, he must plead it.—(Cal. 1867) Cadiz v. Majors, 33 Cal. 288; (1871) Kenyon v. Quinn, 41 Cal. 325.

[b] Where a husband brings ejectment, and relies on a deed to his wife making the demanded premises her separate property, and no equitable defense is set up, no issue is raised as to the legal effect of the deed. Swain v. Duane, 48 Cal. 358.

[c] Where defendant in ejectment relies on a superior equitable title arising on an executed parol gift which he is entitled to have specifically performed, such defense must be pleaded.—Manly v. Howlett, 55 Cal. 94.

§ 127. Stipulations.

[a] An executor, suing in ejectment, produced a stipulation, signed by the attorneys of both parties, admitting "that plaintiff's testator was owner of the premises prior to defendant's entry; that defendant entered under him, and now claimed the premises as her property, and is in possession; that defendant does not design by this to admit a tenancy at any time." Held, that this was prima facie sufficient to maintain the action; and that the legal effect of the facts admitted could not be qualified by the closing provision of the agreement.—Haight v. Green, 19 Cal. 113.

[b] The parties to an action in ejectment stipulated for a reference, and that plaintiff would within a certain time convey a portion of the disputed premises to defendant. On trial, in pursuance of such stipulation, judgment was rendered for plaintiff for possession of the entire tract. Held, that defendant had an equitable title to the land agreed to be conveyed to him by the stipulation.—Killey v. Wilson, 33 Cal. 690.

B. EVIDENCE.

1. Judicial Notice, Presumptions and Burden of Proof, §§ 128-131.
2. Admissibility of Evidence, §§ 132-146.
3. Weight and Sufficiency of Evidence, §§ 147-157.

1. Judicial Notice, Presumptions and Burden of Proof.

JUDICIAL NOTICE, § 128.
PRESUMPTIONS AS TO TITLE, § 129.
PRESUMPTIONS AS TO POSSESSION OR RIGHT TO POSSESSION, § 130.
BURDEN OF PROVING TITLE, § 131.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 123-129; 17 Cent. Dig., cols. 2298-2311, §§ 238-245.

§ 128. Judicial Notice.

[a] An answer to an ejectment setting up forfeiture by noncompliance by the plaintiff with the mining rules should set out those rules, as the court will not judicially notice them.—Dutch Flat Water Co v. Mooney, 13 Cal. 534.

[b] For the purpose of supplying a complaint in ejectment omitting to allege seisin at the date of the commencement of the action held that the court, under Code of Civil Procedure, section 1875, subdivision, 8, will take notice of the fact that in Riverside county possession in 1905 for the purpose of putting in a crop would include the month of April, when the complaint was filed.—McGillivray v. Miller (Cal. App.), 84 Pac. 778.

§ 129. Presumptions as to Title.

[a] Under Statutes of 1861, page 589, and section 180 of the Practice Act, as amended in 1866, from a finding in ejectment that the defendants were in possession of the premises, and that the plaintiff deraigns title thereto under a patent from the United States issued to his grantor, and that the plaintiff was the owner thereof, and entitled to possession, and the defendants were trespassers thereon, though no fact is stated respecting defendants' claim of title, it will be presumed that the title was in plaintiff.—Morrill v. Chapman, 35 Cal. 85.

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§ 130. Presumptions as to Possession or Right to Possession.

[a] Under Statutes of 1861, page 589, and section 180 of the Practice Act, as amended in 1866, from a finding in ejectment that defendants were in possession of the premises, and that plaintiff deraigns title thereto under a patent from the United States, issued to his grantor, and that plaintiff was the owner thereof and entitled to possession, and defendants were trespassers thereon, though no fact is stated respecting the defendants' claim of title, it will be presumed that plaintiff was entitled to possession.—Morrill v. Chapman, 35 Cal. 85.

[b] Where plaintiff in ejectment leased the premises before the action was brought, and, when defendants were found in possession, authorized the lessee to sue in plaintiff's name, it will be presumed that the lease was abandoned by mutual consent, and it cannot be urged as a defense that plaintiff was not entitled to possession.—Brandt v. Philippi, 82 Cal. 640, 23 Pac. 122.

[c] Where the findings show title in plaintiff, the right of present possession is presumed, as a matter of law.—McCarthy v. Brown, 113 Cal. 15, 45 Pac. 1.

§ 131. Burden of Proving Title.

[a] If the tenant can refuse to surrender to the landlord the premises leased, at the termination of the lease, on the ground that the landlord does not have the paramount title, and that the owner of the paramount title has made a demand on him for a surrender of the premises, it devolves on the tenant, in ejectment brought by the landlord, to prove both the paramount title, and that such demand was made before the landlord commenced his action.—Camarillo v. Fenlon, 49 Cal. 202.

[b] A recital in a patent that plaintiff's claim to the land in controversy was established "pursuant to the act of Congress of May 20, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto," does not impose on him the burden of showing that the homestead was not acquired under laws requiring actual settlement and residence by the claimant.—Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861.

[c] When the plaintiff in an action of ejectment proves a paper title his case is made out, and, if the defendant relies upon adverse possession under the statute of limitations he must prove either that no taxes were levied or assessed upon the land, or that he paid all taxes which were levied and assessed thereon.—Baldwin v. Temple, 101 Cal. 636, 35 Pac. 1008.

[d] Where prima facie legal title is shown by the plaintiff, such as would protect the defendant if judgment were obtained upon it, and the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the prima facie legal owner.—Giselman v. Starr, 106 Cal. 651, 40 Pac. 8.

[e] Where the city under which defendant holds as lessee, before the making of the lease, granted all its rights in occupied lands within a territory including the disputed premises, the burden of showing that the lands in controversy were unoccupied, and so not included in the grant, is on defendant relying on that fact as an affirmative issue. Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18.

[f] The burden of proof is upon all persons coming into possession subsequent to the commencement of the action of ejectment to show affirmatively that their possession is rightful, and under a title not determined in the action, and was not taken by collusion with the defendants; and in the absence of a showing to the contrary, it will be presumed that they came in under the defendants. This presumption is not overthrown by showing that they came in under a stranger to the action, unless it is also shown that such stranger was in possession at or prior to the commencement of the action.—Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

2. Admissibility of Evidence.

COMPETENCY AND RELEVANCY IN GENERAL, § 132.
IDENTITY AND DESCRIPTION OF PROPERTY, § 133.
—— PLATS AND SURVEYS, § 134.
TITLE AND RIGHT OF POSSESSION, § 135.
—— DEEDS, § 136.
—— PUBLIC LANDS, § 137.
—— SALE AND PURCHASE UNDER EXECUTION, § 138.
—— CONTRACTS TO CONVEY, § 139.
—— MORTGAGES, § 140.
—— PARTITION OR DIVISION BY COTENANTS, § 141.
—— PURCHASE UNDER FORECLOSURE, § 142.
—— ADVERSE POSSESSION, § 143.
—— RIGHT OF POSSESSION, § 144.
—— PRIOR POSSESSION, § 145.
—— NECESSITY OR SUFFICIENCY OF PRELIMINARY OR SUPPLEMENTARY PROOF, § 145½.
POSSESSION AND OUSTER, § 146.

§ 132. Competency and Relevancy in General.

[a] Where plaintiff shows that defendant accepted a lease of the premises from plaintiff, and defendant introduces evidence of adverse possession, plaintiff should be allowed to rebut by evidence of his own title. Abbey Homestead Assn. v. Willard, 48 Cal. 614.

[b] The exclusion of evidence as to what was said, or as to what occurred, at the time of the delivery of several deeds passing from a subsequent grantee to other grantees successively, without any offer to show its relevancy and competency, and that it was not

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hearsay, does not appear to be erroneous. Beattie v. Crowdson, 124 Cal. 577, 57 Pac. 463.

[c] The admission of certain evidence held not error, where similar evidence had previously been given without objection.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

§ 133. Identity and Description of Property.

[a] Declarations of prior owner as to boundaries and circumstances under which they were made are admissible against party claiming under him.—Austin v. Andrews, 71 Cal. 99, 16 Pac. 546.

[b] Evidence of the location of a house on the land, which was one of the calls in the patent, are admissible.—Northern Co. v. Jordan, 87 Cal. 23, 25 Pac. 273.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 132; 17 Cent. Dig., cols. 2314-2321, §§ 249-253.

§ 134. —— Plats and Surveys.

[a] In an action of ejectment brought against a pre-emption claimant by a patentee from the state as of swamp and overflowed lands, the plat of the survey of the town in which the land is located is admissible for the purpose of showing the lines of the subdivisions, including the land.—Robinson v. Forrest, 29 Cal. 317.

[b] In an action of ejectment where the question in controversy was the position of the red line, or waterfront of San Francisco, held, that a diagram, made by the county surveyor and believed by him to be correct, though not an official plat, was admissible in evidence for the purpose of showing what the party offering it claimed to be the true position of the line.—People v. Klumpke, 41 Cal. 263.

[c] In an action of ejectment by the state for land in San Francisco claimed to be outside of the red line, or waterfront, a map purporting to have been made in 1864 by order of the state harbor commissioners, but not shown to have been approved or adopted by them, is not competent evidence in their favor to show the true location of the red line.—People v. Klumpke, 41 Cal. 263.

§ 135. Title and Right of Possession.

[a] The payment of taxes assessed on the demanded premises, by the defendant, is not evidence, in an action of ejectment, to show abandonment or disclaimer on the part of plaintiff.—Davis v. Perley, 34 Cal. 630.

[b] In an action of ejectment, where the plaintiff claims title under a deed executed to him on a given date, a prior deed of trust executed by his grantors, as security for an indebtedness due from them, is admissible in evidence as tending to show that they did not have the legal title to the premises at the time of the deed to the plaintiff; and the question whether the indebtedness has been paid and a reconveyance made by the trustees does not affect its admissibility.—Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480.

[c] An occupant of land claimed possession from the administrator of an estate to the rights of which he succeeded. Held not error to admit evidence of the probate proceedings through which occupant claimed.—Avila v. Pereira, 120 Cal. 589, 52 Pac. 840.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 134-143; 17 Cent. Dig., cols. 2321-2366, §§ 254-277.

§ 136. —— Deeds.

[a] A deed of trust is a conveyance of the legal title; and, where the plaintiff claims under a conveyance made June 15, 1872, a deed of trust executed by his grantors January 29, 1872, is admissible, as tending to show that the title was not in plaintiff's grantors at the time his conveyance was made. The questions of the payment of the debt which the deed of trust was given to secure, and of the reconveyance of the land, do not affect the admissibility of the deed. Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480.

§ 137. —— Public Lands.

[a] In an action to recover land, against one in possession of it as the public land of the United States under a pre-emption right, testimony which the defendant offers to establish, in part, his pre-emption right should not be rejected because his offer does not embrace every fact necessary to establish the defense.—Tyler v. Green, 28 Cal. 406, 87 Am. Dec. 130.

[b] When the plaintiff, in an action of ejectment, claims the premises under a title from the United States, and the defendant under a patent from the state as swamp and overflowed land, ceded by the United States, the former may introduce oral testimony to show that such land is not swamp and overflowed.—Thornton v. Thompson, 28 Cal. 602.

[c] In an action of ejectment brought against a pre-emption claimant by a patentee from the state as of swamp and overflowed lands, the plat of the survey of the town in which the land is located is not admissible for the purpose of proving, by the surveyor's descriptive notes found on the plat, that such subdivisions are swamp and overflowed.—Robinson v. Forrest, 29 Cal. 317.

[d] A certificate of the United States register that the grantor of plaintiff, as the agent of the state, has located land at his office in part satisfaction of lands granted to the state, is not admissible in evidence of the plaintiff's right to recover in ejectment.—Slaughter v. Fowler, 44 Cal. 195.

[e] An entry made by an alcalde in San Francisco, in 1846, of the presentation to

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him, by the claimants, of title papers to a lot made by a former alcalde, is evidence in ejectment tending to show that the claimants then made an open adverse claim to the lot. Sill v. Reese, 47 Cal. 294.

[f] An offer by defendant to show that the land in controversy was within the exterior boundaries of a Mexican grant when the declaratory statement of plaintiff's grantor was presented, and not, therefore, subject to homestead entry, was properly excluded, as too indefinite.—Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861.

§ 138. —— Sale and Purchase Under Execution.

[a] If a sheriff's deed recites enough to identify the judgment, and to show the authority of the officer to sell, that is, that the sale was made by virtue of an execution issued upon a judgment in an action wherein —— was plaintiff and —— was defendant, it is admissible in evidence as proof of transmission of title.—Montgomery v. Robinson, 49 Cal. 258.

[b] Plaintiff claiming under execution sale must introduce judgment on which execution issued.—Leviston v. Henninger, 77 Cal. 462, 19 Pac. 834.

[c] In an action of ejectment, where the defendant claims the right to the possession of the property through a sale under an execution, it is necessary for him to introduce in evidence the judgment as the basis of the execution, and, if the enforcement of the judgment has not been stayed, the fact that an appeal therefrom has been taken does not prevent the judgment from being received in evidence and considered as a collateral fact in support of the execution.—Colton Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

[d] Where, in ejectment, title was claimed under an execution sale on a judgment against one to whom a patent had issued, and who was shown to have been in possession until shortly before commencement of the action, it was error to exclude from the evidence the judgment-roll showing such judgment, the execution, levy, sale and sheriff's deed.—Robinson v. Thornton, 129 Cal. 12, 61 Pac. 946.

§ 139. —— Contracts to Convey.

[a] Conveyances executed by the owners of different lots of land, in pursuance of a verbal agreement to exchange the same, are admissible in evidence in an action by one claiming under one of the original grantees against an intruder who sets up by way of defense a want of title in the plaintiff, owing to the agreement to exchange having been verbal. The conveyances show that the contract has been carried into effect, and is not, therefore, void, under the statute of frauds.—Ryan v. Tomlinson, 39 Cal. 639.

[b] Defendant is entitled to prove contract of sale under which he took possession and erected improvements, whereby he became equitable owner and as such agreed with plaintiff's grantor as to division line.—Helm v. Wilson, 76 Cal. 484, 485, 18 Pac. 604.

§ 140. —— Mortgage.

[a] Plaintiff in ejectment claimed by succession to the estate of B. in the premises. Defendant set up a mortgage to himself from C., and foreclosure thereof. Held, that plaintiff might show an executory contract for the sale of the land by B. to C., and C.'s failure to comply with the terms thereof.—Palmer v. McCafferty, 15 Cal. 334.

§ 141. —— Partition or Division by Cotenants.

[a] An adjudication, in partition of a rancho, that certain defendants were owners in fee of the whole, held to be admissible evidence in a subsequent action of ejectment by one of them for a parcel thereof against persons claiming title under parties to the partition.—Hancock v. Lopez, 53 Cal. 362.

§ 142. —— Purchase Under Foreclosure.

[a] Plaintiff claiming under deficiency judgment must introduce the docketed deficiency judgment and return of sheriff on foreclosure showing what deficiency was.—Leviston v. Henninger, 77 Cal. 463, 19 Pac. 834.

[b] Plaintiff could not introduce a deed from the assignee of the purchaser on the foreclosure sale, executed after this suit was begun, on the ground that defendant had put the foreclosure in evidence as an outstanding title. There was no issue of outstanding title, and the foreclosure was only introduced to show that the lien on which plaintiff's title was based had been extinguished.—Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120.

§ 143. —— Adverse Possession.

[a] The payment of taxes assessed on demanded premises by the defendant is not evidence in an action of ejectment to show possession and claim of title on his part.—Davis v. Perley, 30 Cal. 630.

[b] In support of his plea of limitations, defendant introduced evidence of adverse possession in his landlord for the requisite period of time. Held, that a judgment in plaintiff's favor in an action brought against one claiming under the same landlord, accompanied by evidence that, pending that action, the landlord disclaimed any interest in the land, was admissible in plaintiff's behalf.—Dillon v. Center, 68 Cal. 561, 10 Pac. 176.

[c] In ejectment, evidence that plaintiff and his grantor paid the taxes on the land in suit is admissible to show the claim of title, and that it had not been abandoned.—Baum v. Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

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§ 144. —— Right of Possession.

[a] In ejectment, evidence offered by plaintiff to prove that defendant entered with permission, and as tenant of plaintiff, is admissible.—Heath v. Wallace, 53 Cal. 436.

[b] Where neither party claims under a paper title, evidence offered by defendant tending to show that, prior to plaintiff's taking possession, the land had been in the possession of other parties, is immaterial and inadmissible.—Foot v. Murphy, 72 Cal. 104, 13 Pac. 163.

[c] In ejectment defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Plaintiff objected to its admission on the ground that he was not a party to the action. Held that, while the judgment was not admissible as bearing on the title, it was admissible to show where the right of possession was from the service of summons in the action.—Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738.

§ 145. —— Prior Possession.

[a] The plaintiff in ejectment may show that when he was in possession be always claimed title, as that goes to explain his possession as being independent and not subordinate.—Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

[b] In an action to recover real estate, a written contract for the sale and conveyance of the land in question by the plaintiff to the defendant, and signed by both of them, is admissible in evidence to show that the plaintiff had the prior possession of the premises and that the defendant received the possession from him.—Frisbie v. Price, 27 Cal. 253.

[c] On the issue of prior possession in ejectment, the judgment-rolls in prior actions between the grantors of the plaintiff and the defendant are admissible in evidence as tending to prove title.—McCourtney v. Fortune, 57 Cal. 617.

§ 145½. —— Necessity or Sufficiency of Preliminary or Supplementary Proof.

[a] Constable's deed under execution where execution was against third party, cannot be read in evidence in an ejectment suit unless title is shown in the defendant in execution at the time of the levy and sale, or the counsel offering it connects it in some way with the issue between the parties to the suit.—McGarrity v. Byington, 12 Cal. 426.

[ab] Where a sheriff's deed is executed by a deputy in the name of the sheriff, whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read in evidence in an action of ejectment.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

[b] Where no power is given executors to sell land, their deed is not admissible in evidence, except on proof of a compliance with the statutory provisions relating to sales by executors.—White v. Moses, 21 Cal. 43.

[c] A deed recited that the executors, the grantors therein, were authorized by the will "to sell his [the testator's] property in California, as therein mentioned and contained." Held inadmissible, without proof of the taking of the preliminary steps, or production of the will sufficient to prove the deed valid.—White v. Moses, 21 Cal. 43.

[d] Where there is evidence of the former possession of the party under whom defendant claims, the deed of such party is admissible on defendant's behalf.—Roper v. McFadden, 48 Cal. 346.

§ 146. Possession and Ouster.

[a] The plaintiff in an action of ejectment may offer in evidence a deed to the defendant to explain the latter's possession.—McMinn v. Mayes, 4 Cal. 209.

[b] Plaintiff has right to prove what part of land in dispute was occupied by one of the defendants in an action of ejectment against several defendants.—Ellis v. Janes, 10 Cal. 456.

[c] On the trial of an action of ejectment, a judgment rendered for the defendant in an action of forcible entry and detainer brought by a tenant of the plaintiff in ejectment against the defendant is not admissible in evidence to show actual possession in the defendant at that time, although that suit was conducted and expenses paid by the landlord, the plaintiff in ejectment.—Davis v. Perley, 30 Cal. 630.

[d] In an action against a county for land claimed by defendant to have been dedicated to the public use, evidence is admissible on plaintiff's behalf to prove that a certain person had been employed by the board of supervisors to look after fences on the property and to keep them in repair, and that in performing this service he acted as a servant of the county, since it tends to show the possession of the county.—Barry v. Sonoma County, 43 Cal. 217.

[e] If the defendant sets up limitations, evidence that he leased the land to a tenant, and instructed him to keep stock of other people off the land, is admissible as tending to sustain his allegation of possession.—Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183.

[f] It is error to exclude evidence showing that defendant had torn down a part of plaintiff's house, as the erection and occupation of the house by plaintiff is important in determining the character of his possession, and any interference therewith is important on the issue of ouster.—Gray v. Dixon, 74 Cal. 508, 16 Pac. 305.

[g] In ejectment to recover possession of premises from a tenant, it was proper to

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show that defendant had continued in the occupancy of the land, and was withholding possession.—McKissick v. Ashby, 93 Cal. 422, 33 Pac. 729.

[h] In ejectment held proper to admit in evidence the assessment-roll, showing that the property was assessed to plaintiff.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

[i] In ejectment held proper to permit plaintiff to testify that he had paid taxes.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 143; 17 Cent. Dig., cols. 2366, 2367, § 278.

3. Weight and Sufficiency of Evidence.

TITLE AND RIGHT TO POSSESSION, § 147.
—— GRANT, CONVEYANCE OR DEED, § 148.
—— ADVERSE POSSESSION, § 149.
—— MORTGAGE OR FORECLOSURE SALE, § 150.
—— DESCENT OR DEMISE, § 151.
—— TAX OR EXECUTION SALE, § 152.
—— PUBLIC LANDS, § 153.
—— EQUITABLE TITLE AND DEFENSES, § 154.
—— IDENTITY OF PARTIES IN CHAIN OF TITLE, § 155.
POSSESSION, § 156.
OUSTER, § 157.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 144-154; 17 Cent. Dig., cols. 2368-2404, §§ 279, 298.

§ 147. Title and Right to Possession.

[a] If plaintiff in ejectment shows that defendant accepted a lease of the premises from plaintiff, this is presumptive evidence of plaintiff's title, and is not overcome by proof that defendant was in possession when he executed the lease.—Abbey Homestead Assn. v. Willard, 48 Cal. 614.

[b] Defendant contended on appeal that plaintiff's deraignment of title in ejectment was defective because of an outstanding trust deed executed by M. The record contained a recital that plaintiff introduced a reconveyance, wherein all the interest which had been conveyed by the deed of trust executed by M. was reconveyed. The date of the reconveyance was eighteen years prior to the action of ejectment. Held, that the evidence did not show any outstanding title available against plaintiff at the time of the commencement of the action.—Baum v. Roper, 132 Cal. 42, 64 Pac. 128.

[c] Where plaintiffs in ejectment claimed that a deed from a prior owner, under which defendants, who were in possession, claimed title, was in fact a mortgage, and that plaintiffs had succeeded by a conveyance to the rights of the mortgagor, plaintiffs were not entitled to possession, in the absence of proof that the debt which the alleged mortgage was given to secure had been paid.—Hooper v. Young, 140 Cal. 274, 74 Pac. 140.

[d] In ejectment, held only necessary for plaintiff to show a better title from the common source.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

[e] The rule that plaintiff must recover on the strength of his own title held not applicable in an action based solely on the prior actual possession of plaintiff as against a mere trespasser, or one claiming only under a later possession.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

[f] Plaintiff held entitled to recover on a showing of occupancy as against defendants showing no title through any source within the exceptions in Civil Code, section 1006.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 145-153; 17 Cent. Dig., cols. 2371-2399, §§ 280-296.

§ 148. —— Grant, Conveyance or Deed.

[a] Recitals, in a deed given by a trustee, of facts showing that the grantee is one of the beneficiaries to whom the trustee, by the terms of the trust, was required to convey are prima facie evidence of such facts, in ejectment by the grantee against one not claiming to be beneficiary under the trust.—McCreery v. Duane, 52 Cal. 293.

[b] The production of a power of attorney authorizing the sale and conveyance of property, and a deed executed by the attorney purporting to be a grant, bargain and sale deed, reciting a consideration, makes a prima facie case sufficient to support a verdict in favor of the grantee, against the heirs of the grantor, in the absence of evidence to overcome it.—Mowry v. Mowry, 103 Cal. 314, 37 Pac. 398.

§ 149. —— Adverse Possession.

[a] Plaintiff in ejectment had inclosed the premises with a brush fence from two to three feet high, but offered no proof that he or his grantors had ever subjected them to any uses whatsoever. Held, that he was properly nonsuited.—Hutton v. Schumaker, 21 Cal. 453.

[b] A judgment, in an action of forcible entry and detainer, in favor of the plaintiff, has no tendency to prove abandonment by the defendant in an action of ejectment for those premises brought against the plaintiff in the first action by the defendant's grantees, or to prove that the original plaintiff had taken possession under color of title.—Roberts v. Unger, 30 Cal. 676.

[c] Where the plaintiff showed clearly a chain of title to the demanded premises, reaching back to the patent from the government, and there was at least substantial conflict as to whether the defendants, who claimed by adverse occupation, had occupied for such time, and in such manner, as would enable them to set up the statute of limitations, held, there was sufficient evidence to

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support a verdict for the plaintiff.—Hancock v. Burton, 73 Cal. 52, 14 Pac. 392.

[d] Where defendant in ejectment alleges, and introduces evidence to prove, adverse possession by himself at the time of its location by plaintiffs, who claimed under a certificate of purchase, from the federal government pursuant to such location, a failure by the court to find as to such adverse possession is reversible error, since Code of Civil Procedure, section 1925, which renders a certificate of purchase or location of land, issued by the federal government, prima facie evidence of title in the holder, also provides that such evidence may be overcome by proof that at the time of the location the land was in the adverse possession of the adverse party.—McTarnahan v. Pike, 91 Cal. 540, 27 Pac. 784.

§ 150. —— Mortgage or Foreclosure Sale.

[a] If one who has obtained a certificate of purchase from the state for a sixteenth or thirty-sixth section conveys the same, and the grantee gives him a mortgage to secure the purchase money, and he assigns the mortgage and debt to a third party, who forecloses and obtains a sheriff's deed, evidence of such fact tends to show that the right which was granted by the state by the certificate of purchase had vested in the holder of the sheriff's deed, and that he thereby became entitled to the possession of the premises.—Daniels v. Henderson, 49 Cal. 245.

§ 151. —— Descent or Demise.

[a] Where it appeared that the land had been the community property of the plaintiffs' father and mother; that the father died, and plaintiffs inherited one-half of the land, and their mother the other half; that the mother subsequently married the defendant, and afterward died, whereupon plaintiffs inherited from her two-thirds of her half, and the defendant the other third—a judgment that plaintiffs recover an undivided five-sixths of the land, instead of merely that plaintiffs were tenants in common of an undivided five-sixths of the land with the defendant, and should be let into possession thereof as such, is error, as being against evidence.—Burgel v. Prisser, 89 Cal. 70, 26 Pac. 787.

§ 152. —— Tax or Execution Sale.

[a] A deed of land under a tax sale is only prima facie evidence that no redemption was had, and a party who made a redemption may, in ejectment based on the title acquired by the deed, prove the fact of such redemption.—Cooper v. Shepardson, 51 Cal. 298.

[b] In ejectment against an execution debtor, plaintiff claimed under the sheriff's deed. Held, that plaintiff, to make out a prima facie case, need only show the judgment of a court of competent jurisdiction, the execution issued thereon, and the sheriff's deed; and that it was immaterial that the judgment was not entered or docketed at the time of the issue of the execution.—Los Angeles County Bank v. Raynor, 61 Cal. 145.

[c] Where, in ejectment, the plaintiff gives in evidence a judgment-roll showing a judgment in his favor and against defendants, an execution duly issued thereon, a sale to plaintiff, an attachment and sheriff's return showing a levy which had never been released, and evidence of possession subsequent to the levy and prior to the judgment in the first suit, and defendants offer no evidence, a finding for plaintiff is supported by the evidence.—Royon v. Guillee, 3 Pac. 672.

§ 153. —— Public Lands.

[a] The certificates of location and purchase of lands issued under the state laws are prima facie evidence of title in the holders, in the courts of that state.—Richter v. Riley, 22 Cal. 639.

[b] The recitation in a patent issued by the United States to one as heir of a homestead claimant, that such person is the heir of the homestead claimant and has performed the necessary conditions to perfect the homestead claim, is sufficient proof of the facts recited in an action of ejectment brought by the patentee.—Chant v. Raynolds, 49 Cal. 213.

[c] If a patent to land is issued to a railroad company under a grant made by Congress of alternate sections along the line of its route, and ejectment is brought on the patent against one who had settled on the land and acquired a pre-emption right before the land had been withdrawn from market, and he depends on the ground that the land officers were misled by false and fraudulent testimony of the agent of the railroad company, the facts that such agent swore that the land was vacant and unappropriated, and that the land officers did not know that the defendant was on the land, tend to show that the land officers were so misled.—Campbell v. Buckman, 49 Cal. 362.

[d] A certificate of location of state school lands, in the hands of the person to whom it is issued, or his vendees, is prima facie evidence of legal title, upon which they are entitled to recover in ejectment, as against one who does not show a better title.—Stanway v. Rubio, 51 Cal. 41.

[e] Where certificates of purchase of lands are surrendered, as required by law, for the purpose of obtaining a patent therefor, the issue of a patent for a portion of the land only, on the surrender of such certificate, does not destroy their effect as evidence of the ownership of the remainder, in the absence of evidence as to why the patent was not issued for the whole.—Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336.

[f] Certificates of purchase of lands, and indorsements thereon, showing that patents have issued for part of the land described therein, together with the testimony of the surveyor general that patents have issued as noted in such indorsements, is sufficient

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proof of the patents to establish a prima facie case of ownership of the land patented, in the absence of an objection that the evidence is secondary, or on motion for nonsuit. Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336.

§ 154. —— Equitable Title and Defense.

[a] An equitable defense in an action of ejectment must be distinctly proved.—Estrada v. Murphy, 19 Cal. 248; Lestrade v. Barth, 19 Cal. 660; Cadiz v. Majors, 33 Cal. 288; McCauley v. Fulton, 44 Cal. 355.

§ 155. —— Identity of Parties in Chain of Title.

[a] In ejectment upon the question of identity between the grantor in a deed and the holder of the title under a patent from the United States, in the deed the grantor described himself as "of the Island of Hawaii, Sandwich Islands," and the property as situated in Yuba county, and known as "Johnson's Ranch," and as having been originally granted to Pablo Gutieras by the Mexican government, "and has since then been confirmed to the party of the first part by the board of commissioners." In the patent, the residence of the patentee was not given, but he was referred to as the person filing the petition before the land commission for confirmation of his claim under the grant to Pablo Gutieras. The original deed was also produced in court, and the case was tried in a county where the grantor and his signature were well known, and no question had been made about it. Held, that a sufficient prima facie case of identity had been made out.—Mott v. Smith, 16 Cal. 533.

§ 156. Possession.

[a] Fact that cattle and horses roamed over, and grazed upon, a particular tract of land does not of itself alone make out an actual possession of the land in the owner.—Sunol v. Hepburn, 1 Cal. 254.

[b] Fact that party had cattle on land, or was there for short periods himself, or that he claimed within given limits, is, in the absence of any inclosure or some visible physical signs of the extent of his boundaries or claim insufficient to show the fact of possession of any particular tract, when others were also in possession.—Wilson v. Corbier, 3 Cal. 166.

[c] Plaintiff in ejectment, relying on prior possession, showed that in 1856 he fenced in the premises, and thereafter cultivated them up to about the time of defendant's entry. Held, that possession was sufficiently established, without any direct testimony as to the efficiency of the fence.—Hestres v. Brannan, 21 Cal. 423.

[d] Where plaintiff relies on prior possession alone, proof that he had the land inclosed by a fence made of posts eight feet apart with two rails nailed on is not sufficient to establish such prior possession.—Black v. McGrath, 32 Cal. 15.

[e] Where the sole evidence of possession by plaintiff's grantor is that he filed a claim and affidavit, built a fence on one side of the land, ran furrows around it, put stakes at the corners and along the lines, occupied and cultivated a portion not embraced in the suit, and, while so occupying and cultivating, sold to plaintiff, but by consent remained in possession until his crop was off, it is not sufficiently established.—Spangle v. Dellinger, 42 Cal. 149.

[f] Proof that plaintiff entered into actual possession of part of the land, claiming the whole, under a deed describing the whole, is prima facie proof of prior possession, sufficient to go to the jury.—Donahue v. Gallavan, 43 Cal. 573.

[g] Evidence that plaintiff was in possession, by his servants, of houses on the demanded premises, makes a prima facie case, sufficient to go to the jury.—Donahue v. Gallavan, 43 Cal. 573.

[h] Evidence that defendant was the landlord of the tenants in possession is sufficient evidence of the defendant's possession.—Oakland Gaslight Co. v. Dameron, 67 Cal. 663, 8 Pac. 595.

[i] Where evidence does not show that defendant was in possession of any definite portion of tract or that plaintiff was ousted, judgment for defendant is proper.—Garner v. Wright, 77 Cal. 86, 19 Pac. 184.

[j] In an action of ejectment, proof that the plaintiff and his grantors had been in the possession of land for many years, and up to within a short time prior to the commencement of the action, claiming title thereto under conveyances from their respective grantors, establishes a prima facie case entitling the plaintiff to possession, and a nonsuit, granted upon the ground that the plaintiff had not shown any title in himself, is erroneous.—Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099.

[k] Code of Civil Procedure, section 318, provides that no action for the recovery of real property can be maintained unless plaintiff, his ancestor, or grantor was seised or possessed of the property within five years before suit. In ejectment for an unimproved lot, the evidence showed that plaintiff and his grantors had held the legal title to the same for more than ten years prior to the action, maintaining the fence inclosing it, and paying the taxes. Held, that the evidence was sufficient to support a verdict for plaintiff.—Baum v. Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

[l] In an action of ejectment, the possession of the land in controversy by the plaintiff prior to the intrusion of the defendant is, in the absence of any evidence in support of the defendant's right to the possession, sufficient to authorize a judgment of recovery.—Goodwin v. Scheerer, 106 Cal. 690, 40 Pac. 18.

[m] When the evidence for the plaintiff in an action of ejectment tends to prove prior

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actual possession of the demanded premises by the plaintiff, such prior possession is prima facie evidence of plaintiff's title, as against an intruder, who shows no better right; and it is improper to grant a nonsuit in such case. Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408.

[n] In ejectment to recover possession of public land, plaintiff claimed under a deed from D., who had occupied the land without color or claim of title. There was no evidence of any act of possession on plaintiff's part, and several witnesses testified that defendants were in possession of the land in July, 1889. Held, that the evidence did not support a finding that D. sold and delivered possession to plaintiff in August.—Daubenbiss v. White, 31 Pac. 360.

[o] In ejectment by a widow against her husband's administrator for premises which had been set apart as a homestead to plaintiff and her minor children, it appeared that, from the time of defendant's appointment as administrator till the homestead was set apart, defendant collected the rents of the premises, and paid taxes; that two months thereafter plaintiff demanded possession of him, which he refused to give; that in his verified statement to the tax collector he included this homestead property; and that he leased part thereof to another. Held, that the evidence justified a verdict that defendant was in possession when the action was commenced.—Moore v. Moore, 34 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 153, 154; 17 Cent. Dig., cols. 2399-2404, §§ 297, 298.

§ 157. Ouster.

[a] An ouster by defendant may be established without evidence that the land in dispute was so inclosed by him as to deprive plaintiff of possession.—Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710.

[b] In ejectment, in which the answer denied ouster and the possession and withholding by defendants, it appeared that the land in dispute is a strip six feet wide, on which a water ditch is located. The evidence showed that defendants frequently put a pressure board in the ditch, which cut off plaintiff's water, and diverted it into a flume made by them. Held, that the evidence established a trespass, merely, and did not justify a judgment for plaintiff.—Tibbets v. Bakewell, 35 Pac. 1007.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT AND REVIEW.

COURSE AND CONDUCT OF TRIAL—SEPARATE TRIALS AS TO SEVERAL DEFENDANTS, § 158.
—— CONDUCT OF TRIAL, § 159.
—— SCOPE OF INQUIRY AND POWERS OF COURT, § 160.
—— QUESTIONS FOR JURY, § 161.
—— SUBMISSION OF ISSUES, § 162.
DISMISSAL AND NONSUIT, § 163.
—— BY THE COURT BEFORE TRIAL, § 164.
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INSTRUCTIONS, § 166.
—— FORM, REQUISITES, AND SUFFICIENCY, § 167.
—— EVIDENCE IN GENERAL, § 168.
—— TITLE AND RIGHT OF POSSESSION, § 169.
VERDICT AND FINDINGS—SUFFICIENCY IN GENERAL, § 169½.
—— FAILURE TO SPECIFY ON WHICH COUNT OR DEFENSE FINDING IS BASED, § 170.
—— DESIGNATION OR DESCRIPTION OF PROPERTY, § 171.
—— DESIGNATION OF TITLE, ESTATE OR INTEREST, § 172.
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—— RESPONSIVENESS TO ISSUES, § 176.
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NEW TRIAL FOR CAUSE—GROUNDS, § 178.
JUDGMENT—FORM, REQUISITES, AND SUFFICIENCY, § 179.
—— DEFAULT JUDGMENTS, § 179½.
—— EXTENT OF RELIEF OR RECOVERY, § 180.
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EXECUTION AND ENFORCEMENT OF JUDGMENT, § 182.
—— FORM AND REQUISITES, § 183.
—— RIGHT TO POSSESSION AND WRIT THEREFOR, § 184.
—— ALIAS WRITS, § 185.
—— PERSONS SUBJECT TO OUSTER, § 186.
—— INJUNCTION, § 187.
—— STAY, § 187½.
—— VACATING OR QUASHING WRIT, § 188.
—— SATISFACTION OR RELEASE, § 189.
—— MANNER OF EXECUTING WRIT, § 190.
—— OPERATION AND EFFECT OF ENFORCEMENT, § 191.
APPEAL AND ERROR—REVIEW, § 192.
—— HARMLESS ERROR, § 193.
—— DISPOSITION OF CAUSE, § 194.
RESTITUTION—GROUNDS, § 195.
—— PROCEEDINGS, § 196.

§ 158. Course and Conduct of Trial—Separate Trials as to Several Defendants.

[a] In an action for the recovery of land brought against many defendants holding separate portions thereof, and having no common interest, it is proper for the court, without any motion therefor, to order separate trials, when it becomes apparent that the several parcels of land in controversy are separate and distinct, and that the several classes of defendants rely upon different sources of title. If separate trials in such cases be not allowed, the rule permitting the plaintiff to join, as defendants, all who are in possession of the tract for which he sues, will produce great inconvenience and injury.—Judson v. Malloy, 40 Cal. 299.

§ 159. —— Conduct of Trial.

[a] In ejectment, the statute authorizes the court to direct the jury to be conducted

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to view the land in controversy; but it does not authorize them to view any other property than that which is in litigation, nor to use the result of their examination as independent evidence in the case.—Wright v. Carpenter, 50 Cal. 556.

[b] After the equitable defense is dismissed, the court should proceed to the trial of the issues at law.—Thomas v. Lawlor, 53 Cal. 405.

[c] In ejectment equitable issues should be first tried.—Schieffery v. Tapia, 68 Cal. 188, 8 Pac. 878.

[d] Party waives right to have equitable defenses first tried by assenting to trial of whole cause.—George v. Silva, 68 Cal. 273, 9 Pac. 257.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 156; 17 Cent. Dig., cols. 2405-2507, §§ 302, 303.

§ 160. —— Scope of Inquiry and Powers of Court.

[a] Failure of defendant in ejectment to appear when the cause is called for trial—an answer being in—authorizes the court to try it without a jury.—Doll v. Feller, 16 Cal. 432.

[b] Where a defense arising from a verbal contract for the sale of the lands, accompanied with acts of part performance, is set up to an action of ejectment, the court must first pass upon this defense, and if, on hearing the evidence, the court determines the defense to be good, it should enjoin the further prosecution of the action, with its decree for a specific performance; and, on the other hand, if the court refuse the relief claimed by defendant, it should call a jury to determine the issue upon the general denial.—Weber v. Marshall, 19 Cal. 447.

[c] Upon a complaint containing the usual allegations in ejectment, and all that are necessary to quiet title, and a prayer that defendants be required to set forth their claims; that said claims be adjudged to be invalid, and plaintiff's title declared to be good; that plaintiff be restored to possession, and defendants be barred forever from asserting any claim to the land, and "for such other and further relief as shall be meet in the premises"—judgment would not be given without evidence, even if there was no answer.—Chester v. Field, 87 Cal. 422, 25 Pac. 493.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 160; 17 Cent. Dig., cols. 2407-2409, §§ 304-306.

161. —— Questions for Jury.

[a] In actions for the recovery of land, the question as to possession and identity of the land should be left for the jury.—Hicks v. Davis, 4 Cal. 67.

[b] It is not province of jury to determine whether a grant could fairly be presumed from a possession of a certain character.—Castro v. Gill, 5 Cal. 40.

[c] In a suit in ejectment, questions as to the proper parties plaintiff, as to the validity and effect of conveyances, and of proceedings in the probate court, and as to the loss of a conveyance and its contents, secondarily proved, are for the court exclusively Seaward v. Malotte, 15 Cal. 304.

[d] A jury need not be called to pass upon an equitable defense to an action of ejectment. The parties are entitled to a jury upon the legal issues; but as to the equitable defenses the court sits as a chancellor, and may or may not, according to its discretion, order issues to a jury.—Weber v. Marshall, 19 Cal. 447.

[e] The court, and not the jury, must pass upon the equitable title set up in the answer, and it must be sufficiently pleaded to warrant the court in granting a decree which will estop the further prosecution of the action.—Downer v. Smith, 24 Cal. 114.

[f] Where both parties in ejectment claim under a common grantor, and the answer sets up, not only a legal title in defendant, but also a parol contract by the common grantor to convey to him, and an entry thereunder, and alleges that plaintiff purchased subsequently, and entered on the land with notice of these transactions, the defense is both legal and equitable, and the court may first try the equitable defense, and refuse to plaintiff a jury trial on a traverse of the answer.—Bodley v. Ferguson, 30 Cal. 511.

[g] Where, upon examination of the complaint in an action of ejectment, there appears on its face no defect in the description of the demanded premises, it is a question of fact whether the description will apply to the land sought for.—Moss v. Shear, 30 Cal. 467.

[h] Where there was evidence for the plaintiff tending to show that the amount of annual rent specified in an original parol lease was changed and increased by consent of the parties for the ensuing years, and that the defendant was in partial default of rent for the year in which the action was brought, it was a question of fact essential for the jury to determine as to the number and character of the leases entered into between the parties, and an instruction that the only lease established was the original parol lease for years, under which the defendant entered into possession, at a specified annual rental, is prejudicially erroneous, as touching upon a matter of fact, and taking from the jury the evidence for the plaintiff as to the change in the terms of rental.—Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 160; 17 Cent. Dig., cols. 2409-2413, §§ 307-310.

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§ 162. —— Submission of Issues.

[a] Where, to an action of ejectment, several defenses are set up, some legal and some equitable, it is error for the court to frame special issues involving these various defenses—legal and equitable—and submit them all together to a jury.—Weber v. Marshall, 19 Cal. 447.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 163; 17 Cent. Dig., cols. 2413-2415, § 311.

§ 163. Dismissal and Nonsuit.

[a] The plaintiff in an action of ejectment has a right to dismiss the action as to any of the defendants who have not been served with summons, or who have not appeared and set up an adverse claim.—Hinkel v. Donohue, 88 Cal. 597, 26 Pac. 374.

§ 164. —— By the Court Before Trial.

[a] In ejectment upon disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon the only proper judgment is one of nonsuit.—Noe v. Card, 14 Cal. 576.

[b] Where a cause of action in ejectment is stated, and as ground for relief in equity the complaint contains a separate statement of facts, upon which an injunction is asked, restraining the defendants from working or selling the property, the action should not be dismissed because the allegations for relief in equity show that the court has no jurisdiction to grant it.—McNeady v. Hyde, 47 Cal. 481.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 164, 165; 17 Cent. Dig., cols. 2415-2419, §§ 313-315.

§ 165. —— At Trial.

[a] A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint.—McKee v. Greene, 31 Cal. 418.

[b] Where defendant in ejectment moves for a nonsuit, and intends to rely on the point that a deed offered in evidence by plaintiff, and which was admitted without objection, does not include the demanded premises, he should distinctly so state in his motion.—Sanchez v. Neary, 41 Cal. 485.

[c] Where, in an action of ejectment, the landlord is made a joint defendant with his tenant, and upon the trial there is no proof that the landlord was in possession of any part of the demanded premises at the time the action was commenced, the landlord is entitled to a nonsuit.—Hussman v. Wilke, 50 Cal. 250.

[d] In ejectment for the possession of several distinct pieces of land, defendant may have a nonsuit as to such portions of the demanded premises as plaintiff's evidence shows were in his own possession at the time of the commencement of the action.—Dillon v. Center, 68 Cal. 561, 10 Pac. 176.

[e] Where in ejectment plaintiff introduced no evidence as to her right to the land, that she had been ousted of by defendant, or that she had any right to eject defendant, a nonsuit was properly granted.—Billings v. Pearson (Cal. App.), 86 Pac. 825.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 15 Cyc. 165; 17 Cent. Dig., cols. 2418, 2419, § 316.

§ 166. Instructions.

[a] In ejectment, where the defense is that plaintiffs' ancestor conveyed the premises to defendants' grantor, by a deed which plaintiffs claim was forged, it is error to instruct that a forged deed is void, and confers no rights, "except, if duly recorded, it is constructive notice of that fact."—Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897.

[b] In ejectment, where defendant claims by virtue of the statute of limitations, and also by reason of an alleged settlement of the line between him and plaintiff by their respective grantors, failing which defenses there is no question of plaintiff's right to the land, it is not error to instruct that plaintiff is entitled to recover, unless defendant shows title in one of the ways pleaded, and that the fact that he has in good faith made improvements on the land in controversy cannot affect the verdict.—Helm v. Wilson, 89 Cal. 593, 26 Pac. 1103.

[c] Where, in an action of ejectment between persons claiming the right of possession of the bed of a river, several witnesses testified to the nature and character of the inclosures by farmers in that neighborhood of land of the same kind and quality as that sued for, including the plaintiffs', it was not error to charge that in determining whether the land in controversy was occupied and used for purposes to which it was adapted if plaintiffs occupied and used any portion of it, the jury might consider the manner in which the owners of land of like character in the same neighborhood commonly occupied and used such lands.—Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cent. Dig., cols. 2419-2432, §§ 319-326.

§ 167. —— Form, Requisites and Sufficiency.

[a] Where the court had admitted in evidence the mesne conveyances through which plaintiff traced title, and the defendants were shown to be mere trespassers, it charged the jury with "the written evidence of title, together with the admissions of the parties,

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authorized them to find for plaintiff, since the execution of the papers had been passed on by the court." Held, that this instruction was correct as amounting only to an announcement of the law as to the effect of the conveyances, and of the admission of the defendants.—Stark v. Barrett, 15 Cal. 362.

[b] In an ejectment suit, the court instructed the jury that they must be satisfied that plaintiff's grantor had had "actual bona fide occupation, and had subjected the land to his will and control for some time." Held, that this instruction was proper, and that the word "occupation" was not too strong, it not signifying, from the connection in which it was used, anything more than "possession," and it not appearing to have been otherwise understood by the jury. Lawrence v. Fulton, 19 Cal. 683.

[c] In ejectment, it is error to charge that, defendant being in possession, plaintiff cannot recover, unless he prove an earlier and better possession, the use of the term "better" tending to mislead.—Sweeney v. Reilly, 42 Cal. 402.

[d] Instructions upon the subject of adverse possession by a tenant in common are to be taken together and considered as a whole; and if, when so considered, the law as to adverse holding between such tenants is correctly stated, the fact that one of the instructions taken by itself is not complete upon that subject will not vitiate the charge to the jury, but the jury will be deemed to have properly applied the law as stated by the charge taken as a whole.—Feliz v. Feliz, 105 Cal. 1, 38 Pac. 521.

[e] In ejectment, an instruction that, if the jury find for plaintiff, their verdict will be that they find for plaintiff for the recovery of the possession of the premises described in the complaint, is not objectionable, as requiring the jury to give a verdict for the whole premises, where the answer raises no question as to the amount of land plaintiff might recover, and defendant asks for no instruction with reference to the amount of such land.—Feliz v. Feliz, 105 Cal. 1, 38 Pac. 521.

§ 168. —— Evidence in General.

[a] Where defendants claimed title by adverse possession, and there was evidence to support that defense, an instruction ignoring such defense, and directing the jury to find for the plaintiff if he established the title set up by him, is erroneous.—Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24.

§ 169. —— Title and Right of Possession.

[a] In an action for the recovery of a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual inclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the preemption laws of the United States, or the possessory law of this state.—Bradshaw v. Treat, 6 Cal. 172.

§ 169½. Verdict and Findings—Sufficiency in General.

[a] Where the court has erroneously admitted evidence that, pending the action, plaintiff conveyed the premises to a third person, where such conveyance has not been set up in the pleading, the refusal to find the fact which it tends to establish is not error, since no material issue on that point is raised.—Moss v. Shear, 30 Cal. 467.

[b] In ejectment, the court will, if requested, specify in the findings the facts constituting the claim of title set up by the opposite party.—Morrill v. Chapman, 35 Cal. 85.

[c] In ejectment, general verdict is sufficient.—Joy v. McKay, 70 Cal. 445, 11 Pac. 763.

[d] Where, in ejectment, defendant pleaded a bar of the action, and, by cross-complaint, averred adverse possession for five years, under claim of right founded upon a written instrument, but the court failed to find upon either issue, although there was evidence to support them, the judgment must be reversed. Christy v. Spring Valley Waterworks, 84 Cal. 541, 24 Pac. 307.

[e] Where the answer in an action for the recovery of real estate set up as a defense that the action was barred by Code of Civil Procedure, section 318, which requires the plaintiff or his predecessors to have been seised or possessed of the property within five years, and the court found that the action was not barred by said section, such finding was, in effect, that plaintiff or his predecessors had been in possession within five years, and was a sufficient determination of an issue raised by another defense pleaded, which depended upon such question of fact, although no finding was expressly made on that issue.—Baum v. Roper, 145 Cal. 116, 78 Pac. 466.

[f] Where, in ejectment to recover a storeroom under a lease of the entire building from one of defendants, the complaint alleged a conspiracy between defendants to withhold the property from plaintiff, a finding that the lease gave plaintiff the right of possession of the entire building except such storeroom, which was occupied by the other defendant, negatived the issue of conspiracy.—Schwannecke v. Goodenow, 52 Pac. 588.

[g] In ejectment against the lessor and another lessee, a finding that plaintiff lessee had no right of possession need not dispose of the relative rights and liabilities of defendants in the property in controversy.—Schwannecke v. Goodenow, 52 Pac. 588.

[h] In ejectment, a finding held to support a judgment for plaintiff. Civ. Code, sec.

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762.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 166-172; 17 Cent. Dig., cols. 2432-2450, §§ 327-345.

§ 170. —— Failure to Specify on Which Count or Defense Finding is Based.

[a] A judgment in ejectment will be reversed, if there was a general verdict, without designating upon which one of several defenses set up in the answer it was rendered, if it appear that some of the defenses were insufficiently pleaded.—Anderson v. Fisk, 36 Cal. 625.

§ 171. —— Designation or Description of Property.

[a] A verdict finding that plaintiff is entitled to recover the land in controversy is sufficient, and the words "in accordance with the United States survey," appended at the end, will be presumed to be consistent with the former part, in the absence of a showing to the contrary, and may be rejected as surplusage.—Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

[b] A finding in ejectment that "defendant withheld the east half of section 13" is a sufficient finding that he withheld the east half of section 31, where that is the only section mentioned in the complaint.—Johnson v. Vance, 86 Cal. 128, 24 Pac. 863.

[c] In ejectment, the verdict was that plaintiff was "entitled to the possession of the land described within the following boundaries," etc.; but there was nothing to show that the verdict referred to the land described in the complaint or answer, or the patents and deeds introduced in evidence, and no natural monuments were mentioned in the boundaries given. Held, that the verdict was insufficient.—Northern Ry. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273.

§ 172. —— Designation of Title, Estate, or Interest.

[a] A finding that defendant has a good and perfect title to the demanded premises supports a judgment for him, whether it is to be regarded as a finding of fact or a conclusion of law.—Frazier v. Crowell, 52 Cal. 399.

[b] Finding in an action of ejectment that the plaintiff is the owner of the land in controversy is a sufficient finding that the defendants are not the owners.—Coates v. Cleaves, 92 Cal. 427, 28 Pac. 580.

[c] Findings which show a paramount source of title, with mesne conveyances to plaintiff therefrom, antedating the commencement of the action, discloses title in the plaintiff, carrying with it the right of possession, and the withholding of the possession from one who is seised of the premises is presumptively adverse to his right and is wrongful.—McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14.

[d] A finding, as a conclusion of law, in an action to recover real estate, that defendant is entitled to the possession until paid for improvements, which is neutralized by a finding that defendant's possession is unlawful, does not authorize a judgment for defendant.—Moffit v. Rosecrans, 136 Cal. 416, 69 Pac. 87.

[e] Findings, in an action to recover real estate, that plaintiff is entitled, "on the conditions hereinafter expressed," to the possession of the property in question, and which require the payment of a certain sum to defendant for improvements before plaintiff shall recover the possession, are insufficient to authorize judgment for plaintiff for the want of findings on the issue of ownership, or that plaintiff is entitled to possession.—Moffit v. Rosencrans, 136 Cal. 416, 69 Pac. 87.

[f] In an action of ejectment, where the plaintiff recovered judgment, subject to a homestead claim upon part thereof, and there is no finding in favor of either party as to the ultimate facts of title and right of possession in issue, and no facts are found as to the alleged homestead, and as to whether or not it attached to the premises prior to the title acquired by plaintiff, the judgment is not sustained, and must be reversed.—The Wickersham Banking Co. v. Rice, 137 Cal. 506, 70 Pac. 546.

[g] Where defendants in ejectment claim title, possession, and right of possession under an alleged verbal gift from plaintiff's ancestor, a finding that such ancestor "took title to the land in his own name, and did not promise that he would then or thereafter convey the same to defendants, and that he never did convey to them," and that plaintiff is the owner and seised in fee of the whole property is sufficient.—Eva v. Symons, 145 Cal. 202, 78 Pac. 648.

§ 173. —— Ouster by and Possession of Defendant.

[a] Where, in ejectment, issue is taken on the allegation of possession by defendant at the commencement of the action, and on this issue evidential facts were found by the court, but there was no finding thereon, the decision of the court cannot be sustained.—Soto v. Irvine, 60 Cal. 436.

[b] Though "wrongful" withholding of possession is gravamen of action, word "wrongful" need not be used in complaint or findings.—Johnson v. Vance, 86 Cal. 131, 24 Pac. 863.

[c] Where plaintiff in ejectment alleges possession by defendant, and he admits it, it is not necessary that the court should find that defendant was in possession, as findings on

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to admitted facts are not required.—Johnson v. Vance, 86 Cal. 128, 24 Pac. 863.

[d] In ejectment, a finding that defendant "ousted the plaintiff" is sufficient, since the probative facts need not be stated.—McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14.

[e] A finding that, on a certain date, "defendant did oust and eject plaintiff from the possession of said lot, ... and has ever since wrongfully and unlawfully withheld possession from plaintiff," is a sufficient finding of the fact of uster, though placed under the heading "Conclusions of Law"; the use of the words "wrongfully and unlawfully," in describing the withholding, being harmless surplusage.—McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14.

§ 173½. —— Joint or Several Verdict.

[a] In ejectment the verdict may be joint against several defendants without specifying their respective lots in a whole tract, where they file a joint answer, which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and defendants being in possession. McGarvey v. Little, 15 Cal. 27.

[b] Where several defendants in ejectment unite in an answer amounting to a general denial, a joint general verdict is proper, though the answer concludes with a prayer for separate verdicts. To entitle defendants to separate verdicts they should set forth with specific description the parcels which they severally occupy or claim, and thus direct the attention of the plaintiff to the course of defense upon which they will separately insist.—Patterson v. Ely, 19 Cal. 28.

§ 174. —— Incorrect, or Insufficient Verdict or Finding.

[a] Inadvertent finding that plaintiff was in possession at commencement of suit will not avoid judgment when pleadings admit and other findings indicate that defendant was in possession.—Fisher v. Slattery, 75 Cal. 329, 17 Pac. 235.

§ 175. —— Special Verdict.

[a] In a suit in ejectment, to the question whether plaintiff had notice of a sale of the property, the special finding was, "Yes, if possession is notice." Held, that the response was equivocal, and insufficient for that reason.—Woodson v. McCune, 17 Cal. 298.

§ 176. —— Responsiveness to Issues.

[a] In an action of ejectment, a verdict "in favor of the plaintiff against the defendants for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages," is a general verdict, covering all the issues, and the words, "for the possession of the premises described in the complaint herein," do not limit the finding to any particular fact or issue.—Hutton v. Reed, 25 Cal. 478.

[b] In an action of ejectment, where the complaint alleges seisin in the plaintiff, a finding of prior possession in the defendant does not meet the issue as to title.—Knight v. Roche, 56 Cal. 15.

[c] In an action of ejectment, and for use and occupation, where defendant denied the entry, charged as unlawful, and the court found that he did make the entry and, in a separate sentence, found "the loss of said rents, issues, and profits in the sum of seventy-five dollars," such findings, though clumsily drawn, substantially cover the issues.—Thompson v. Brannan, 76 Cal. 618, 18 Pac. 783.

[d] In ejectment based on a tax deed, where it is essential to plaintiff's case to prove each fact going to establish the validity of his deed, an allegation in the answer of payment of the tax before sale of the property does not create a material issue, requiring a finding thereon, the fact being covered by a finding as to the validity of the deed.—Cooper v. Miller, 113 Cal. 238, 45 Pac. 325.

§ 177. —— Construction and Operation.

[a] A general verdict will bind all the defendants in ejectment, unless they answer separately or demand separate verdicts.—Ellis v. Jeans, 7 Cal. 409.

[b] Where the complaint avers seisin and ouster on a certain date, and the court finds that plaintiff was owner on a prior date, and conveyed before the date named in the complaint, the property going into the hands of defendant, who was in possession from that time until the beginning of the action, the finding covers all the material issues, though there is no express finding as to the issue of ownership on the date named in the complaint.—Kidder v. Stevens, 60 Cal. 414.

[c] When the legal title of the plaintiff in ejectment is admitted, the findings of a jury upon special issues submitted to it by the court, where the matter to be tried is one of purely equitable defense, are not binding upon the court.—Wallace v. Maples, 79 Cal. 433, 21 Pac. 860.

[d] A verdict in an action of ejectment, whereby the jury "find for the plaintiff, and judgment in the sum of eleven hundred and seventy-five dollars," though informal, must be construed to be a general verdict, with a special finding of the value of the rents and profits during the whole period of the wrongful withholding, and is sufficient to support a judgment that the plaintiff recover the possession of the premises and "the sum of eleven hundred and seventy-five dollars rents and profits" and costs.—Johnson v. Visher, 96 Cal. 310, 31 Pac. 106.

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[e] A cross-complaint to quiet title in an action of ejectment presents only a legal, and not an equitable, defense, and the verdict of the jury in such action as to the amount of the damages suffered by the plaintiff is not advisory, but conclusive, except as against the power of the court to grant a new trial. The court cannot disregard the verdict, and make findings inconsistent therewith as to the amount of the damages.—Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637.

§ 178. New Trial for Cause—Grounds.

[a] Where plaintiff relies on a paper title and recovers judgment, and after trial defendant discovers that prior to the commencement of the action plaintiff had conveyed the title to a third person, a new trial should be granted.—Crammer v. Porter, 41 Cal. 462.

[b] Where it was clearly established that plaintiff had possessory title, and that the withholding by defendants was unlawful, and judgment went for defendants, it is proper to grant a new trial.—Johnson v. Hancock, 4 Pac. 1093.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 172-174; 17 Cent. Dig., cols. 2450-2454, §§ 346-352.

§ 179. Judgment—Form, Requisites, and Sufficiency.

[a] That one codefendant had surrendered possession to the other authorizes a finding of possession by one and not by the other, and judgment thereupon against the one in possession only.—Burke v. Table Mountain Water Co., 12 Cal. 403.

[b] In ejectment against several defendants occupying different portions of property sued for, several judgments may be entered and at different times—and this, whether upon trial, on separate findings or verdicts, or on findings by the court, or after default.—Lick v. Stockdale, 18 Cal. 219.

[c] To a suit in ejectment, an equitable defense, imperfectly pleaded, was set up. The trial was by the court, and the findings did not distinctly show defendant's equity as against the plaintiff's claim. Held, that the judgment for the plaintiff must be affirmed. Meador v. Parsons, 19 Cal. 294.

[d] In an action against several defendants sued jointly, where defendants sever their answers, but do not demand separate trials, and the jury find specially that defendants are severally in possession of separate parcels of the land, a joint judgment against all or part of the defendants is erroneous.—Leese v. Clark, 28 Cal. 26.

[e] In an action against several defendants sued jointly, where defendants sever their answers, but do not demand separate trials, and the jury find specially that defendants are severally in possession of separate parcels of the land, the entry of a several judgment against part of the defendants is not a discontinuance of the action, or an abandonment as to the others.—Leese v. Clark, 28 Cal. 26.

[f] In an action against several defendants sued jointly, where defendants sever their answers, but do not demand separate trials, and the jury find specially that defendants are severally in possession of separate parcels of the land, an erroneous entry of a joint judgment does not preclude plaintiff from trying for and having several judgments against defendants.—Lessee v. Clark, 28 Cal. 26.

[g] Where there is a finding in ejectment that plaintiff holds an interest in common with others in the demanded premises, it is proper for the court to define in the judgment the extent of his interest.—Mahoney v. Middleton, 41 Cal. 41.

[h] In a judgment in ejectment, if the land recovered is described as bounded by any object, so that it appears upon the record that its boundaries are capable of being identified in the field, the judgment upon its face is not void for uncertainty.—Lawrence v. Davidson, 44 Cal. 177.

[i] A judgment sufficiently describes the land in controversy, by calling for a well-ascertained beginning point, from whence the land is to be run to a designated monument, a "station fence post," and then giving the course of every other call in the description.—Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

[j] Where the complaint in ejectment alleges that defendant is in possession of the whole of a section of land, and the answer alleges he is in possession of only the east half, a judgment declaring plaintiff owner of the east half will not be reversed because it fails to find as to the west half, as it is an immaterial issue.—Johnson v. Vance, 86 Cal. 128, 24 Pac. 863.

[k] A judgment for the recovery of land entered in September, 1891, described a certain tract, but excepted from its effect such parts "as were sown to grain by the defendant during the fall of 1890 and the winter of 1891." Held, that the term "winter of 1891" referred to the winter of 1890-91, and the description is prima facie sufficient to identify the land excepted.—Rosenthal v. Mathews, 100 Cal. 624, 34 Pac. 624.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 174-178; 17 Cent. Dig., cols. 2454-2469, §§ 353-368.

§ 179½. —— Default Judgments.

[a] A sued in ejectment B, the tenant of C. B reported to C, whose counsel put in a demurrer, and began to prepare a defense to the suit. Pending this preparation and before argument on the demurrer, B, fraudu-

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lently and collusively with A, withdrew the demurrer. Held, that a judgment by default for A was properly set aside, and C properly admitted to defend.—Barrett v. Graham, 19 Cal. 632.

[b] Where ejectment is brought against a tenant, and he permits a default to be entered, the landlord may, on proper showing made in the name of the tenant, have the default vacated.—Dimick v. Deringer, 32 Cal. 488.

[c] Where, in ejectment, default and judgment were taken and rendered against a tenant without the knowledge of his landlord, a motion to set aside the default and vacate the judgment was properly granted.—Mowry v. Nunez, 33 Pac. 1122.

[d] Where the defendants, after the commencement of an action in ejectment, and before default, had conveyed their interest in the land in controversy to another, who did not join in the motion or ask to have the action continued in the names of the defendants, held, that an order should be affirmed, refusing to open the default.—Moore v. Kellogg, 58 Cal. 385.

[e] A judgment by default in ejectment against Indians who are ignorant and unacquainted with modes of judicial proceedings may be reopened on affidavits of merits made by counsel.—Byrne v. Alas, 68 Cal. 479, 9 Pac. 850.

§ 180. —— Extent of Relief or Recovery.

[a] The plaintiff is as much entitled to recover the improvements, which are fixtures, as the land.—McMinn v. Mayes, 4 Cal. 209.

[b] Where, in ejectment, the defense alleged is based on a verbal contract of sale, accompanied with acts of part performance, taking the contract from the operation of the statute of frauds, and defendant's equity is sustained by the evidence, the court will decree a conveyance to him from plaintiff and also enjoin further prosecution of the action. Weber v. Marshall, 19 Cal. 447.

[c] A plaintiff in ejectment, suing for an undivided interest in land, may recover an interest less than the one sued for.—(Cal. 1863) Halsey v. Martin, 22 Cal. 645.

[d] The plaintiff in an action of ejectment cannot ask that he be adjudged the owner and put into possession, and that the defendant be enjoined from claiming title to the land recovered. He must rely upon his judgment as a bar.—Doyle v. Franklin, 40 Cal. 106.

[e] Growing crops, as between a successful plaintiff in ejectment and the evicted defendant, belong to the realty.—Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33.

[f] In an action of ejectment, where the answer avers that the deed under which the plaintiff deraigns title was intended as a mortgage to secure a debt due to the plaintiff, and seeks a redemption of the premises, the judgment should provide for the payment of the mortgage debt within a designated time, and in default thereof that the property be sold, and the proceeds applied to such payment.—Healey v. O'Brien, 66 Cal. 517, 6 Pac. 386.

[g] In an action in the nature of ejectment, the court found that the plaintiff had advanced the purchase price on behalf of the defendant, and that he held the legal title in trust for him, and ordered that, upon tender of the amount due, the plaintiff execute deed of the premises to defendant; and further, that in case of plaintiff's failure to do so, the clerk of court should, as commissioner, execute and deliver the same. Held, that the plaintiff could not object to the decree that, in the event of his refusal to make the deed, it deprived him of his security without payment, as it was incumbent on the defendant to tender and deposit the money with the commissioner before he was entitled to obtain the deed.—Ward v. Matthews, 73 Cal. 13, 14 Pac. 604.

[h] Where defendant in his cross-complaint alleged a notice of rescission prior to the filing of the same, and expressed a willingness to surrender possession to plaintiff on payment by him of the amount paid on the purchase price, the court might properly award such relief, less value of rental from the date of the rescission to the date of the trial, and embody it in its judgment. But it was error to give judgment for such relief and also to leave the defendant in possession.—Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738.

[i] Where an intervener in ejectment prays for only part of the demanded premises, it is error to render judgment in his favor for the whole premises, and enjoin plaintiff from prosecuting or maintaining an action therefor.—Reay v. Butler, 7 Pac. 669.

[j] Recovery cannot be had in ejectment for land not specified in the complaint.—Scott v. Rhodes, 41 Pac. 878.

FOR AUTHORITIES FROM OTHER STATES:

Action of ejectment, recovery of part in suit for the whole: 54 Am. Dec. 415, note. See, also, 15 Cyc. 181; 17 Cent. Dig., cols. 2474-2478, § 373.

§ 181. Operation and Effect.

Conclusiveness of judgment in ejectment suit. See Judgment, § 510.

Judgment in ejectment as bar. See Judgment, §§ 406, 407.

Effect of judgment in ejectment on after-acquired title. See Judgment, § 407.

[a] A judgment in ejectment does not transfer to the successful party the title of the adverse party, but, if presented in the proper mode whenever such adverse title is drawn in issue, it shuts out all proof of such

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adverse title. Its effect bears a closer resemblance to an extinguishment than a transfer of the adverse title. The judgment awards the possession to the prevailing party because he had title at the commencement of the action, and because the losing party had no title, or not such a title as would authorize him to withhold the possession; but it neither directly nor indirectly transfers the title.—Mahoney v. Middleton, 41 Cal. 41.

[b] A judgment for plaintiff raises the presumption that defendant was shown to be in possession at the time of the commencement of the action.—Tubbs v. Ghirardelli, 45 Cal. 231.

[c] Judgment in ejectment concludes parties and privies as to all matters in issue in suit.—Thrift v. Delaney, 69 Cal. 191, 10 Pac. 475.

[d] Judgment does not bar parties from showing in subsequent action, new matter giving defeated party title or right to possession.—Thrift v. Delaney, 69 Cal. 191, 10 Pac. 475.

[e] Prior to the 1st of May, 1872, a purchaser pendente lite of the premises in controversy in an action of ejectment from a defendant in possession thereof was bound by the judgment afterward rendered in the action; and such judgment is admissible against him in a subsequent action brought by him to recover possession of the same premises from the plaintiffs in the prior action.—Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480.

[f] Judgment in favor of defendant for costs rendered on special verdict that plaintiff was owner and entitled to possession and that defendant had not withheld possession from him does not conclude plaintiff's title. Hughes v. Wheeler, 76 Cal. 231, 18 Pac. 386.

[g] Former judgment in ejectment against defendant does not bar second ejectment suit if he remains in possession.—Southern Pacific R. R. Co. v. Purcell, 77 Cal. 71, 18 Pac. 886.

[h] A former judgment in ejectment in favor of the appellant is conclusive in a subsequent action to quiet title brought by the respondent, the grantee of a purchaser from the defendant in ejectment, who took pendente lite, with sufficient notice of the pendency of the action.—McLean v. Baldwin, 136 Cal. 565, 69 Pac. 259.

FOR AUTHORITIES FROM OTHER STATES:

Judgment in ejectment who may be dispossessed under: 39 Am. Dec. 311, note.

Judgment in ejectment, conclusiveness of: 85 Am. Dec. 187, note.

See, also, 15 Cyc. 183; 17 Cent. Dig., cols. 2479-2481, § 379.

§ 182. Execution and Enforcement of Judgment.

[a] Where a sheriff, in executing a writ of possession, finds other persons than those named in possession of the property, and there is a reasonable doubt as to whether or not he has a right to remove them, he may demand indemnity.—Long v. Neville, 36 Cal. 455.

[b] On the issue as to the right of one not a party to an ejectment suit to remain in possession of the property in controversy after judgment, he has the burden of showing that his possession was rightful, and under a title that had not been determined in the action in ejectment, or that possession was not taken by collusion with defendants in the action.—Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

[c] Where writ of possession is issued after rendition, though before entry, of judgment, held it may be executed.—Baum v. Roper (Cal. App.), 82 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

30 L. R. A. 129, note. See, also, 15 Cyc. 184-189; 17 Cent. Dig., cols. 2481-2490, §§ 380-404.

§ 183. —— Form and Requisites.

[a] If, in a writ of possession issued on a judgment in ejectment, the land recovered is described so that its boundaries appear on the fact of the writ to be possible of identification by the sheriff in the field, the writ is not void for uncertainty of description.—Lawrence v. Davidson, 44 Cal. 177.

§ 184. —— Right to Possession and Writ Therefor.

[a] If plaintiff dies after judgment in his favor has been rendered, a writ of restitution may be issued on the judgment, at the instance and for the benefit of his successor in interest in the property.—Franklin v. Merida, 50 Cal. 289.

§ 185. —— Alias Writs.

[a] On the hearing for the issuance of an alias writ of possession in ejectment, evidence of a resurvey made after the trial by the surveyor who had testified on the trial was not improper, though the findings and judgment did not require any additional survey to be made, the survey bearing on the question whether the defendant had reentered into possession of any of the plaintiff's land as described in the judgment.—Dutra v. Pereira, 135 Cal. 320, 67 Pac. 281.

[b] Where judgment for plaintiff in ejectment is fully executed by putting plaintiff in possession, an alias writ of possession cannot issue except upon an adjudication that the person against whom the writ is to run is guilty of a contempt.—Rousset v. Reay, 31 Pac. 900, 32 Pac. 171.

[c] A motion for an alias writ of possession should not be entertained where the lapse of time after re-entry is sufficient to create a title in an adverse possessor, and

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bar an action of ejectment.—Rousset v. Reay, 31 Pac. 900, 32 Pac. 171.

[d] Plaintiff having obtained judgment in ejectment, a writ of possession was issued and executed in 1882 against defendants and one M, who was not a party to the suit, and a few months later M re-entered, and remained thereafter in exclusive possession. In 1889, plaintiff moved for an alias writ of possession against defendants and M. Held, that M could show on such motion that he was not a member of defendants' family, and that his possession was open and notorious, and that he was the owner of the premises in dispute, and was not a party to the ejectment suit.—Rousset v. Reay, 31 Pac. 900, 32 Pac. 171.

§ 186. —— Persons Subject to Ouster.

[a] The persons in possession of premises at the commencement of an action of ejectment to which he is not a party cannot be dispossessed by virtue of a writ of habere facias issued under a judgment for plaintiff in said suit.—(Cal. 1863) Fogarty v. Sparks, 2 Cal. 142; (1869) Ford v. Doyle, 37 Cal. 346.

[b] A writ of restitution obtained in an action of ejectment against a tenant in common cannot be served upon the grantee of the defendant's cotenant in a deed executed pending the litigation.—Wattson v. Dowling, 26 Cal. 124.

[c] Where, pending an action of ejectment against a tenant of a third party, the latter obtains possession by virtue of an action against such tenant under section 13 of the act concerning forcible entries and unlawful detainers, and with notice of the ejectment suit, and then leases to another person, the latter, though having no such notice, can be lawfully dispossessed under a writ of habere facias possessionem issued after judgment for the plaintiff in the ejectment suit. Long v. Neville, 29 Cal. 131.

[d] A writ of possession authorizes the putting out of all who have come into possession since the bringing of suit, notwithstanding they came in as tenants of a third party, when it is not shown that the latter came in before suit brought, or under an adverse title.—Leese v. Clark, 29 Cal. 664.

[e] A party and her tenants, coming into possession of lands after an action brought to recover possession under a prior unrecorded deed from two of the defendants in the action, of which plaintiff had no notice when the action was commenced, held to have been properly dispossessed under a writ of restitution issued on a judgment for plaintiff in such action.—Mayne v. Jones, 34 Cal. 3.

[f] A person cannot be legally dispossessed of land under a writ issued on a judgment rendered in an action to which he was not made a party, and when he holds under another party.—(Cal. 1868) Rogers v. Parish, 36 Cal. 127.

[g] The court ordered a writ of possession to be executed against a stranger to the suit in which it issued, where it appeared that he was in possession of the premises in controversy under cover of a legal process collusively obtained for the purpose, by persons shown to be friendly to the defendants, after the judgment in the action in which the writ issued was affirmed, and when there was no hope of avoiding the result in any other mode.—Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166.

[h] One who, after an action of ejectment has been commenced, enters upon the demanded premises, but not under the defendant, or by collusion with him, and is not made a party to the action, cannot be rightfully removed by virtue of a writ of restitution issued on a judgment rendered in the action.—Mayo v. Sprout, 45 Cal. 99.

[i] A real action was brought against the occupants of a tract of land, among whom was C. The suit was dismissed as to him. Judgment was afterwards recovered by plaintiff, and an attempt was made to oust C., under the writ of possession, from that part of the tract claimed by him. Held, that he was not affected by the judgment, and that its execution should be stayed as to him. McLean v. McNamara, 60 Cal. 610.

[j] Under a writ of possession issued on a judgment in ejectment, defendant's wife may be ejected, since her possession is presumed to be his.—Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33.

[k] One in possession under a mortgage of growing crops, given pending the ejectment suit, may be evicted under the writ of possession.—Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33.

§ 187. —— Injunction.

[a] A motion to restrain the sheriff from executing against the mover a writ of possession, in an action of ejectment to which he was not a party, held to be properly denied; the affidavit not showing that he did not enter under the defendants, or in collusion with them.—McCreery v. Everding, 54 Cal. 166.

[b] Where the plaintiff, in an action of ejectment, recovered judgment on the sole ground that the defendant, being his tenant, was estopped to deny his tenancy, and a third party claimed also as landlord of the same tenant under a superior title, recognized as such by the trial court, but of which he was not allowed the advantage in the action, an order restraining dispossession of the grantee of such third party under the writ of possession is properly granted.—Moulton v. McDermott, 93 Cal. 660, 29 Pac. 259.

[c] In an action to enjoin a sheriff from ejecting a plaintiff under a judgment of ejectment against his father, plaintiff testified that he never heard of the action against his father, but he was shown to have been in

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the courtroom during a portion of the trial. He testified that he did not know whether his father was ever in possession of the land, but admitted that he had been living with his father, and that he had worked for him for several years. He obtained from his father, as general manager of a corporation in possession of the land, a conveyance of the personal property of the corporation, and testified that he agreed with his father to permit the corporation to remain in possession of the land without any charge for rent. He claimed to have taken possession under a deed executed by a director of a corporation shortly after the rendition of a judgment of the supreme court affirming the judgment of ejectment. Held, that plaintiff's possession was taken by collusion with his father. Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

[d] In an action by one in possession of land to enjoin the enforcement of a judgment of ejectment in an action in which he was not a party, it will be presumed that he obtained possession under the defendants in the ejectment action, in the absence of evidence to the contrary.—Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

[e] He does not overthrow such presumption by proof that he obtained possession through a stranger to the action in ejectment, unless he shows that the stranger was in possession before the action in ejectment was commenced, or was entitled to possession under a title adverse to that of plaintiff in ejectment.—Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

§ 187½. —— Stay.

[a] Where a landlord jointly sued in ejectment with a tenant, has answered and had the action dismissed as to himself, but judgment has been rendered by default against the tenant, the court cannot, on motion of the landlord, order the proceedings to be stayed under a writ of restitution.—Dimick v. Deringer, 32 Cal. 488.

§ 188. —— Vacating on Quashing Writ.

[a] Persons claiming to be entitled to possession, and not to have been equally dispossessed under a writ of restitution, may move to set aside an ex parte order, made without notice to any one, allowing the writ to issue upon a judgment in ejectment rendered more than seven years prior to the order, and the party obtaining the writ is not injured by the making of such motion, instead of a motion to restore possession, where the evidence is conflicting as to whether the persons were in fact dispossessed.—Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247.

§ 189. —— Satisfaction or Release.

[a] If, in an action of ejectment, judgment has been reversed because the plaintiff was in possession of part of the land, for the occupation of which damages were given, the plaintiff cannot release such part from the operation of the judgment, and enforce the judgment as to the rest, if its location has not been determined.—Ellis v. Jeans, 26 Cal. 272.

§ 190. —— Manner of Executing Writ.

[a] Under a writ of restitution, it is the duty of the officer serving the writ to remove from the premises the defendant, and all persons who have derived possession from them since the commencement of the action, and all other persons who have acquired possession subsequent to the filing of the lis pendens, or with actual notice of the pendency of the action.—Fogarty v. Sparks, 22 Cal. 142.

[b] Upon a writ of restitution issued upon a judgment for the plaintiff in an action of ejectment, the sheriff is authorized to remove from the land the defendants and all persons found thereon, whose possession was derived under the defendants or either of them.—Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

§ 191. —— Operation and Effect of Enforcement.

[a] A defendant evicted in ejectment by a writ of restitution is estopped to deny that his prior possession was wrongful.—Mann v. Rogers, 35 Cal. 316.

§ 192. Appeal and Error—Review.

[a] Where the court's findings of fact in ejectment are supported by some evidence, they will not be disturbed.—Ellis v. Jeans, 26 Cal. 272.

[b] Where the findings of a court in ejectment express only the facts constituting the prevailing title, the defeated party, in order to review the findings, is not restricted to an exception to the findings as defective, but may, by exception, on the ground that the evidence was insufficient to justify the verdict and findings, review the unexpressed and implied findings.—Morrrill v. Chapman, 35 Cal. 85.

[c] In a trial of ejectment by the court without a jury, it should, if requested, include in the findings the facts constituting the title of the defeated party, and it is not presumed on appeal that it would refuse when so requested.—Morrill v. Chapman, 35 Cal. 85.

[d] Where defendant in ejectment offered evidence "tending to prove" that lands in question were included in a grant under which he claimed, which was superior to plaintiff's title, the absence of a finding in the record on that fact presumes that it was not established.—Morrill v. Chapman, 35 Cal. 85.

[e] If the court finds that defendant was not in actual occupation of the demanded premises when suit was commenced, and still

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renders judgment, it will be presumed, in support of the judgment, that the court found such possession as would support ejectment. Tubbs v. Ghirardelli, 45 Cal. 231.

[f] An action of ejectment will not lie in favor of a lessor who has received annual rent under a void parol lease, before the expiration of the year for which the rent was received; and where the evidence upon the question of the receipt of rent for that year is conflicting, and the verdict was against the plaintiff, the finding of the jury as to that fact is controlling upon appeal.—Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685.

[g] In ejectment, the court having found that plaintiff is not, and never was, owner or entitled to the possession of the land described in the complaint, and this finding being unchallenged, the supreme court cannot, on appeal, examine the deed under which plaintiff claims.—Gilbert v. Kelly, 138 Cal. 689, 72 Pac. 344.

§ 193. —— Harmless Error.

[a] Upon default, the court found that the plaintiff was entitled to the whole tract, and that the defendant had occupied part. Damages being waived, it was held that judgment for possession of the whole tract could not be complained of by the defendant.—Vallejo v. Fay, 10 Cal. 377.

[b] Where no damages are claimed in an action to recover realty, no injury can result from a joint verdict.—Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

[c] In ejectment though it is irregular for plaintiff, in proving his case, to introduce in evidence a judgment which is an estoppel, yet, if the defendant is conclusive as an estoppel, defendant is not injured because the judgment was not reserved for rebutting testimony.—Clink v. Thurston, 47 Cal. 21.

[d] If plaintiff in ejectment, pending the action, conveys the demanded premises by a deed absolute on its face, and defendant proves it on the trial, evidence of plaintiff in rebuttal that the deed was intended as a mortgage is not prejudicial to defendant. Clink v. Thurston, 47 Cal. 21.

[e] Where defendant is in possession of only part of the demanded premises, and plaintiff owns the whole and claims no damages, defendant is not injured by a judgment in plaintiff's favor for the whole tract.—Camarillo v. Fenlon, 49 Cal. 202.

[f] In ejectment defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Held, that failure of the court to find as to the effect of such judgment on plaintiff's right to claim title to the land was not reversible error where the evidence showed adverse possession in defendants for a sufficient length of time to bar plaintiff's action. Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738.

[g] In ejectment, where plaintiff city claims the land in dispute by dedication and the court has found that there was such a dedication, a further finding that after the dedication the owners of the land directed that it be so designated on the maps of the city is immaterial, and the fact that it is not supported by the evidence will not affect the judgment for plaintiff.—City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247.

[h] Where plaintiff in ejectment shows title to the whole tract in suit, and that defendant is in possession of a portion, defendant cannot complain of a judgment for plaintiff for such portion on the ground that the judgment does not sufficiently describe it.—Pierce v. Hilton, 102 Cal. 276, 36 Pac. 595.

[i] The admission in evidence in an action of ejectment brought by an executrix, of a complaint filed in another action, averring individual ownership in the same plaintiff, conceding it to be erroneous, is not prejudicial, where it is conceded upon both sides that the administration is not concluded, and that no distribution has been had, and all other statements in such pleading were in support of the testimony of the executrix. Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685.

[j] Where a judgment for defendant in ejectment is sustained on other grounds than that of his adverse possession, error in finding that he had paid the taxes on the land during the time he was in possession is harmless. Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 190-194; 17 Cent. Dig., cols. 2499-2514, §§ 405-418.

§ 194. —— Disposition of Cause.

[a] Where a judgment is erroneous by reason of a wrong construction given to the description of land in a deed in evidence, the supreme court cannot modify the judgment, but will reverse it and grant a new trial.—Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

§ 195. Restitution—Grounds.

[a] When one who, after an action of ejectment has been commenced, enters upon the demanded premises, but not under the defendant or by collusion with him, and who is not made a party to the action, is removed under a writ of restitution issued on a judgment rendered in the action, he will be restored to possession upon application made to the court.—Mayo v. Sprout, 45 Cal. 99.

[b] Upon a reversal of an order for a writ of restitution the appellant is entitled to be restored to all that he has lost by virtue of the order, and to be placed in the same position as he was prior to the execution of the writ, by the removal of all persons that have been placed in possession of the land by virtue of the writ, as well as of all those

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who have come in under him after that date. Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643.

FOR AUTHORITIES FROM OTHER STATES:

Restitution, writ of, how must be executed and who may be dispossessed under: 15 Am. St. Rep. 56, note. See, also, 15 Cyc. 194-197; 17 Cent. Dig., cols. 2514-2520, §§ 419-430.

§ 196. —— Proceedings.

[a] A party who is removed from the possession of real estate by virtue of a writ of restitution issued on a judgment in ejectment, and who moves to be restored to the possession on the ground that he was not a party to the action, must make out a clear case, free from ambiguity.—California Quicksilver Min. Co. v. Redington, 50 Cal. 160.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS AND TAXES.

A. Damages and Mesne Profits, §§ 197-207.

B. Improvements and Taxes, §§ 208-214.

A. DAMAGES AND MESNE PROFITS.

RIGHTS OF PARTIES TO DAMAGES AND MESNE PROFITS — NATURE AND FORM OF REMEDY, § 197.

—— RIGHTS AND LIABILITIES AS TO DAMAGES OR MESNE PROFITS IN GENERAL, § 198.

—— DEFENSES, § 199.

—— RECOVERY OF DAMAGES OR MESNE PROFITS IN ACTION OF EJECTMENT, § 200.

—— EXTENT OF RECOVERY, § 201.

—— MEASURE, ELEMENTS, AND AMOUNT OF DAMAGES, § 202.

PROCEEDINGS TO DETERMINE RIGHT TO DAMAGES AND MESNE PROFITS, § 203.

—— STAY, § 204.

—— APPOINTMENT OF RECEIVER, § 205.

—— VERDICT AND FINDINGS, § 206.

—— JUDGMENT, § 207.

§ 197. Rights of Parties to Damages and Mesne Profits—Nature and Form of Remedy.

[a] The value of the use and occupation of the demanded premises can be recovered only in the form of damages.—Miller v. Myers, 46 Cal. 535.

§ 198. —— Rights and Liabilities as to Damages or Mesne Profits in General.

[a] Where plaintiff transfers the premises pending action, and the court orders the action continued in the name of the original plaintiff, he may recover judgment for both possession and the rents and profits.—Moss v. Shear, 30 Cal. 468.

[b] Rents and profits cannot be recovered from a person who is entitled to the possession of the land during the time in which they accrue.—Rich v. Maples, 33 Cal. 102.

[c] Neither damages nor rents and profits can be recovered in an action of ejectment, unless there is a judgment for the recovery of possession.—Locke v. Peters, 65 Cal. 161.

[d] No rents and profits can be recovered in ejectment from one occupying land with the consent of the owner for the period of such consent.—Ross v. Evans, 65 Cal. 439, 4 Pac. 443.

[e] An heir at law is entitled to the rents, issues, and profits of land not specifically devised, so long as wrongfully kept out of the possession thereof; and it is error to exclude evidence of the value of the rents of the demanded premises in an action of ejectment by the heir against a cotenant.—Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091.

§ 199. —— Defenses.

[a] A tenant in possession of premises who is sued in ejectment is not released from liability to the plaintiff for the use of the premises from the fact that he has paid rent to his landlord. If compelled to pay any further sum by the action, he can have recourse upon his landlord for the same.—Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

§ 200. —— Recovery of Damages or Mesne Profits in Action of Ejectment.

[a] Under the Practice Act in this state, it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action.—Sullivan v. Davis, 4 Cal. 291.

[b] The land and mesne profits may be recovered in the same action under Statutes of 1850 and under Revised Code, article 20, page 389.—(Cal. 1861) Bay v. Pope, 18 Cal. 694.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 206; 17 Cent. Dig., cols. 2539-2542, §§ 438-444.

§ 201. —— Extent of Recovery.

[a] A tenant in common may, as against a stranger, recover the whole premises in an action of ejectment, but he can recover only his proportional share of the mesne profits. Clark v. Huber, 20 Cal. 196.

[b] If plaintiff in ejectment is in possession of portion of land sued for it is error, if the answer denies damages, for the court to assess damages against defendant for the use of the entire tract.—Ellis v. Jeans, 26 Cal. 272.

[c] Where plaintiff in ejectment establishes his title, he cannot maintain claim and delivery for a crop raised and harvested on the land by defendant's tenant before judgment in ejectment was rendered, though the tenant

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knew that plaintiff disputed his landlord's title.—Johnson v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979.

[d] Where, in ejectment, defendant is found to be a mere trespasser, plaintiffs, though owning only an undivided one-half, are entitled to possession of the whole tract, but to one-half the rents and profits accruing during the detention; defendant being liable for the remaining half to the owner of the other undivided one-half of the estate.—McGuire v. Lynch, 126 Cal. 576, 59 Pac. 27.

§ 202. —— Measure, Elements, and Amount of Damages.

[a] In an action to recover possession of land, brought against a party who was a naked trespasser upon his entry, and, while such, made improvements, but afterward became a cotenant, the plaintiff can recover the increased value of the rents and profits arising from such improvements.—Carpentier v. Mitchel, 29 Cal. 330.

[b] An owner of land may recover from a disseisor the value of the use and occupation of the land, but this very fact shows that he cannot recover the crops grown by the disseisor while he was out of possession.—Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 205-209; 17 Cent. Dig., cols. 2542-2555, §§ 445-452.

§ 202½. —— Period of Computation.

[a] Plaintiff in ejectment can recover mesne profits only from the accrual of his right of possession.—Clark v. Boyreau, 14 Cal. 634.

[b] Rents and profits can be recovered, in an action of ejectment, for only three years prior to bringing suit, when the defendant sets up the statute of limitations.—Carpentier v. Mitchell, 29 Cal. 330.

[c] In an action to recover land and damages for its detention, if the statute of limitations of three years is pleaded as to the damages, the plaintiff can only recover damages which accrued three years before the commencement of the action.—Love v. Shartzer, 31 Cal. 487.

§ 203. Proceedings to Determine Right to Damages and Mesne Profits.

[a] Where damages are claimed for use and occupation prior to the commencement of the action the complaint must state the title of plaintiff as existing at some prior date (to be designated), and as continuing up to the commencement of the action, and the entry of defendant at some date subsequent to that of the alleged title.—Payne v. Treadwell, 16 Cal. 220.

[b] In an action of ejectment, a general averment of, and a prayer for, damages for the unlawful withholding are sufficient to support judgment for damages, in the absence of a special demurrer or objection to the evidence on that subject.—Martin v. Durand, 63 Cal. 39.

[c] Complaint in ejectment alleging that defendant wrongfully ousted plaintiff, and took possession of the premises to plaintiff's damage, is sufficient without an averment that defendant had received the rents and profits.—Johnson v. Visher, 96 Cal. 310, 31 Pac. 106.

§ 204. —— Stay.

[a] The pendency of a suit in the federal court, brought by the United States to cancel a patent under which plaintiff claimed title, is no ground for a stay of proceedings in an action to recover the mesne profits of the land after plaintiff had recovered judgment in ejectment against defendant.—Avery v. Superior Court of Contra Costa County, 57 Cal. 247.

§ 205. —— Appointment of Receiver.

[a] After final judgment in an ejectment suit in which a receiver has been appointed to take charge of the disputed premises and retain the profits derived from them, the court will not order the issue to be tried whether the receiver has taken possession of other land than that which was the subject of the suit, but it will be presumed that he did not transcend the bounds of his authority.—Ellis v. Jeans, 26 Cal. 272.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 217; 17 Cent. Dig., cols. 2563, 2564, § 462.

§ 206. —— Verdict and Findings.

[a] When, in ejectment, there is no finding as to the value of the use and occupation of the premises, the plaintiff is not entitled to judgment for damages by way of mesne profits.—Camarillo v. Fenlon, 49 Cal. 202.

[b] In ejectment, the verdict of the jury is conclusive as to damages, and the court cannot allow a different sum on finding made by the court.—Mills v. Fletcher, 10 Cal. 142, 34 Pac. 637.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 218; 17 Cent. Dig., col. 2565, § 464.

§ 207. —— Judgment.

[a] Plaintiffs in ejectment alleged that, during defendant's possession, the use and occupation, rents and profits of the premises had amounted to ten thousand dollars, which sum was claimed in damages. The complaint was verified, and the answer failed to specifically deny the allegations of the complaint. Held, that a verdict and judgment rendered

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on the pleadings for the whole amount claimed must stand.—Patterson v. Ely, 19 Cal. 28.

[b] In an action of ejectment against several defendants, judgment for damages may be rendered against all jointly, although one or more of them have not been in possession of the whole of the premises for which ejectment was brought, but in the exclusive possession of a part, if no request is made that a several judgment should be rendered.—Ellis v. Jeans, 26 Cal. 272.

[c] Where the annual value of the premises in ejectment is found both in gold and currency, it is not error to render a general judgment for an amount equal to the currency valuation.—Carpentier v. Small, 35 Cal. 346.

[d] A judgment for damages, in an action of ejectment, where no damages are alleged in the complaint, is clearly erroneous.—McKinlay v. Tuttle, 42 Cal. 570.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 218; 17 Cent. Dig., cols. 2565, 2566, § 465.

B. IMPROVEMENTS AND TAXES.

RIGHTS OF PARTIES AS TO IMPROVEMENTS AND TAXES, § 208.
TITLE AND POSSESSION REQUISITE TO SUPPORT CLAIM, § 209.
SETOFF OF IMPROVEMENTS OR TAXES AGAINST DAMAGES OR MESNE PROFITS, § 210.
—— ITEMS WHICH MAY BE SET OFF, § 211.
—— TITLE AND POSSESSION REQUISITE TO AUTHORIZE SETOFF, § 212.
—— EXTENT OF SETOFF, § 213.
—— PLEADING, § 214.

§ 208. Rights of Parties as to Improvements and Taxes.

[a] Where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on the property.—Ford v. Holton, 5 Cal. 319.

FOR AUTHORITIES FROM OTHER STATES:

Allowance for improvements, in actions of ejectment: 2 Am. Dec. 724, 13 Am. Dec. 349, 14 Am. St. Rep, 53, notes. See, also, 15 Cyc. 218-232; 17 Cent. Dig., cols. 2568-2571, § 468; cols. 2573-2576, §§ 470-475, 477; cols. 2578-2581, §§ 479-481.

§ 209. Title and Possession Requisite to Support Claim.

[a] Defendant in ejectment is not entitled to an allowance for betterments unless it appears that he was a bona fide purchaser. (Cal. 1868) Carpentier v. Small, 35 Cal. 346.

§ 210. Setoff of Improvements or Taxes Against Damages or Mesne Profits.

[a] Value of improvements on land may be set off against the rents and profits thereof. Welch v. Sullivan, 8 Cal. 165.

[b] In an action to recover lands, the court cannot set off the value of the improvements against the damages when the defendant does not ask it.—Carpentier v. Gardiner, 29 Cal. 160.

FOR AUTHORITIES FROM OTHER STATES:

Mesne profits in ejectment, setoff of betterments against: 9 Am. St. Rep. 795, note. See, also, 15 Cyc. 231, 232; 17 Cent. Dig., cols. 2600-2609, §§ 502-508.

§ 211. —— Items Which May be Set Off.

[a] The right in ejectment to offset improvements made by defendant or his grantor against plaintiff's claims for damages depends on whether the improvements are permanent.—Carpentier v. Small, 35 Cal. 346.

§ 212. —— Title and Possession Requisite to Authorize Setoff.

[a] A defendant, who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation.—Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

[b] In ejectment defendant cannot have his improvements set off against the mesne profits under section 257 of the Practice Act, where the improvements were made after plaintiff's title accrued, or where the holding of the defendant is not adverse within that section.—Bay v. Pope, 18 Cal. 694.

[c] One entering within color of title upon a lot within the limits of an incorporated city is not entitled to have the value of improvements put up by him deducted from the damages sustained by the true owner.—White v. Moses, 21 Cal. 34.

[d] A defendant in ejectment can only set off the value of improvements made against damages claimed for withholding lands when he has held such lands under color of title adversely and in good faith.—Love v. Shartzer, 31 Cal. 487.

[e] Code of Civil Procedure, section 741, provides that "when damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant . . . . holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a setoff against such damages." Held, that defendant is not entitled to set off the value of his improvements where he enters under a contract to convey which says nothing about his taking possession, and is ejected on account of default in his payments, and where the improvements are made by him before a de-

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mand for possession, as, before demand made, his possession is not adverse.—Hannan v. McMackle, 82 Cal. 122, 23 Pac. 271.

§ 213. —— Extent of Setoff.

[a] The value of permanent improvements made by defendant can only be allowed to the extent of the rent found due for the use of the land.—(Cal. 1855) Ford v. Holton, 5 Cal. 319; (1859) Yount v. Howell, 14 Cal. 465.

§ 214. —— Pleading.

[a] In an action of ejectment, the defendant, in order to be allowed the value of his improvements, must plead them by way of setoff in his answer.—Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94.

ELECTION.

Right of litigant to elect tribunal when jurisdiction is concurrent. See Courts, § 167.
Right of debtor to elect where property exceeds statutory exemption. See Exemptions, § 16.
Between counts in criminal pleading. See Indictment and Information, § 112.
To rescind contract to purchase or convey land. See Vendor and Purchaser, §§ 34, 44.
To take under will. See Wills, VII, D.
To take under will or under laws of descent. See Wills, §§ 334-339.

ELECTION BETS.

See Gaming, § 5.

ELECTION DISTRICTS.

See Elections, § 19.

ELECTION OFFICERS.

See Elections, §§ 21-27.

ELECTION OF REMEDIES.

Include choice between different means of redress afforded by law for the same injury or different forms of proceeding on the same cause of action; when such election is allowed or required; and nature, requisites, operation, and effect of such election.

NATURE AND GROUNDS IN GENERAL, § 1.
RIGHT OF ELECTION, § 2.
NECESSITY FOR ELECTION, § 3.
TIME WITHIN WHICH RIGHT OF ELECTION MUST BE EXERCISED, § 4.
NOTICE OF ELECTION, § 5.
CAUSES OF ACTION AND REMEDIES SUBJECT TO ELECTION, § 6.
INCONSISTENCY OF ALTERNATIVE REMEDIES, § 7.
VALIDITY AND FINALITY OF ELECTION—MISTAKE OR IGNORANCE OF FACTS, § 8.
—— MISTAKE AS TO REMEDY, § 9.
—— INEFFECTIVENESS OF REMEDY, § 10.
OPERATION AND EFFECT OF ELECTION, § 11.

For breach of contract. See Contracts, § 249.
Effect of election between remedies on statute of limitations. See Limitation of Actions, § 15.

§ 1. Nature and Grounds in General.

[a] A party has his election of alternative remedies.—Salmon v. Hoffman, 2 Cal. 142.

[b] Election of alternatives applies only where party stands in same position as to both alternatives, and is bound to indicate a choice.—Norris v. Harris, 15 Cal. 228.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 251-267; 18 Cent. Dig., cols. 7-9, § 1.

§ 2. Right of Election.

[a] Unless there is a remedy to relinquish there is no right to election.—San Bernardino I. Co. v. Merrill, 108 Cal. 494, 41 Pac. 487.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 253-257, 264; 18 Cent. Dig., cols. 15, § 5.

§ 3. Necessity for Election.

[a] Defendant cannot be compelled to elect between denial of title and plea of statute of limitations.—Willson v. Cleaveland, 30 Cal. 192.

[b] Where facts are peculiarly within knowledge of defendant, and cannot be certainly known to plaintiffs, as to precise nature and limits of defendant's liability, before evidence is all in, plaintiff may state his cause of action variously in different counts of complaint, and should not be compelled to elect upon which count he will proceed.—Rucker v. Hall, 105 Cal. 425, 38 Pac. 962.

[c] Fact that plaintiff made two averments of damages where he should have made but one, including both grounds, does not put him to an election.—Fox v. Oakland etc. Ry., 118 Cal. 68, 62 Am. St. Rep. 216, 50 Pac. 25.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 257; 18 Cent. Dig., cols. 15-17, § 6.

§ 4. Time Within Which Right of Election Must be Exercised.

[a] A right to elect between remedies which is conferred upon the condition of relinquishing one of the remedies by some positive act must be exercised while both of the remedies are open, and, unless there is a remedy to relinquish, there is no place for an election. San Bernardino Investment Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

§ 5. Notice of Election.

[a] When the defendant is allowed time to answer until the plaintiff elects on which

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count of the complaint he will go to trial the plaintiff should serve a copy of the complaint with notice of his election.—Willson v. Cleaveland, 30 Cal. 192.

[b] When court does not fix time, defendant is entitled to ten days after service of notice of election to answer.—Willson v. Cleaveland, 30 Cal. 192.

§ 6. Causes of Action and Remedies Subject to Election.

[a] Where the breach of a contract is a wrong the party may sue in tort instead of suing upon the contract.—Sheldon v. Steamship Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193.

[b] Landlord entitled to sue in forcible entry and detainer may elect to sue in ejectment.—McCarthy v. Yale, 39 Cal. 585.

[c] When one person converts to his own use personal property of another the latter may waive the tort, and sue in assumpsit for the value thereof.—Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626.

[d] Party who has been induced to execute contract by fraud may elect to rescind or sue for damages for deceit without warning other party that he intends to charge him with fraud.—Schmidt v. Mesmer, 116 Cal. 270, 148 Pac. 54.

[e] After unlawful conversion owner may maintain replevin or trover.—Howe v. Johnson, 117 Cal. 42, 48 Pac. 978.

§ 7. Inconsistency of Alternative Remedies.

[a] Where it was agreed that defendant would pay a certain amount to plaintiffs in consideration that plaintiffs would dismiss certain proceedings then pending in the probate court, and defendant afterward notified plaintiffs that she rescinded and withdrew from the agreement, plaintiffs cannot maintain an action to recover the amount stipulated to be paid, while at the same time continuing to prosecute the proceedings in the probate court.—Hellings v. Heyenfeldt, 107 Cal. 577, 40 Pac. 1026.

[b] When two inconsistent remedies are open to a person he must elect which he will pursue, and, having elected one, he is debarred from the other.—Parke and Lacy Co. v. White Lumber Co., 101 Cal. 37, 35 Pac. 442.

[c] Party having inconsistent remedies may not pursue both but must choose between them.—Hines v. Ward, 121 Cal. 120, 53 Pac. 427.

§ 8. Validity and Finality of Election—Mistake or Ignorance of Fact.

[a] Doctrine of election is applicable only when party is cognizant of all facts, and then makes a free and deliberate choice.—Wells v. Robinson, 13 Cal. 133.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 261; 18 Cent. Dig., cols. 31, 32, § 3.

§ 9. —— Mistake as to Remedy.

[a] Where a lessor mistakes his remedy, and brings ejectment against his lessee, such action is not an election of remedies which will bar a subsequent action for unlawful detainer.—Agar v. Winslow, 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 262; 18 Cent. Dig., cols. 32, 33, § 14.

§ 10. —— Ineffectiveness of Remedy.

[a] The rule that where there exists an election of inconsistent remedies, the party is confined to the remedy first preferred and adopted, only applies where both remedies are open and legally available to the plaintiff; and where the remedy first adopted is not legally available, the party is not estopped by his mistake in selecting it from subsequently availing himself of the other remedy.—Agar v. Winslow, 123 Cal. 587, 69 Am. St. Rep. 84, 56 Pac. 422.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 33, 34, § 15.

§ 11. Operation and Effect of Election.

[a] Where one having a legal and also an equitable remedy proceeds at law, he may estop himself from afterward, in equity, pursuing a fund which, but for his having elected his legal remedy, he might have had impressed with a trust in his favor.—Hanly v. Kelly, 62 Cal. 155.

FOR AUTHORITIES FROM OTHER STATES:
Election of remedies, when irrevocable: 10 Am. St. Rep. 487, note. See, also, 15 Cyc. 262; 18 Cent. Dig., cols. 34-40, §§ 16, 17.

ELECTION PRECINCTS.

See Elections, § 19.

ELECTIONS.

Include choice by popular vote at general or special elections of public officers and determination by such vote of questions submitted thereto; nature of right of suffrage and regulation of its exercise in general; constitutional and statutory provisions relating thereto; qualifications and registration of voters; ordering or calling elections, regular or special, and notice thereof; election districts or precincts, election officers, and places and times of voting; nominations and ballots; conduct of elections; ascertaining results and making returns thereof; proceedings to contest result; and violations of election laws.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL, §§ 1-5.

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II. ORDERING OR CALLING ELECTION AND NOTICE, §§ 6-18.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS, §§ 19-27.

IV. QUALIFICATION OF VOTERS, §§ 28-36.

V. REGISTRATION OF VOTERS, §§ 37-46.

VI. NOMINATION AND PRIMARY ELECTIONS, §§ 47-54.

VII. BALLOTS, §§ 55-67.

VIII. CONDUCT OF ELECTION, §§ 68-81.

IX. COUNT OF VOTES, RETURNS AND CANVASS, §§ 82-91.

X. CONTESTS, §§ 92-135.

XI. VIOLATION OF ELECTION LAWS, §§ 136-146.

Reviewability of orders made in election contests. See Appeal and Error, §§ 48, 49.

By unincorporated associations. See Associations, § 12.

Of state officers. See California, § 18.

Of clerks of court. See Clerks of Court.

Primary election law as interference with right to assemble and petition. See Constitutional Law, § 128.

Primary election law as class legislation. See Constitutional Law, § 210.

Validity of contracts influencing election of public officer. See Contracts, § 35.

Persons entitled to vote at corporate meeting. See Corporations, §§ 207-210.

Contest of corporate election. See Corporations, § 272.

Of county officers. See Counties, § 56.

Liability of county for election expenses. See Counties, § 117.

To determine question of issuing county aid bonds. See Counties, § 133.

Validity of election held on holiday. See Holidays, § 3.

Election of assignee of insolvent estate by creditors. See Insolvency, § 38.

Election of judges. See Judges, § 4.

Necessity that juror be qualified voter. See Jury, § 47.

Of justices of the peace. See Justices of the Peace, § 7.

Regulation of, by mandamus. See Mandamus, § 44.

To annex or detach territory to or from city. See Municipal Corporations, § 13.

Of city officers. See Municipal Corporations, § 46.

Municipal bond election. See Municipal Corporations, § 318.

Of officers of religious corporations. See Religious Societies, § 3.

Of school trustees, boards and officers. See Schools and School Districts, § 13.

Validity of special election laws. See Statutes, § 33.

Town elections. See Towns, § 5.

Irrigation district bond elections. See Waters and Watercourses, §§ 278, 279.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

NATURE AND SOURCE OF RIGHT, § 1.
POWER TO REGULATE, § 2.
STATUTORY PROVISIONS — CONSTRUCTION, § 3.
POWER OF LEGISLATURE TO EXTEND BEYOND CONSTITUTIONAL LIMITATION, § 4.
OPERATION OF PROVISIONS OF CONSTITUTION OF UNITED STATES, § 5.

§ 1. Nature and Source of Right.

[a] Election cannot take place under constitution without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law-making power and through legislative enactments; and the legislature must provide for and regulate the conduct of an election, or there can be none. People ex rel. McKune v. Weller, 11 Cal. 49, 70 Am. Dec. 754.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 280; 18 Cent. Dig., cols. 50, 51, § 1.

§ 2. Power to Regulate.

[a] Legislature has only power to reasonably regulate exercise of right of free suffrage.—Spier v. Baker, 120 Cal. 376, 52 Pac. 659.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 280-288; 18 Cent. Dig., cols. 51-53, §§ 2-5.

§ 3. Statutory Provisions—Construction.

[a] Provisions of election law are not directory, but mandatory; yet they are to be liberally construed.—Jennings v. Brown, 114 Cal. 307, 46 Pac. 77.

[b] Whether forms prescribed for holding election are mandatory or directory and whether their observance is essential to validity of election depends upon character of acts prescribed. Instances.—Murphy v. San Luis Obispo, 119 Cal. 632, 51 Pac. 1085.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 53-55, §§ 6, 7.

§ 4. Power of Legislature to Extend Beyond Constitutional Limitations.

[a] Legislature cannot extend right of suffrage to persons not included in section 1, article 2 of the Constitution.—Spier v. Baker, 120 Cal. 376, 52 Pac. 659.

§ 5. Operation of Provisions of Constitution of United States.

[a] The elective franchise is not one of the immunities or privileges intended in the first section of the fourteenth amendment to the federal constitution.—Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

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[b] Mere power of state to determine class of inhabitants who may vote within her limits is not curtailed in the fourteenth amendment. Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

[c] The clause of the fourteenth amendment of the constitution of the United States that "all persons born or naturalized . . . . are citizens," etc., does not confer citizenship upon white women, they having been citizens before its adoption, and therefore it does not confer on them the right as citizens to vote.—Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 283; 18 Cent. Dig., cols. 55-57, § 8.

II. ORDERING OR CALLING ELECTION AND NOTICE.

CONSTITUTIONAL AND STATUTORY PROVISIONS, § 6.
ORDERING AND HOLDING ELECTION, IN GENERAL — AUTHORITY AND EXERCISE THEREOF, IN GENERAL, § 7.
—— AUTHORITY TO HOLD GENERAL OR SPECIAL ELECTION, § 8.
—— IRREGULARITIES AND DEFECTS, § 9.
NOTICE OR PROCLAMATION—NECESSITY, IN GENERAL, § 10.
—— REQUISITES AND SUFFICIENCY, IN GENERAL, § 11.
—— PUBLICATION AND POSTING, § 12.
—— PROOF OF NOTICE, § 13.
GENERAL AND SPECIAL ELECTIONS DEFINED, § 14.
CALLING SECOND ELECTION, § 15.
SUBMISSION OF SPECIFIC QUESTIONS, § 16.
TIME FOR HOLDING ELECTION, § 17.
MANDAMUS TO COMPEL ELECTION, § 18.

§ 6. Constitutional and Statutory Provisions.

[a] The act of May 7, 1881, cannot operate to postpone the elections provided for in the acts of April 2, 1866, and March 30, 1872, because such operation would extend the terms of municipal officers, and therein violate section 9, article 11, of the constitution; but the act of May 7, 1881, applies to the city and county of San Francisco, and its operation in providing for a municipal election in 1882 is constitutional and valid. (Ross, J., concurring.)—Wood v. Board of Election Commrs., 58 Cal. 561.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 317, 318; 18 Cent. Dig., col. 67, § 20.

§ 7. Ordering and Holding Election in General—Authority and Exercise Thereof in General.

[a] An election held in pursuance of an act which authorizes the county judge to fix the time, place, and manner of holding it is void, as the legislature cannot delegate to a judge a purely ministerial function.—Dickey v. Hurlburt, 5 Cal. 343.

[b] The board of election commissioners cannot refuse to call and hold an election on the ground that there may not be sufficient funds in the treasury to defray the expenses.—Gibbs v. Bartlett, 63 Cal. 117.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., col. 67, § 21.

§ 8. —— Authority to Hold General or Special Election.

[a] Where an act by its own terms was not to go into effect till a certain day named, and one of its sections provides for an election on a day prior to the time in which the law was to go into effect, the election so held was a nullity, there being no law then in existence authorizing it.—People ex rel. McDougal v. Johnston, 6 Cal. 673.

[b] Election to be valid must be authorized by an existing statute.—People v. Mathewson, 47 Cal. 442.

[c] Election held without authority of law gives no title to office.—Page v. Supervisors, 85 Cal. 54, 24 Pac. 607.

§ 9. —— Irregularities and Defects.

[a] The means of bringing about an election, and irregularities therein, as the neglect of the course prescribed by statute, the election itself being prescribed by law, are to be disregarded; for it is presumed that all electors knew that law, and were not prevented from voting by fraud or misconduct on the part of those managing the election.—People v. Brenham, 3 Cal. 477.

§ 10. Notice or Proclamation—Necessity, in General.

[a] Under San Francisco City Charter, article 2, section 4, which requires the common council to give notice of the election of mayor, an election held at the time the law directs would be valid without the giving of such notice; for it should not be in the power of incumbents in office to prevent the election of their successors.—People v. Brenham, 3 Cal. 477.

[b] The proclamation of the governor, required by statute, is necessary to the validity of a special election.—People v. Porter, 6 Cal. 26.

[c] The statute requiring the governor to issue his proclamation of election to fill vacancies in certain offices is mandatory, and an essential prerequisite to all such elections. People v. Weller, 11 Cal. 49.

[d] An election to fill a vacancy in the office of district judge is invalid, unless made under and in pursuance of the proclamation of the governor.—People v. Weller, 11 Cal. 49.

[e] Object of the proclamation is to give notice to the electors that such an election will be held.—People v. Weller, 11 Cal. 49.

[f] F. was elected, in the month of May, 1857, county judge of San Mateo county, in

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pursuance of the provisions of an act "to organize and establish the county of San Mateo." No proclamation of the governor was issued calling this election. At the general election in 1858, in pursuance of the proclamation of the governor, an election was held for the same office, and T. was elected. The second election did not invalidate the prior election and F. was entitled to the office.—People ex rel. Fox v. Templeton, 12 Cal. 394.

[g] An election to fill a vacancy caused by a resignation of a county judge must be preceded by a proclamation by the governor of the fact of the vacancy, and that it is to be filled by such special election.—People v. Rosborough, 14 Cal. 180.

[h] A special election for the office of comptroller of state, held without executive proclamation made in advance of the election, designating the time at which such election is to be holden, is void.—Kenfield v. Irwin, 52 Cal. 165.

[i] It is essential to the validity of a popular election that the time at which the same is to be holden should be designated in advance.—Kenfield v. Irwin, 52 Cal. 164.

[j] In special elections to fill vacancies, notice of the election is necessary, though it is held at the same time as a general election. People v. Thompson, 67 Cal. 627, 9 Pac. 833.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 81-87, §§ 33-35.

§ 11. —— Requisites and Sufficiency in General.

[a] The neglect of an officer to perform a mere ministerial act will not defeat an election, where there was actual notice, and no fraud or surprise.—People v. Campbell, 2 Cal. 135.

[b] It is not enough that there was a proclamation that all vacancies about to occur would be filled, if the vacancy was one which had already occurred. The county judge in his election notice cannot supply the defect in the governor's proclamation.—Westbrook v. Rosborough, 14 Cal. 180.

[c] Where the proclamation for a general election notifies voters that a certain office will be voted for, such office having been rendered vacant by the death of the incumbent, it is no objection to the validity of the vote for such office that the proclamation failed to state that, as to that office, the election was a special one.—Tillson v. Ford, 53 Cal. 701.

[d] An election proclamation, ordered published by the board of supervisors, pursuant to Political Code, section 1056, is not invalid because the clerk affixed a scroll thereto, instead of his official seal, though the County Government Act (Stats. 1883, p. 299, sec. 20, subd. 8) makes it the duty of the clerk to place his seal upon all proceedings of the board, whenever the same are ordered published.—(1890) San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

[e] A notice of election in a school district must clearly state the particular place where the election is to be held, and where the notice is so contradictory and misleading that it failed to satisfy the statute, the election is invalid.—People v. Caruthers School District, 102 Cal. 184, 36 Pac. 396.

[f] The provision of the statute that the notice of special election shall state the amount of the tax levy to be made for the payment of the bonds is satisfied by provisions in the ordinance calling such election that the bonds shall be "serials"; that one-twentieth of the whole indebtedness shall be paid each year, including interest at six per cent, payable semi-annually; and that "the tax levy for the payment thereof amounts during the full period of twenty years to ninety-seven thousand eight hundred dollars" for waterworks bonds, and to forty thousand seven hundred and fifty dollars for the sewer bonds.—E. M. Derby & Co. v. City of Modesto, 104 Cal. 515, 38 Pac. 900.

[g] An act provided that the question of dissolution of a municipal corporation should be submitted at a special election, and that the legislative body of the corporation should give notice thereof by publication in a newspaper. Held, that where such body made provision for such an election, and directed the city clerk to give notice thereof in a designated paper, a notice of such election, over the clerk's official signature, published in such paper, was sufficient.—Mintzer v. Schilling, 117 Cal. 361, 49 Pac. 209.

[h] A notice of election for trustees of a school district, stating that "the polls will be open between the hours of 1 P. M. and 5 P. M.," obviously imports that they would be open from 1 to 5 P. M., and sufficiently states that the polls were to be kept open for four hours, as required by law.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

[i] Where a notice of election stated that it was to elect school "trustees," failure to state that there were vacancies to be filled did not invalidate the election, no voters being misled.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

[j] One of two buildings was used as a store, and the other was used by the storekeeper as a storehouse, though goods were ocasionally sold therein. An election notice designated the precinct voting place as the "store," giving the name of the storekeeper, and the election was held in the storehouse, which had been used for such purpose at the two preceding elections, and no one was misled by the notice. Held, not a failure to hold the election at the place named in the notice, sufficient to invalidate the election.—Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30.

[k] When statute prescribes both time and place of election, election is valid though

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notice thereof is defective or not given at all. Sanchez v. Fordyce, 141 Cal. 430, 431, 75 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 15 Cyc. 323-325; 18 Cent. Dig., cols. 87-93, §§ 36, 37.

§ 12. —— Publication and Posting.

[a] Where notice of an election is published for twenty days, as prescribed by the act authorizing it, the passage of an amendatory act affecting only the details of the election will not necessitate a republication of the notice.—Hobart v. Butte County Supervisors, 17 Cal. 23.

[b] Political Code, section 1055, provides that the board of supervisors, upon the receipt of the governor's proclamation of a general or special election, shall cause a copy of the same to be published in some newspaper printed in the county, and posted in each place of election, and, in the case of a special election to fill vacancies in certain state offices, they shall post or publish a copy of such proclamation upon the receipt thereof. Section 1056 provides that whenever a special election is ordered by the board of supervisors they must publish and post a proclamation in the same manner as a proclamation issued by the governor. Held, that if a proclamation by the board of supervisors of a special election, on a proposition to levy a tax to build a bridge, was published in a county newspaper, it was not necessary that it be posted also.—(1890) San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

[c] The statute does not, in terms, provide that the "four successive weeks" in which notice shall be posted "prior to the election" shall be the four successive weeks next preceding the election, and a notice posted on the fourth day of October, 1892, and remaining posted for four successive weeks from that date, is a sufficient compliance with the letter of the statute.—Woodward v. Fruitvale Sanitary District, 99 Cal. 554, 34 Pac. 239.

[d] Where the election was directed to be held on July 27, 1896, and notice was published in five weekly issues of a newspaper, commencing June 27th, and ending July 25, 1896, it complied with the provision requiring notice to be given by publication in a newspaper "for a period of thirty days prior to such election."—Mintzner v. Schilling, 117 Cal. 361, 49 Pac. 209.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 15 Cyc. 324; 18 Cent. Dig., cols. 93-96, § 38.

§ 13. —— Proof of Notice.

[a] If the clerk of the board of supervisors neglects to enter an order for the publication of a special election proclamation upon the minutes, as he is required to do by law, parol evidence is admissible to prove that such an order was made.—San Luis Obispo County v. White, 91 Cal. 432, 27 Pac. 756, affirming (1890) 91 Cal. 432, 24 Pac. 864.

[b] Proof made that the notice of election was posted fifteen days before the election is sufficient to show a posting for fifteen days, as required by the law; and it is not necessary to prove that the notice remained posted each day after it was posted.—People v. Lodi High School Dist., 124 Cal. 694, 57 Pac. 660.

§ 14. General and Special Elections Defined.

[a] Elections to fill vacancies occasioned by the death or resignation of an officer are special elections.—People v. Porter, 6 Cal. 26.

[b] Special election is an election held to supply a vacancy in office occurring before the expiration of the full term for which the incumbent was elected.—Kenfield v. Irwin, 53 Cal. 165.

[c] A general election is an election held to select an officer after the expiration of the full term of the former officer.—Kenfield v. Irwin, 53 Cal. 165.

§ 15. Calling Second Election.

[a] Where an election has been declared to have resulted in the election of no one, a new election must be called, though perhaps a candidate may question the correctness of the canvass in some other proceeding than a contest of the election.—Austin v. Dick, 100 Cal. 199, 34 Pac. 655.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 77, 78, § 28.

§ 16. Submission of Specific Questions.

[a] Under Constitution, article 11, section 8, providing that proposed amendments of city charters may be submitted to a vote of the electors at "a general or special election," such amendments may be legally submitted at an election held for the sole purpose of voting thereon.—People v. Davis, 114 Cal. 363, 46 Pac. 150.

[b] Under Statutes of 1883, page 93, section 4, providing for submission to a vote at the next general election of a proposition to reorganize a town as a city whenever a petition shall be presented to the board, signed by one-fifth of the qualified electors, a petition to which the required number of signatures was obtained by attaching thereto signatures cut from other petitions, identical in form, gives the board no jurisdiction to submit such proposition.—People v. Town of Berkeley, 36 Pac. 591.

§ 17. Time for Holding Election.

[a] Election held at a time not authorized by law is void.—Dickey v. Hurlbut & Others, 5 Cal. 343.

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[b] Legislature may change time of election. People v. Haskell, 5 Cal. 359.

[c] Election by the people had before the election fixed for filling the office of governor cannot defeat the policy of the state that all elective officers connected with the executive department of the government shall be elected at the same time and place and in the same manner.—People v. Melony, 15 Cal. 58.

[d] No election could be held in San Francisco until the first Tuesday after the first Monday in November, 1882. (Myrick, J., and McKee, J., dissenting.)—Wood v. Board of Election Commrs., 58 Cal. 561.

[e] A general clause in a city charter provided that it should take effect May 18, 1903, and contained a specific provision that the first election under it should be held on the second Monday of May, 1903, and that the trustees of the then existing city should provide for the election. Held, that the election was properly held on the second Monday, which fell on the 11th, the provision as to the 18th not referring to the election, but to the machinery of the new government.—Trafton v. Quinn, 143 Cal. 469, 77 Pac. 164.

§ 18. Mandamus to Compel Election.

[a] Application for writ of mandamus to compel the board of supervisors of Yolo county to take steps preparatory to the holding of an election on the first Wednesday of September, 1881, for certain county officers. Application denied.—Treadwell v. Supervisors of Yolo County, 62 Cal. 563.

III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

ELECTION DISTRICTS OR PRECINCTS—CONSTITUTIONAL AND STATUTORY PROVISIONS, § 19.
—— CREATION AND ALTERATION OF DISTRICTS OR PRECINCTS, § 20.
ELECTION OFFICERS—APPOINTMENT, § 21.
DEFECTS IN APPOINTMENT, § 22.
MISCONDUCT OF JUDGES, § 23.
—— EFFECT OF FAILURE OF OFFICER TO BE SWORN, § 24.
INELIGIBILITY OF OFFICER AS AFFECTING VALIDITY OF ELECTION, § 25.
AUTHORITY OF ELECTION BOARD TO INVESTIGATE ELECTION FRAUDS, § 26.
REMOVAL OF OFFICERS, § 27.

§ 19. Election Districts or Precincts—Constitutional and Statutory Provisions.

[a] Under Laws of 1865-66, page 292, providing that every election district throughout the state shall be so constructed as not in any case to embrace more than one township, and in such a manner that its exterior limits shall not cross the exterior boundaries of any township, town or city, or any ward, district, or other territorial subdivision in and for which local officers are to be elected, an incorporated city lying in parts of two townships may be laid off into election districts by making one or more districts in that part of it lying in each township.—People v. Laine, 33 Cal. 55.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 98-100, § 41.

§ 20. —— Creation and Alteration of Districts or Precincts.

[a] Where the board of supervisors of a county neglected to lay off election districts in a certain town or city and appoint boards of registration in the same, under the provisions of the registry act, and an election was held, not in accordance with the provisions of said act, it was held that the election was void and conferred no rights upon the parties who claimed to have been elected.—People v. Laine, 33 Cal. 55.

[b] The relators claimed to have been elected representatives in Congress at the general election in 1884. Their claim was based on the alleged invalidity of the act of March 13, 1883, dividing the state into congressional districts, and repealing all acts in conflict therewith. Only a few votes were received by them, and these were cast in pursuance of the act of March 30, 1872, relating to the same subject as the act of 1883, and within the repealing clause of the latter act. No proclamation was issued by the governor for an election in accordance with the act of 1872. Held, that the claim of the relators, conceding the invalidity of the act of 1883 could not be sustained.—People v. Thompson, 67 Cal. 627, 9 Pac. 833.

[c] Since, under Political Code, section 1129, the board of election commissioners of San Francisco were authorized to change the boundaries of, create new, or consolidate established election precincts, the fact that such commissioners redistricted a city under Statutes of 1897, page 288, providing the manner for the holding of elections for the adoption of freeholders' charters, which act was claimed to be unconstitutional, as violating Constitution, article 11, section 6, declaring that cities and towns, except in matters relating to municipal affairs, shall be subject to, and controlled by, the general laws, is immaterial.—Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923.

[d] Political Code, section 1129, as amended by Statutes of 1889, page 424, authorizes the change of election precincts, and provides that boards having control of elections may from time to time change the boundaries, so that there shall always be as many precincts as shall be sufficient to make the number of votes at any one precinct not more than two hundred, as nearly as can be ascertained. Held, that the change of election precincts was within the discretion of election boards, and that in the absence of any action preceding an election at which such precincts had been changed, to correct alleged erroneous actions of the board, or show that a fair election was thereby prevented, an elector cannot thereafter impeach

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an election held on that ground alone.—Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923.

[e] Statutes regulating the formation of election precincts at municipal elections are directory, and not mandatory. An honest error of the council in establishing ward precincts only at a special election for the annexation of territory to the city, instead of the usual voting-places, where the statutory provisions as to special municipal elections are conflicting, does not vitiate the election, in the absence of fraud, and of any showing that anyone who desired to vote was unable to do so.—People v. Los Angeles, 133 Cal. 338, 65 Pac. 749.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 100-104, § 42.

§ 21. Election Officers—Appointment.

[a] Election returns should not be rejected for any irregularity in the appointment of the officers of election, where it does not appear that any injurious results accrued therefrom, either by the reception of illegal votes or the rejection of legal votes, or that either of the candidates lost or gained votes thereby. Keller v. Chapman, 34 Cal. 635.

§ 22. Defects in Appointment.

[a] If inspector of election, appointed by board of supervisors, fails to attend at the polls, and one is there appointed by the judges, instead of being appointed by the electors present, it is not such an irregularity as will vitiate the election at that precinct, provided the result of the election is not thereby changed.—Sprague v. Norway, 31 Cal. 173.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 310-313; 18 Cent. Dig., cols 104-117, §§ 44-48.

[b] Where one of the judges appointed by the superintendent of schools to conduct an election to determine whether a high school should be established in a school district fails to attend, and the other judges choose a substitute, instead of his being appointed by the electors present, the irregularity will not vitiate the election, where the result was not changed thereby.—People v. Lodi High School Dist. of San Joaquin County, 124 Cal. 694, 57 Pac. 660.

[c] Where election commissioners were authorized to appoint election officers for each precinct, their failure to appoint as many officers as they were authorized to appoint for an election was a mere irregularity, not sufficient to invalidate the election.—Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 311; 18 Cent. Dig., cols. 112-117, §§ 47, 48.

§ 23. Misconduct of Judges.

[a] If votes are cast by duly qualified electors, on a lawful occasion and at the proper place, their effect cannot be defeated by reason of mere official delinquency of the inspector in not transmitting them to the county clerk.—Bourland v. Hildreth, 26 Cal. 161.

[b] Neglect of directory provisions of statute, together with actual fraud sufficient to throw doubt on result of election, is ground for rejecting entire vote of precinct if there be no means of purging the poll.—Russell v. McDowell, 83 Cal. 77, 23 Pac. 183.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 316; 18 Cent. Dig., cols. 127, 128, § 52.

§ 24. —— Effect of Failure of Officer to be Sworn.

[a] Failure of officers conducting election in given district to be sworn as the election laws provide will not invalidate the entire election, without reference to its influence on the general result.—Whipley v. McKune, 12 Cal. 352.

[b] The neglect of the officers of the election to be sworn as required by law, though a felony, cannot affect the validity of the election, if a fair election and honest count were not thereby prevented.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

§ 25. Ineligibility of Officer as Affecting Validity of Election.

[a] Certain ballots held not rendered invalid because of ineligibility of certain members of the election board, under Political Code, section 1142.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

§ 26. Authority of Election Board to Investigate Election Frauds.

[a] Board of election commissioners is purely a creature of statute and can only do that which statute says it may do. It cannot investigate election frauds. (Garoutte, J.)—People v. Buckley, 116 Cal. 155, 47 Pac. 1009.

§ 27. Removal of Officers.

[a] Mayor of city and county of San Francisco does not have exclusive jurisdiction to remove election commissioners for misconduct in office, but jurisdiction is also vested in the superior court.—Roberts v. Superior Court of City and County of San Francisco, 147 Cal. 568, 82 Pac. 201.

IV. QUALIFICATION OF VOTERS.

CONSTITUTIONAL AND STATUTORY PROVISIONS, § 28.
—— VALIDITY OF LAWS PERMITTING SOLDIERS TO VOTE, § 29.

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—— POWER OF LEGISLATURE TO PRESCRIBE TEST FOR VOTERS, § 30.
QUALIFICATION, IN GENERAL, § 31.
CITIZENSHIP, § 32.
—— NATURALIZATION, § 33.
RESIDENCE, § 34.
—— EMPLOYMENT IN PUBLIC SERVICE, § 35.
—— INMATES OF PUBLIC INSTITUTIONS, § 36.

§ 28. Constitutional and Statutory Provisions.

[a] Political Code, section 1239, subdivision 3, which was valid under Constitution 1863, article 2, section 1, provides that "a person must not be held, by reason of having moved from one precinct to another in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." Held, that it conflicted with the new constitution (article 2, section 1), which requires residence in the precinct for thirty days preceding the election.—Russell v. McDowell, 83 Cal. 70, 23 Pac. 183.

[b] Constitution should not be construed to cut off right to vote of person who has resided in state one year, in county ninety days, including residence in precinct on thirtieth day preceding election (concurring opinion).—Russell v. McDowell, 83 Cal. 82, 23 Pac. 183.

[c] The material facts necessary to be charged to show a disqualification to vote are those facts prescribed by the constitution and the code as constituting the qualifications and creating the disabilities of electors.—People v. Neil, 91 Cal. 465, 27 Pac. 760.

[d] Section 1083 of the Political Code, assuming to define who "shall be a qualified elector," which adds to the constitutional qualifications that of enrollment upon the great register of the county fifteen days prior to the election, must be construed to use the words "qualified elector," in the sense of an elector who has the right to vote. Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312.

[e] Under Constitution of 1900, article 2, section 2½, Political Code, section 1367, prescribing qualifications of voters at primary elections held not in violation of Constitution, article 2, section 5.—Rebstock v. Superior Court of City and County of San Francisco, 146 Cal. 308, 80 Pac. 65.

FOR AUTHORITIES FROM OTHER STATES:

Qualifications for voters and for holders of office, power of the states to impose: 97 Am. Dec. 263, note; 18 Cent. Dig., cols. 136-138, § 56.

§ 29. —— Validity of Laws Permitting Soldiers to Vote.

[a] The provision in the constitution which provides that "every white male citizen of the United States of the age of twenty-one years, who shall have been a resident of that state six months preceding the election, and of the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections authorized by law," fixes, by the words "in which he claims his vote," the place at which the elector must vote, if at all; and therefore the act of the legislature of 1863, allowing soldiers from that state in the service of the United States to vote without the county in which they reside, is unconstitutional.—Bourland v. Hildreth, 26 Cal. 161.

[b] Act of April 25, 1863, providing for the taking of the votes of electors of the state while they are outside the county of their residence, engaged in the military service of the United States, is repugnant to Constitution, article 11, section 1, providing that "a citizen . . . . who shall have been a resident of the state six months next preceding the election, and [of] the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections."—Bourland v. Hildreth, 26 Cal. 161.

[c] Constitution, article 2, section 1, providing that a citizen who shall have been a resident of the state six months preceding the election, and of the county or district "in which he claims his vote" thirty days, shall be entitled to vote, defines the place of voting; and therefore act of 1864, authorizing soldiers in the army of the United States to vote elsewhere than in the county or district where they reside, and have their votes returned and counted in such county or district, is unconstitutional.—(1864) Bourland v. Hildreth, 26 Cal. 161; (1866) Day v. Jones, 31 Cal. 261.

§ 30. —— Power of Legislature to Prescribe Test for Voters.

[a] That legislature has no power to establish a test for voters at primary or other election intimated.—Spier v. Baker, 120 Cal. 379, 380, 52 Pac. 659.

§ 31. Qualifications in General.

[a] Evidence considered and held to support the findings that certain voters were not qualified voters.—Donnelly v. Potter, 55 Cal. 474.

[b] Only persons declared competent by constitution are entitled to vote in this state. Spier v. Baker, 120 Cal. 376, 52 Pac. 659.

[c] Persons entitled to vote at any election are entitled to vote at primary elections.—Spier v. Baker, 120 Cal. 378, 379, 52 Pac. 659.

[d] The constitutional qualifications of an elector are not the same thing as the legal qualifications of a voter. The voter is the elector who votes; and an elector may not be legally qualified to vote.—Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312.

§ 32. Citizenship.

[a] A citizen of the United States may renounce his allegiance by taking an oath

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of allegiance to a foreign power; and his son, born abroad afterward, is not a citizen of the United States, nor can he vote there.—Browne v. Dexter, 66 Cal. 39, 4 Pac. 913.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 290; 18 Cent. Dig., cols. 143-146, §§ 63-66.

§ 33. —— Naturalization.

[a] Where a registered voter produced a certificate of naturalization from a court having a clerk and a seal, and, for aught that appeared, common-law jurisdiction, held, that the court erred in rejecting his vote.—Preston v. Culbertson, 58 Cal. 198.

§ 34. Residence.

[a] When elector moves his family to county with intention of residing there, that is the county where he should vote while his family remains there, although he passes his time and works in an adjoining county.—People v. Holden, 28 Cal. 123.

[b] The thirty days' residence in a county, to entitle an elector to vote, must be ascertained by excluding the day of the election. People v. Holden, 28 Cal. 123.

[c] One who removes to another state with his family and votes there, loses his residence, though intending to return.—Donnelly v. Potter, 55 Cal. 474.

[d] Laborer unmarried, resides in the county of his labor, though intending to return when unemployed.—Donnelly v. Potter, 55 Cal. 474.

[e] Persons who are not residents of county in which an election is held are not qualified voters, and their votes are properly deducted in the count.—Donnelly v. Potter, 55 Cal. 474.

[f] The fact that a voter left his real residence once a week to visit a place he had taken as a homestead, in order to comply with the homestead laws, did not estop him from claiming his real residence for the purpose of voting.—Preston v. Culbertson, 58 Cal. 198.

[g] Residence in precinct for thirty days preceding election is a constitutional prerequisite to right to vote.—Russell v. McDowell, 83 Cal. 81, 23 Pac. 183.

[h] A vote was not necessarily illegal on account of nonresidence of the voter, where he testified that he was often absent from the town, performing different jobs, but that he always left with the intention of returning when his work was done.—Smith v. Thomas, 121 Cal. 533, 54 Pac. 71.

[i] Political Code, section 52, subdivision 3, provides that every person has, in law, a residence, which cannot be lost until another is gained. By section 1239, subdivision 4, it is declared that a person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely; and subdivision provides that the mere intention to acquire new residence, without the fact of removal avails nothing, "neither does the fact of removal without the intention." Held, that where a voter had no intention of making the precinct into which he moved his home but went there for temporary purposes, he did not lose his legal residence in the precinct from which he moved, although he did not have a place in such precinct that he could call his home.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[j] A wood chopper, who had no home, but who made a particular place in a ward his home whenever in town or out of work for five years past, and who was sent there when sick, and who never voted in any other place for eleven years, is a legal voter in such ward.—Smith v. Thomas, 52 Pac. 1071

FOR AUTHORITIES FROM OTHER STATES:

Residence or domicile, what and where is, and how lost or changed: 48 Am. St. Rep. 711, note. See, also, 15 Cyc. 294; 18 Cent. Dig., cols. 146-162, §§ 67-74.

§ 35. —— Employment in Public Service.

[a] Mere fact that man is soldier in United States army does not disqualify him from voting in this state. But he cannot vote unless he has been a citizen of the state and of the county in which he votes for the constitutional period.—Orman v. Riley, 15 Cal. 48.

[b] D., who was a citizen of New York, enlisted in that state as a soldier in the service of the United States. He came to California under military orders, and has been in the state more than six months, in the county of Mendocino more than thirty days, but still in the service and under military orders, applied to the county clerk to be registered as a voter in that county. Held that, in view of such facts alone, he was not entitled to be registered. Mere residence as a soldier of the United States, and obedience to military orders, does not make a residence in the sense of the laws of California in relation to the elective franchise. Delvin v. Anderson, 38 Cal. 92.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 294; 18 Cent. Dig., cols. 156, § 71.

§ 36. —— Inmates of Public Institutions.

[a] Where a veteran becomes an inmate of the veterans' home with the intention of making it his permanent residence, the fact that he is supported at public expense does not prevent him from voting in the precinct where the home is located. The Constitution, article 2, section 4, provides that for the purpose of voting no person shall be deemed to have gained or lost residence while kept at any almshouse or

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sylum at public expense.—(1865) People v. Holden, 28 Cal. 123; (1895) Stewart v. Kyser, 105 Cal. 459, 39 Pac. 19.

[b] An inmate of the veterans' home, whose ntention is to stay there as long as he lives, s a resident of the precinct in which the ome is located, and qualified to vote as uch, though he became an inmate of the home olely because of his indigent circumstances. Stewart v. Kyser, 105 Cal. 459, 39 Pac. 19.

OR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 293; 18 Cent. Dig., cols. 159-161, § 73.

V. REGISTRATION OF VOTERS.

TATUTORY PROVISIONS, § 37.
LECTIONS SUBJECT TO REGISTRATION LAWS, § 38.
ECESSITY FOR REGISTRATION, § 39.
ERSONS ENTITLED TO REGISTRATION, § 40.
EGISTRATION OFFICERS, § 41.
ROCEEDINGS FOR REGISTRATION, § 42.
— CORRECTION OF LISTS, § 43.
IREGULARITIES AND DEFECTS—RIGHT TO VOTE, § 44.
ONCLUSIVENESS AND EFFECT OF REGISTRATION, § 45.
— IRREGULARITIES AND DEFECTS AS AFFECTING RIGHT TO VOTE, § 46.

37. Statutory Provisions.

a] The object of the registration law is to revent illegal voting by providing, in adance of election, an authentic list of quali- d electors; and, when its terms are doubtful, ey should be so construed as to give the llest opportunity to voters to procure the try of their names upon the register that consistent with reasonable precautions ainst fraudulent registration.—Welch v. illiams, 96 Cal. 365, 31 Pac. 222.

b] The Political Code provides that the alified electors of counties may have their mes registered at any time, and preribes with great care and particularity the ties of electors and officers in relation ereto, and further provides (section 1094) at a great register shall be kept. Section 94, as amended by Laws of 1889, provides at upon the order of the board of supersors a new registration may be made, and at such registration shall commence one ndred days before a general election, and ntinue eighty-five days, when it shall cease, ld, that the board of supervisors may ncel the existing register, and order a new e, more than one hundred days before a neral election, and that the registry of a me in the new register, made at any time er the old register is canceled, and more an fifteen days prior to the election, is fful and valid.—Welch v. Williams, 96 Cal. 5, 31 Pac. 222.

] Provision in primary law that no per- is entitled to vote whose name does not pear on great register used at last general election, is void as curtailing constitutional right of suffrage.—Spier v. Baker, 120 Cal. 377, 378, 52 Pac. 659.

[d] Registration is not a "qualification" of an elector, and cannot add to the qualifications fixed by the constitution; but it is to be regarded as a reasonable regulation by the legislature for the purpose of ascertaining who are qualified electors, and of having their names enrolled upon an authentic list, in order to prevent illegal voting.—Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312.

[e] Registration is not a constitutional qualification of voters; but is simply a reasonable method of identifying qualified voters. A registry law should not be construed so as seriously to impair the practical working of a city government, and leave it without a legislative department, unless clearly imperative.—People v. Woswick, 142 Cal. 71, 75 Pac. 663.

FOR AUTHORITIES FROM OTHER STATES:

Constitutionality of registration laws: 23 Am. Dec. 642, 54 Am. St. Rep. 843, notes.

Power of the state to require and to prescribe mode of proof of registration: 28 Am. St. Rep. 260, note. See, also, 15 Cyc. 302; 18 Cent. Dig., cols. 181-187, §§ 95, 96.

§ 38. Elections Subject to Registration Laws.

[a] Act of 1865-66 for registration of voters covers whole subject of elective franchise, and applies to municipal and local, as well as to general state and county, elections.—People ex rel. Ellsworth v. Laine, 33 Cal. 55.

[b] The act of 1878 does not provide for or authorize precinct registration at special elections, and any required changes in the precinct registers for a special election may be had at the office of the registrar, under the regulations of the board of election commissioners. The rights of the registered voters are subject to the power of the election commissioners to consolidate precincts and to change polling places for a special election.—Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 187-190, § 97.

§ 39. Necessity for Registration.

[a] Under the registry act a vote is illegal where the name of the elector is not on the poll list of election precinct where the vote is cast on the day of the election.—Webster v. Byrnes, 34 Cal. 273.

[b] A person is not a qualified elector unless enrolled on great register fifteen days before election.—Fallbrick v. Sullivan, 119 Cal. 618, 51 Pac. 947.

[c] Re-registration is not required for the annual school election.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

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FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 302; 18 Cent. Dig., cols. 176-178, § 92.

§ 40. Persons Entitled to Registration.

[a] An entry of A's registration in the great register of the county failed to show the date of his naturalization, as required by law. The board of supervisors ordered a re-registration under Political Code, section 1094, but the county clerk refused to register A on the ground that he had failed to furnish him with the date of his naturalization. Held that, A's name being enrolled and uncanceled on the great register, he was entitled to register under the provisions of the above section; and that section 1097 does not apply to persons who have been previously registered.—Cohen v. Harvey, 56 Cal. 70.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 303; 18 Cent. Dig., cols. 178-180, § 93.

§ 41. Registration Officers.

[a] Clerks and other assistants to the registrar mentioned in the twenty-ninth section of the act of 1877-78, relating to the registration of voters (Stats. 1877-78, p. 299), are to be appointed by the board for the purposes indicated in that section.—Schmitt v. Dunn, 55 Cal. 651.

[b] Under act of March 18, 1878, to regulate the registration of voters, etc., in San Francisco, the board of election commissioners has power to fix the number of the registrar's clerks, but the power of selecting and employing them belongs to the registrar.—Schmitt v. Dunn, 55 Cal. 651.

[c] Act of 1889 amending section 1142, Political Code, providing for two inspectors and two judges in each precinct, applies only to board of election on election day and not to board of precinct registration.—Meyers v. Pond, 86 Cal. 67, 24 Pac. 808.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 304, 305; 18 Cent. Dig., cols. 190-195, §§ 98-102.

§ 42. Proceedings for Registration.

[a] Where, on an election contest, it appeared from the affidavits of certain voters that each of them had sworn to a statement that he could read the constitution in English, write his name, and mark his ballot, and, apart from the undisputed fact that they were not able to mark their ballots, and that some of the affidavits were signed by mark, and some by another person at the request of the deponent, there was nothing to indicate that the registration officer did not fully question them or correctly enter their statements, such facts were not sufficient to support a conclusion that the registration officer did not fully perform his duty. Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[b] Where, on an election contest, it appeared that the formal affidavit for registration signed by an elector was in the precinct register, but there was no jurat of the county clerk showing that he had been sworn, but it appeared that he went to the clerk's office, and that the clerk prepared his affidavit, and that he understood he was making an affidavit, and the clerk testified that it was usual to swear the voters when they were registered, it being the duty of the clerk to administer such an oath, it was proper to presume that the clerk discharged his duty and administered the necessary oath.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 305-307; 18 Cent. Dig., cols. 195-197, § 103.

§ 43. —— Correction of Lists.

[a] The act of March 18, 1878 (Stats. 1877-78, p. 299), only authorizes the board of election commissioners of the city and county of San Francisco to appoint clerks or other persons to assist the registrar in ascertaining the correctness of the precinct registers and in correcting the same, and the board cannot appoint an agent or other assistants to advise it in the selection and appointment of precinct boards of registration and officers of election, nor for the purpose of scrutinizing the roll and detecting fraud in the registration, for its own information, and not as assistants to the registrar.—Falk v. Reis, 88 Cal. 514, 26 Pac. 359.

[b] Nor is such authority given the board by section 33, providing that all provisions for carrying out the registration and election laws shall be made by the board.—Falk v. Reis, 88 Cal. 514, 26 Pac. 359.

[c] Supervisors have no authority to cancel old register until new one is complete.—Fullrick v. Sullivan, 119 Cal. 619, 51 Pac. 947.

[d] The great register, though ordered canceled by the supervisors for the purpose of new registration, remains for all purposes required by law until the new registration is completed, and re-registration is not required for the annual school election.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

[e] After certain voters had registered, it was ascertained that the affidavits of registration contained incorrect designations of their voting precincts, and the county clerk corrected them by inserting the proper precinct names. All the voters in fact actually resided, when they registered, in the precincts represented by the correction. Held, that the correction did not affect the validity of the registration.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 306; 18 Cent. Dig., cols. 199-200, § 105.

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§ 44. Irregularities and Defects—Right to Vote.

[a] Under Political Code, section 1227, providing that no elector shall be allowed to vote if his name is not on the precinct register, a ballot cannot be received from a citizen whose name is not on the register, though its failure to appear thereon is due to the mistake of the county clerk in making the book, and though the elector produces a certificate from the clerk showing that the elector has regularly registered, and that his name is on the great register.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, 975.

[b] During the absence of a deputy registration clerk, electors visited his store to be registered, and their registrations were made out by a person employed in the store, who was not a deputy, but what purported to be the affidavits of such persons were contained in the book of affidavits delivered to the board of election. Held, that such persons were qualified electors; the affidavits merely constituting an official list of voters who have been enrolled by the registration officer on the great register, and the phrase in section 1083, "conformed to the law governing registration," merely meaning those who have caused themselves to be enrolled on the authentic list.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 307; 18 Cent. Dig., cols. 204, § 110.

§ 45. Conclusiveness and Effect of Registration.

[a] In an election contest, evidence may be admitted to show that registered voters are not citizens.—Preston v. Culbertson, 58 Cal. 198.

[b] Political Code, section 1208, provides that when it appears from the register that any elector has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot, he shall, on request, receive assistance in preparing his ballot; and section 1096, subdivision 11, provides that the entry on the great register must show the fact whether or not the elector desiring to be registered is able to read the constitution and to write his name, and whether or not the elector has any physical disability by reason of which he cannot mark his ballot, and, if he cannot mark his ballot by reason of physical disability, the nature of the disability must be entered. Held, that the question whether an elector cannot read, or cannot mark his ballot because of physical disability, is to be ascertained from the entry on the great register. Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

§ 46. —— Irregularities and Defects as Affecting Right to Vote.

[a] Under the register act, which declares a vote illegal if the name of the elector is not on the poll list of the election precinct where the vote is cast on the day of the election, where a name had been entered on a precinct poll list, but at the final sitting of the board of registration, as required by section 24 of that act, the name was erased by the board, it was held that the result was the same as if the name had never been on the poll list.—Webster v. Byrnes, 34 Cal. 273.

[b] Qualified voters, who were properly registered, could not be deprived of their votes because the officers of election neglected to perform the ministerial and directory duty of having the proper register before them for examination, and any provision of law having that effect would be unconstitutional.—People v. Woswick, 142 Cal. 71, 75 Pac. 663.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

CONSTITUTIONAL AND STATUTORY PROVISIONS, § 47.
NOMINATION BY PRIMARY ELECTION, § 48.
NOMINATION BY CONVENTION, § 49.
NOMINATION BY PETITION, § 50.
—— REQUISITES OF PETITION, § 51.
CERTIFICATES OF NOMINATION, § 52.
—— PUBLICATION OF LIST OF NOMINEES, § 53.
DETERMINATION OF CONTROVERSIES, § 54.

§ 47. Constitutional and Statutory Provisions.

[a] Statutes of 1899, page 47, requiring the primary elections of all political parties to be held at the same time, and under the control of the county board of election commissioners, and providing for the use of but one ticket at such an election, which is received by the intending voter without question as to his political affiliations, and taken into the privacy of a booth, where he may name such delegates as he desires to the political convention of one or another of the political parties, whether he is a member of that party or not, is an unwarranted invasion of the rights of political parties, and an innovation of the rights reserved to the people by Constitution, article 1, section 23, providing that the rights enumerated in the constitution shall not be construed to impair or deny others retained by the people.—Britton v. Board of Election Commrs. of City and County of San Francisco, 129 Cal. 337, 61 Pac. 1115.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 211-230, §§ 114-136.

§ 48. Nomination by Primary Election.

[a] Statutes of 1897, page 115, providing for general primary elections, does not apply to municipal elections to be held in the current year, as the election commissioners are not required, under section 5 thereof, to select the names of electors to act as officers of the primary election boards until January, 1898. McKinnon v. Leonard, 118 Cal. 302, 50 Pac. 536.

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[b] Constitution, article 2, section 1, provides that "every native male citizen of the United States . . . . and every male naturalized citizen thereof who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county in which he claims to vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." Article 20, section 11, provides that the privilege of free suffrage shall be supported by laws regulating elections. Acts of 1897, page 115, section 23, relating to primary elections, provides that all native-born citizens who since the last general election have become of legal age, and all persons naturalized since the last general election and who have been legal residents of the county for "thirty days" prior to the election, shall be entitled to vote, on being registered, at any primary election. Held that, since the above section of the statute is an enlargement of the constitutional right of suffrage, it is void.—Spier v. Baker, 120 Cal. 370, 52 Pac. 659.

[c] Acts of 1897, page 115, section 22, relating to the right to vote at primary elections, and which places such elections on the same plane as state elections, provides that "no person shall be allowed to vote whose name does not appear on the great or precinct register of the county, or the city and county, used at the last general election held before such primary election, in the precinct in which he desires to vote as a person entitled to vote in such precinct, or unless his name appears on the supplements to such great or precinct register." By this section various classes of persons qualified under the constitution to vote at all elections which might thereafter "be authorized by law" (Const., art. 2, sec. 1), are debarred from participating in primary elections to be held under the above act. Held, that the act is void, as an attempt to deprive certain citizens of their right to vote at all elections, as provided by the constitution.—Spier v. Baker, 120 Cal. 375, 379, 52 Pac. 659.

[d] Primary election is an "election" referred to in article 20, section 11 and article 2, section 1 of the constitution.—Spier v. Baker, 120 Cal. 375, 379, 52 Pac. 659.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 332, 333; 18 Cent. Dig., cols. 214, 215, § 118.

§ 49. Nomination by Convention.

[a] Where a convention of a political party is regularly called and organized, its nominees and not those of a convention made up of a minority of the delegates, who withdrew from the regular convention, are entitled to have their certificates filed by the Secretary of State, though the delegates violate pledges, and disregard the advice of the executive committee, in that it nominates certain men who do not belong to the party, and makes a bargain by which some of its nominees are to retire in favor of the nominees of other parties.—Hutchinson v. Brown, 122 Cal. 189, 54 Pac. 738, 42 L. R. A. 232.

[b] In deciding on the regularity of certificates of nomination for Congress offered to the Secretary of State to be filed, the usage of a party in nominating its candidates, viz., by the formation of district conventions at a state convention by the delegates thereto, in accordance with the call of the state central committee, will be recognized as decisive in favor of a candidate thus nominated against one nominated by delegates in a district convention organized and conducted independent of the state convention.—Spelling v. Brown, 122 Cal. 277, 55 Pac. 126.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 215-217, §§ 119, 120.

§ 50. Nomination by Petition.

[a] Nominees of convention held entitled to a place on the official ballot, although the petition for the primary election was not filed thirty days before the date of the election, as required by Political Code, section 1361.—Ellis v. Wheatly, 147 Cal. 372, 81 Pac. 1105; Thompson v. Wheatly, 147 Cal. 372, 81 Pac. 1105.

[b] The purposes of the statute concerning nominations by certificates are to permit independent nominations of candidates, and to facilitate the formation of new political parties.—Partridge v. Devoto (Cal. Sup.), 82 Pac. 775.

[c] The court, in determining whether a political party name, adopted by persons signing a certificate of nomination of candidates, is liable to mislead the voters, within Political Code, section 1188, held authorized to consider certain matters of public knowledge.—Partridge v. Devoto (Cal. Sup.), 82 Pac. 775.

§ 51. —— Requisites of Petition.

[a] Certificates of nominations of candidates for public office held invalid, under Political Code, section 1188.—Partridge v. Devoto (Cal. Sup.), 82 Pac. 775.

§ 52. Certificates of Nomination.

[a] Under section 1192 of the Political Code, a certificate of nomination by a convention must be filed not less than thirty days before the day of election, and the fact that the thirtieth day preceding the election falls on Sunday cannot operate to lessen the time limited by law for such filing, nor do sections 12 and 13 of the Political Code have application to the limitation of time prescribed by section 1192.—Griffin v. Dingley, 114 Cal. 481, 46 Pac. 457.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 336-339; 18 Cent. Dig., cols. 221-223, § 125.

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§ 53. —— Publication of List of Nominees.

[a] Statute does not require the publication of a separate list of nominations for each political subdivision of the county having offices to fill, but requires only the publication of one general list.—Johnson v. Yuba County, 103 Cal. 538, 37 Pac. 528.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 226, 227, § 130.

§ 54. Determination of Controversies.

[a] The registrar is not bound to file every certificate of nomination that is in due form, but, where certificates are presented from each of two conventions claiming to represent the same political party, it is for him to determine, in the first instance at least, which represents the party. (Beatty, C. J., and Harrison and Garoutte, JJ., dissenting.)—McDonald v. Hinton, 114 Cal. 484, 46 Pac. 870, 35 L. R. A. 152.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 338, 339; 18 Cent. Dig., cols. 227-230, §§ 131-136.

VII. BALLOTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS, § 55.
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§ 55. Constitutional and Statutory Provisions.

[a] Election law of 1889 has no retrospective operation.—Russell v. McDonald, 83 Cal. 75, 23 Pac. 183.

[b] Where an election was held before the law as to distinguishing marks on ballots had been changed by the amendment to Political Code, section 1211 (Stats. 1903, p. 150), and a contest was had after the amendment, the provision of the code prior to the amendment was the governing law on the question whether the ballots bore distinguishing marks.—Trafton v. Quinn, 143 Cal. 469, 77 Pac. 164.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 230-232, §§ 137, 138.

§ 56. —— Official Ballots.

[a] Political Code, sections 1197, 1205, as amended by Statutes of 1891, chapter 130, provide that the names of all political parties which have filed certificates of nomination of candidates in accordance with the statutory requirements shall be printed, in separate lines, at the head of the official ballot, and that an elector who desires to vote any such party ticket straight may do so by putting a cross opposite the name of such party; but a ballot so marked shall not be counted, if marked in any other place, except to indicate a vote on a constitutional amendment or other question. Held, that such sections were unconstitutional, as resulting in the partial or total disenfranchisement of any elector so voting unless his party had a full state and local ticket.—Eaton v. Brown, 96 Cal. 371, 31 Am. St. Rep. 225, 31 Pac. 250, 17 L. R. A. 697.

[b] Political Code, section 1197, relating to official election ballots, which provides that the name of a candidate shall be printed only once upon the ballot, and, if any candidate is nominated by more than one certificate of nomination, he must choose which of the party designations he desires to have his name printed under, and, if the candidate shall fail to make the choice, his name shall be placed on the ballot under the party designation named, in the certificate first filed, and underneath the title of the office in the other party column shall be printed the words "No Nomination," is unconstitutional, as interfering with the rights of political parties to make nominations, and with the right of a candidate to demand that his name shall be placed on the ballot, so as to inform the voters that he is the nominee of a particular party; and therefore a candidate nominated by two parties for the same office is entitled to have his name printed twice on the ballot, under the two party designations.—Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97.

[c] Political Code, section 1186, provides that a party represented by a convention in a political division in which sections 1357 to 1375, relative to primary elections, are not mandatory, must have polled, at the last election before the holding of the convention, at least three per cent of the entire vote of the state or other political division for which nominations are to be made. Section 1361 provides that political parties which shall have polled at the last election at least three per cent of the entire vote of the state or other political division for which a primary election is to be held shall be entitled to a place on the official ballot to be used in all primary elections for delegates. Held, that a party which at the last state election polled over three per cent of the total vote of the state is entitled to a place on the congressional ballot in a district where sections 1357 to 1375 are not mandatory, although it failed to cast three per cent of the votes within such district.—Gaylord v. Curry, 145 Cal. 154, 78 Pac. 548.

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FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 346; 18 Cent. Dig., cols. 231, 232, § 138.

§ 57. Form and Contents.

[a] A ballot is a single piece of paper containing the names of the candidates and the offices for which they are designated.—People v. Holden, 28 Cal. 123.

[ab] Ballot should not be rejected because it differs from regulations prescribed in Code in matters over which elector has no control, such as size of ballot, kind of paper on which it is printed, or character of type used in printing.—Kirk v. Rhoads, 46 Cal. 398.

[b] The fact that, in preparing ballots for the election of a supervisor of the first district of a county, the printer, by mistake designated the district as the "second," does not prevent the counting of such ballots, the purpose for which they were cast being obvious.—Inglis v. Shepherd, 67 Cal. 469, 8 Pac. 5.

[c] Ballot not conforming in length and other respects to sec. 1191, Political Code, is properly rejected.—Reynolds v. Snow, 67 Cal. 497, 8 Pac. 27.

[d] The California election law, prior to its amendment by Statutes of 1889, page 209, provided that spurious tickets could only be counted for what they would have been if genuine, where the fraudulent names were "pasted" on the tickets. Held, that under such law tickets in all respects genuine, except that on them was "printed" the name of the adverse party's candidate for sheriff, were properly counted for him in a contest for his office.—Russell v. Dowell, 83 Cal. 70, 23 Pac. 183.

[e] Although it was not required of the clerk of a city that he send the voters a sample ballot before election, where he does so the voters have the right to assume that the ballots furnished them at the voting booth correspond to the sample.—City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699.

[f] Statutes of 1889, p. 358, provides that electors shall be invited to vote on the proposition of annexing territory to a city by placing on the ballots the words "For annexation" or "Against annexation." The ticket used contained the direction, "To vote, stamp a cross (X) in the square opposite the proposition indicating your choice," while below, on separate lines, were the words "For annexation" and "Against annexation." Held a substantial compliance with the statute.—People v. City of Los Angeles, 133 Cal. 338, 65 Pac. 749.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 234-247, §§ 140-150.

§ 58. —— Party Names, Emblems or Devices.

[a] The words "Regular Prohibition Ticket," printed at the head and on the face of a ballot, are not such part of the ticket as renders it illegal, under Political Code, section 1191, providing that the word "For" shall comprise the top line of all tickets used at an election, as the ticket consists merely of the words showing for whom and for what office the ballot is cast.—Coffey v. Edmonds, 58 Cal. 521; Coffey v. Lyman, 92 Cal. 135, 28 Pac. 91.

[b] There should be no party designation at the head of official ballots printed pursuant to Political Code, sections 1197, 1205, as amended by Statutes of 1891, chapter 130.—Eaton v. Brown, 96 Cal. 371, 31 Am. St. Rep. 225, 31 Pac. 250, 17 L. R. A. 697.

[c] The party designation, "National Democratic," on the official ballots, is not calculated to deceive. (Beatty, C. J., and Garoutte, J., dissenting.)—Craig v. Brown, 114 Cal. 480, 46 Pac. 870.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 346; 18 Cent. Dig., cols. 235-238, §§ 142.

§ 59. —— Effect of Printer's Mistake in Describing Office.

[a] Obvious intent to vote for contestant will not be defeated by mistake of printer in description of office.—Inglis v. Shepherd, 67 Cal. 469, 8 Pac. 5.

§ 60. —— Statement of Question or Proposition.

[a] Where the statute provides (Laws 1883, p. 311) that the ballots, on an election to determine the issuance of bonds, shall be printed "For the issue of bonds," or "Against the issue of bonds," ballots "For the issue of bonds" are sufficient, without adding the word "Yes."—Gibson v. Board of Supervisors, 80 Cal. 359, 22 Pac. 225.

[b] A ballot cast at an election on the question of town incorporation, under Statutes of 1883, page 93, marked in pencil in lieu of the official stamp, or having no mark except the words "Against incorporation" at the bottom, is invalid.—People v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 349; 18 Cent. Dig., cols. 241, 242, § 147.

§ 61. Indication of Choice by Voter.

[a] Where a ballot had the names of candidates for judge of the superior court printed in lines directly above that of a candidate for state senator, and the name of the candidate for state senator was erased, and that of a candidate for judge of the superior court upon the opposition ticket written opposite the words "state senator," and in line with it, the intention of the voter, as shown on the face of the ballot, must be held to be to vote for such candidate as state senator,

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and not for the office of judge of the superior court, and it is error for the court to count the ballot for him as candidate for the latter office.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 774.

[b] Ballot is only expression of voter's will, and it must be counted according to its legal effect. When it intelligently shows that a particular person is voted for to fill a particular office it cannot be counted differently merely because the court may believe that the voter made a mistake in preparing his ticket.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779.

[c] Political Code, sections 1197, 1205, as amended by Statutes of 1891, chapter 130, provides that an elector who desires to vote any party ticket straight may do so by putting a cross opposite the name of such party; but a ballot so marked shall not be counted, if marked in any other place, except to indicate a vote on a constitutional amendment or other question. Held, that voters can only express their choice by placing a cross opposite each name or proposition voted for, except in voting for presidential electors, when the mark may be placed opposite the party group.—Eaton v. Brown, 96 Cal. 371, 31 Am. St. Rep. 225, 31 Pac. 250, 17 L. R. A. 697.

[d] The law requiring a voter to place a cross opposite the name of each candidate for whom he votes its mandatory.—Lay v. Parsons, 104 Cal. 661, 38 Pac. 447.

[e] In an election to determine as to the incorporation of a town, official ballots deposited in the ballot-box, without any marks thereon to indicate the elector's wish in any particular, are not to be deemed as "votes cast" in any sense.—People v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937.

[f] Political Code, section 1197, provides for a margin on ballots one-half inch wide, at the right hand of the names, so that the voter may clearly indicate the candidate for whom he votes, and requires the ticket to have printed on it, "To vote for a person, stamp a cross (X) in the square at the right of the name." Section 1211 provides that any ballot not made as provided in the act shall be void. Section 1205 provides that the voter shall prepare his ballot by making a cross after the name of the person for whom he intends to vote. Section 1215 forbids the voter to place any mark upon his ballot by which it may be identified. Held, that a ballot with a cross placed opposite the candidate's name, but outside the square, should be counted as a vote for the candidate opposite whose name the mark is placed.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673.

[g] Failure to follow prescribed mode of marking ballot renders vote nugatory.—Murphy v. San Luis Obispo, 119 Cal. 633, 51 Pac. 1085.

[h] Failure to follow mandatory provisions for holding election vitiates it; minor and unsubstantial departure from directory provisions not changing result does not.—Murphy v. San Luis Obispo, 119 Cal. 632, 51 Pac. 1085.

[i] Where a city ordinance calls for a special election, setting forth the propositions to be voted upon, stating that "each voter shall indicate his wish by writing 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote," and the ballots used at the election had the word "Yes" printed in the right-hand margin opposite each proposition, such change is a material departure from the provisions of the ordinance, and renders the election void.—City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699.

[j] Where a ballot bears a cross opposite the name of a candidate for supervisor, but also contains the name of another in the blank column under the heading "For Supervisor," it cannot be counted for either, under Political Code, section 1211, providing that if a voter marks more names than there are persons to be elected to an office, or for any reason the voter's choice as to any office cannot be determined, the ballot shall not be counted for such office.—Salcido v. Roberts, 136 Cal. 670, 69 Pac. 431.

[k] Political Code, section 1205, provides that an elector shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote, or by writing a name or names in the blank column. Held, that in an election contest it was error to receive a ballot which bore a name written in the blank column and a cross also stamped against it, since the statute only permits a voter to make a cross after a printed name.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[l] Manner of stamping ballot provided by statute is mandatory.—Maddux v. Walthall, 141 Cal. 414, 74 Pac. 1026.

[m] Under the law which required the voter to stamp a cross "against" the answer "Yes" or "No" in voting on constitutional amendments, the stamping of the cross upon the word "No" instead of in the square to its right did not invalidate the ballot.—Tout v. Hawkins, 143 Cal. 104, 76 Pac. 897.

[n] Under Political Code, section 1205, which provides that at elections a cross should be stamped after the name of a candidate on the ballot, and against the answer that the voter desired to give as to a constitutional amendment, the fact that voters had stamped a cross on the parallelogram containing the candidate's name, after the name, but not in the square, and had stamped a cross under or on the word "Yes" or "No," in voting on constitutional amendments, and not in the square, did not render the ballots illegal. Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[o] Under Statutes of 1889, page 399, section 2, authorizing a city to prescribe by ordinance the manner of holding a special election for the issuance of municipal bonds, an

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ordinance directing each voter to indicate his wish by "writing or causing to be written or printed 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote," is mandatory, and is not satisfied by stamping a cross opposite the word "Yes" or "No" printed after the proposition, as provided by the general election law, which the ordinance declares shall only be followed when not in conflict with said ordinance.—Murphy v. City of San Luis Obispo (Cal.), 48 Pac. 974.

[p] A mark made opposite a name by an instrument so full of ink as to practically make a round spot or blot instead of a cross, but in which the cross can be seen, is a sufficient mark.—Salcido v. Roberts, 67 Pac. 1077.

[q] Under Political Code, section 1211, providing that, if a voter marks more names than there are persons to be elected to an office, his ballot shall not be counted for such office, a ballot so marked can only be rejected as to such office.—Salcido v. Roberts, 67 Pac. 1077.

[r] A ballot marked with a cross opposite the "Yes" and "No" to proposed constitutional amendments is valid in other respects, and must be counted for the candidates properly voted for.—Salcido v. Roberts, 67 Pac. 1077.

FOR AUTHORITIES FROM OTHER STATES:

47 L. R. A. 806, note. See, also, 15 Cyc. 353-356; 18 Cent. Dig., cols. 247-265, §§ 151-158.

§ 62. —— Erasure and Insertion of Names.

[a] Evident mistake in a ballot in voting for different offices for both of two rival candidates, through erasure of a wrong name, cannot be corrected.—Donnelly v. Potter, 55 Cal. 474.

[b] In a contested election of a judge, one of the ballots had the words, "For President, Hancock and English," written in lead pencil upon its face under the words, at the top of the names, "Eleventh Senatorial District." Held, that the ballot should be counted.—Coffey v. Edmonds, 58 Cal. 521.

[c] Voters erased with lead-pencil marks the name of the contestant, and also the name of the office to be voted for, leaving simply the number indicating its order on the ballot, and opposite this number and erasure wrote the name of the defendant. Held, that these ballots were properly counted for the defendant.—Reynolds v. Snow, 67 Cal. 497, 8 Pac. 27.

[d] A ballot read: "18. Judge of the Superior Court, R. 19. Judge of the Superior Court, O. 20. State Senator, 10th District, H." The name H. was erased, and opposite, or in line with it, was written the name of respondent, who was a candidate for judge of the superior court. Held, that it was error to count the ballot for respondent, as candidate for judge.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779, 13 L. R. A. 761.

[e] Where the printed name of one candidate on a ballot is erased with an indelible pencil or with red ink and the name of another written opposite with the same kind of pencil or ink, the ballot should be counted for the latter, under Political Code, section 1204, providing that when one name has been erased on a ballot, and another substituted therefor, in any other manner than by the use of "a lead pencil or common writing ink," the name erased must be counted; it being the intention of the legislature merely to prohibit erasures and substitutions in any other style or form, or with any different effect, than would be produced by the use of a lead pencil or common writing ink.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779, 13 L. R. A. 761.

[f] If no name is substituted for a name erased on a ballot, the erased name must be counted, under the provisions of Civil Code, section 1204; such requirement of the statute not being unconstitutional as requiring an educational qualification for the voter, nor as requiring him to disclose the secrecy of his ballot, nor for any other reason.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779, 13 L. R. A. 761.

[g] A ballot is invalid where a cross has been stamped after names written in the blank column.—Salcido v. Roberts, 136 Cal. 670, 69 Pac. 431.

[h] Political Code, section 1197 (Stats. 1899, p. 135), provides that official ballots shall contain a column in which the names of candidates may be written. Section 1211 provides that names written in such column shall be counted for the office under which the name is written. Section 1215 prohibits electors from placing identifying marks on ballots. Held, that writing in and voting for William McKinley as a presidential elector in the election of 1900 would not invalidate the ballot, as the court could not take judicial notice that there was no person by that name in California who was eligible to such office. Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, 975.

[i] In an election contest it was proper to receive a ballot bearing a name written in the blank column, notwithstanding that the name was written beneath the line in which the office was designated.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[j] Political Code, section 1205, provides that a voter shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote, "or" by writing a name or names in the blank column. Held, that in an election contest it was improper to receive ballots bearing a name of a candidate printed in the Democratic column and also written in the blank column.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[k] Political Code, section 1207, provides that, if a voter spoil a ballot, he must return

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it to the ballot clerk, and receive another in its place. Held, that in an election contest it was proper to reject ballots bearing erasures or attempted erasures, or marks once placed on the ballot by the voter, which he afterward sought to remove.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[l] Where there is an erasure clearly apparent on the face of an election ballot, it should not be counted.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[m] On an election contest, ballots on which the voter had written a name in the blank column of the ballot and had stamped a cross after such written name were void.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[n] Political Code, section 1196, declares that a voter may write upon his ballot the name of any person for whom he desires to vote. Section 1197 provides for a blank column where voters may write under the title of the office the name of a person whose name is not printed. Section 1205 provides that the voter shall prepare his ballot by making across after the name of the person for whom he intends to vote, and authorizes the writing of a name or names in the blank column. Section 1211 provides that a ballot not made as provided in the act shall be void, and that any name written on a ballot shall be counted for the office under which it is written, if in the blank column. Held, that writing a name in the wrong column does not invalidate the ballot as a whole, though the written name cannot be counted. Salcido v. Roberts, 67 Pac. 1077.

[o] Under Political Code, section 1205, authorizing the writing of a name in the blank column on the ballot under the title of the office to be voted for, a ballot containing the name of a candidate written under the appropriate heading, but across the horizontal line between the title of the office and next below, or else below such line, is good.—Salcido v. Roberts, 67 Pac. 1077.

[p] A ballot containing the written words "Blac Colu" in the blank column under the title "Justice of the Peace," together with a cross opposite the printed name of a candidate for that office, is valid in other respects, and must be counted for the candidates for other offices properly voted for, the court presuming that the voter intended to vote for a person named "Blac Colu."—Salcido v. Roberts, 67 Pac. 1077.

FOR AUTHORITIES FROM OTHER STATES:

Right of elector to vote for name not on official ballot: 91 Am. St. Rep. 682, note; 18 Cent. Dig., cols. 257-261, § 156.

§ 63. Irregularities and Defects.

[a] A ballot of the National Greenback Labor party differed from the regular ticket in the following particulars, viz.: In the vignette of the ticket were the words, "Ninth District," instead of "Ninth Senatorial District," and below the words "For Assemblyman," instead of "For Member of the Assembly," and the words "For Superior Judge," instead of "For Judge of the Superior Court." Held good.—Coffey v. Edmonds, 58 Cal. 521.

[b] On all the ballots cast at a certain election there appeared, written on the blank space under the office of justice of the peace, "G. G. Brown—Republican." The evidence showed that the writing was all done by the same person, but did not show who did the writing, nor whether it was upon the tickets when they were put in the voters' hands, and showed that there was but one person in the precinct lawfully assisted in marking his ballot. Held, that under Political Code, section 1211, providing that any ballot which is not made as provided in this act shall be void, and shall not be counted, all the ballots, except the one of the voter lawfully assisted, should be rejected.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673.

[c] Under Political Code, section 1215, providing that no voter shall place any mark upon his ballot by which it may afterward be identified as the one voted by him, a ballot with the letter "J" written in pencil in the blank space left for the insertion of the name for justice of the peace is void.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 355, 358, 359; 18 Cent. Dig., cols. 265-282, §§ 159-168.

§ 64. —— Distinguishing Marks in General.

[a] Under Political Code, section 1197, enacting that a ballot which bears any exterior mark designed to distinguish it, or to show by whom it was cast, shall be rejected, if an elector use ink to scratch names from his ballot, and by that means the ballot becomes discolored, such discoloration is not a mark upon the ballot which will authorize the judges of election to refuse to count the vote, for it is not designed to distinguish it from other ballots, or to import knowledge of the person who voted it.—Wyman v. Lemon, 51 Cal. 273.

[b] Designating an office differently on a ballot from the designation on the regular ballots will not vitiate it where there is no mark or sign to show by whom or by what class of persons it was voted.—Coffey v. Edmonds, 58 Cal. 521, 527.

[c] The fact that on the back of a ballot, otherwise regular, is a faint type impression of the face of a similar ticket, caused by there having been too much ink on the type, or that there is a small piece of red sealing wax, or a stain, as from a drop of oil, does not, in the absence of evidence of unlawful intent in causing the impression, make the ballot illegal, within the meaning of Political Code, sections 1206, 1207, which provide that a ballot must be rejected if it bears on the outside any impression, device, color, or thing

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"designed" to distinguish it from other legal ballots, or "intended" to designate or impart knowledge of the person who voted it.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779, 13 L. R. A. 761.

[d] The fact that the cross strokes on a ballot are blurred, or that the lesser part of the cross is on the line below, does not render the ballot invalid.—People v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937.

[e] Where a letter is written in pencil in a blank space left for the initial of a name, though it may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down an initial letter; yet the mark being one having no lawful right on the ballot, and one which could serve as a distinguishing mark, it renders the ballot void, his only remedy, having improperly marked the ballot, being to call for the issuance to him of a fresh ticket. Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

[f] The writing by a voter, on his ballot, of the party designation of a candidate, after the name, which he has also written in, does not constitute a distinguishing mark which invalidates the ballot.—Jennings v. Brown, 114 Cal. 307, 46 Pac. 77, 34 L. R. A. 45.

[g] Under Political Code, section 1215, providing that no voter shall place any mark upon his ballot by which it may afterward be identified as the one voted by him, a mark upon a ballot, having no lawful right there, and that might serve as an identifying mark, vitiates the ballot.—Lauer v. Estes, 120 Cal. 652, 53 Pac. 262.

[h] Upon the trial of an election contest a ballot so marked by the voter when it is voted that it can be identified, should be rejected.—Smith v. Thomas, 121 Cal. 533, 54 Pac. 71.

[i] The fact that the vote for an excessive number of names for one office might be used as an identifying mark does not affect the validity of the ballot in respect of other offices, such identifying marks being relieved from the operation of section 1215 of the Political Code by virtue of the more specific provision of section 1211 of that code, which is a limitation upon section 1215.—Day v. Dunning, 127 Cal. 55, 59 Pac. 196.

[j] Ballots cast for an excessive number of names for one office have only the effect, under section 1211 of the Political Code, to prevent the ballots from being counted for that office; and such excessive number of votes for one office does not constitute an identifying mark within the meaning of section 1215 of the same code, and does not destroy the validity of the ballot, or affect it in so far as properly cast for candidates for other offices.—Day v. Dunning, 127 Cal. 55, 59 Pac. 196.

[k] On an election contest it was proper for the court not to reject ballots to which was attached a stub that should have remained in the books from which the ballots were taken. Farnham v. Boland, 134 Cal. 151, 66 Pac. 200, 366.

[l] On an election contest it was proper to count ballots which the officers at an election had placed in the ballot box without first tearing therefrom the numbers attached.—Farnham v. Boland, 134 Cal. 151, 66 Pac. 200, 366.

[m] If, in the use of the authorized stamp, the voter keeps within the law, the ballot will not be rejected, even though the stamp has been so used that the cross may be an identifying mark, and the ballot should not be rejected for trivial reasons; but the court will do the best it can to hold the voter to a strict compliance with the statute forbidding identifying marks with the use of the stamp.—Farnham v. Boland, 134 Cal. 151, 66 Pac. 200, 366.

[n] The purpose of the provision of section 1215 of the Political Code, that "no voter shall place any mark upon his ballot by which it may be afterward identified as the one voted by him," is to destroy the identity of the ballot, and thereby maintain its secrecy, which is one of the cardinal principles on which the present ballot law is founded. It is intended to cover any mark made by the voter which may serve as a distinguishing mark, whether made with the legally authorized stamp, or with an ordinary pen or pencil.—Farnham v. Boland, 134 Cal. 151, 66 Pac. 200, 366.

[o] Ballots upon which a cross is placed after both "Yes" and "No" in voting upon a constitutional amendment do not have a distinguishing mark which renders them totally void. It only has the effect to nullify the vote upon such amendment; and the rule is similar to that applied where crosses are stamped opposite the names of two or more rival candidates for the same office which are not to be counted as to that office, but may be valid in other particulars, and are to be counted as to other offices to which no objection applies.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821.

[p] Upon a contest of election, ballots upon which the legal mark of the cross is placed opposite the words "No nomination," which mark can by no possibility serve a legitimate purpose, must be regarded as having a distinguishing mark identifying the ballots, and must be rejected.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821.

[q] Ballots upon which the cross was stamped twice in one or more voting squares, or in which a round hole is burned, or which have a special number written on their face, contain identifying marks which render them invalid, and must be rejected.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821.

[r] Where ballots have the name of "H." written, not in the blank column, where the law directs, but under the words "Justice of the Peace," in the Republican, Democratic, or Prohibition column, they are invalid, as bearing distinguishing marks.—Salcido v. Roberts, 136 Cal. 670, 69 Pac. 431.

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[s] A ballot is invalid when a cross has been tamped twice after the name of a candidate. alcido v. Roberts, 136 Cal. 670, 69 Pac. 431.

[t] Where a voter has written a name under he words "For District Attorney," in the lank column, and stamped another name for istrict attorney in another column, and then ttempted to rub out the writing, leaving a onspicuous mark on the ballot, the ballot is nvalid.—Salcido v. Roberts, 136 Cal. 670, 9 Pac. 431.

[u] Where a voter has stamped both "Yes" nd "No" after a proposed constitutional mendment, and then partially rubbed out the ross after "Yes," the ballot is invalid, as earing a distinguishing mark.—Salcido v. oberts, 136 Cal. 670, 69 Pac. 431.

[v] It was proper to reject, as bearing a disnguishing mark, a ballot which had a cross pposite "For Electors," in the Republican olumn.—People v. Campbell, 138 Cal. 11,) Pac. 918.

[w] It was proper to reject, as bearing a disnguishing mark, a ballot which had a cross arked against the names of the nine electors rinted in the Democratic column, and also id the name "William McKinley" written r elector in the blank column.—People v. ampbell, 138 Cal. 11, 70 Pac. 918.

[x] It was proper to reject, as bearing a disnguishing mark, a ballot which had a cross arked against the printed names for electors the Republican column, and had also nine mes written for electors in the blank colnn.—People v. Campbell, 138 Cal. 11, 70 c. 918.

y] It was proper to reject, as bearing an ntifying mark, a ballot on which a cross d been marked against the printed names the electors in the Republican column, d having the name "McKinley" written in blank column for elector.—People v. mpbell, 138 Cal. 11, 70 Pac. 918.

z] It was proper to reject, as bearing a disguishing mark, a ballot marked with a ss after the words "No Nomination."— ople v. Campbell, 138 Cal. 11, 70 Pac. 918.

aa] It was error to reject, as bearing a disguishing mark, a ballot bearing the name 'illiam McKinley" written in the blank mn for electors, but which did not have ross marked against any of the printed nes for that office.—People v. Campbell, 138 . 11, 70 Pac. 918.

bb] In an election contest it was proper to ive a ballot where a mark resembling the er "S," which was claimed to be an ntifying mark, clearly appeared to be an et, by folding, from the writing placed the ballot by the board after the ballot left the hands of the voter.—People v. pbell, 138 Cal. 11, 70 Pac. 918.

cc] Under Political Code, section 1215, fording a voter from placing any mark on ballot by which it may afterward be tified, the intent of the voter must be determined by an inspection of the ballot, irrespective of any conjecture as to the purpose or circumstances under which the mark was made.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[dd] In an election contest it was proper to reject a ballot bearing a double cross mark thereon.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[ee] In an election contest it is proper to reject, as bearing a distinguishing mark, a ballot which has a large ink blot on one of the margins.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[ff] It was proper to reject, as bearing a distinguishing mark, a ballot which had a hole through it where an attempt was made to erase a mark made with the stamp.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[gg] It was proper to reject, as bearing a distinguishing mark, a ballot which had a cross below the voting space in the Republican column for electors.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[hh] Distinguishing mark on ballot renders it illegal and void.—Maddux v. Walthall, 141 Cal. 414, 74 Pac. 1026.

[ii] Cross in square or space after words "no nomination" is a distinguishing mark.—Maddux v. Walthall, 141 Cal. 414, 416, 74 Pac. 1026.

[jj] Mark does not cease to be distinguishing mark from fact that it appears on large number of ballots.—Maddux v. Walthall, 141 Cal. 415, 74 Pac. 1026.

[kk] A ballot marked with a cross instead of with the stamp, as required by statute, is invalid, as bearing a distinguishing mark.—Maddux v. Walthall, 141 Cal. 412, 74 Pac. 1026.

[ll] Where certain voters placed a cross in the square at the right of the words "No Nomination," on their ballots, which mark constituted an identifying mark, invalidating the ballot, the fact that a number of ballots were so marked, and by reason thereof such mark did not identify any one ballot as that cast by a particular voter, did not validate the ballots.—McMenomy v. Ruch, 142 Cal. 77, 75 Pac. 661.

[mm] In an election of a member of a board of supervisors, ballots with a cross stamped opposite the words "No Nomination" are illegal, and should be rejected; the cross being a distinguishing mark, though one hundred and one ballots so stamped were cast in thirteen precincts.—Kincaid v. Reid, 142 Cal. 88, 75 Pac. 657.

[nn] The invalidity of a ballot, stamped by the voter with a cross at a place not authorized by the statute, as bearing a distinguishing mark, is without regard to the number of other ballots so stamped.—Merkley v. Trainor, 142 Cal. 265, 75 Pac. 656.

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[oo] Under Political Code, section 1197, providing, to vote for a person, "Stamp a cross in the square at the right of the name," and section 1215, providing that no voter shall place any mark on his ballot by which it may be afterward identified as the one voted by him, a cross stamped on a ballot in the square opposite the words, "No Nomination," appearing under the designation of certain offices on the ticket, makes it invalid, as bearing a distinguishing mark.—Merkley v. Trainor, 142 Cal. 265, 75 Pac. 656.

[pp] Placing two crosses opposite the name of a candidate is a distinguishing mark which would have justified the exclusion of a ballot under the law prior to its amendment by Statutes of 1903, page 149, chapter 134, (Pol. Code, section 1211).—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[qq] Ink marks on the back of an election ballot, and a blot on another, if not serving as distinguishing marks, do not justify their exclusion.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[rr] An alleged seal on the back of election ballots, which was apparently only a drop of candle grease that had fallen thereon after they were voted, does not justify their exclusion.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[ss] Pencil marks on the face of election ballots, so minute and light as not to be readily observable, cannot serve as distinguishing marks, justifying their exclusion from the count.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[tt] The failure of election officers, through ignorance or carelessness, to remove the number of the ballot, does not make it illegal, as in violation of Political Code, section 1215, prohibiting voters from placing any mark on ballots for identification.—Freshour v. Howard, 142 Cal. 501, 77 Pac. 1101.

[uu] Under the statute which provided that the stamp should be "against" the "Yes" or "No" in ballots on constitutional questions, a stamp under the word "Yes" was not a distinguishing mark invalidating the ballot. Hannah v. Green, 143 Cal. 19, 76 Pac. 708.

[vv] A stamp or cross placed on a ballot in the blank opposite the words "no nomination" is a special mark, which renders the ballot invalid.—McCardle v. Barstow, 145 Cal. 135, 78 Pac. 371.

[ww] The intent of a voter in making a distinguishing mark on his ballot cannot be shown other than by what appears upon the face of the ballot.—Treanor v. Williams, 145 Cal. 315, 78 Pac. 884.

[xx] Ballots having crosses after "No nomination" are properly rejected in an election contest, although there are a large number of such ballots.—Treanor v. Williams, 145 Cal. 315, 78 Pac. 884.

[yy] Where there was a plain and distinct impression of a cross in the blank space on a ballot under the column of Socialist candidates, the ballot was invalid.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[zz] On an election contest, a ballot having pencil writing in an improper place on the face of the ballot was void.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[aaa] On an election contest, a ballot having two or more distinct crosses after the name of a single candidate was void.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[bbb] On an election contest, ballots containing the printed words "no nomination," in the absence of a nominee for a particular office, upon which the voter had stamped a cross after the words "no nomination," were void.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[ccc] Testimony by the inspector of elections and the ballot clerk that they did not see a mark of identification on a ballot when they were counting them is sufficient to support a finding that such mark was placed thereon after it came out of the ballot box.—Smith v. Thomas, 52 Pac. 1079.

[ddd] A mark on a ballot made by folding it before the ink on it had dried does not render the ballot void.—Salcido v. Roberts, 67 Pac. 1077.

FOR AUTHORITIES FROM OTHER STATES:

Distinguishing marks which invalidate ballots: 49 Am. St. Rep. 240, note; 13 L. R. A. 761, 47 L. R. A. 820, note. See, also, 15 Cyc. 357-360; 18 Cent. Dig., cols. 274-281, §§ 166, 167.

§ 65. —— Voting More than One Ballot.

[a] A single piece of paper, cast as a ballot, and containing the name of a candidate more than once, should be counted as one vote, and not rejected as illegally thrown.—People v. Holden, 28 Cal. 123.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 281, 282, § 165.

§ 66. —— Two or More Ballots Folded Together.

[a] A ballot having written or printed on it the name of a person voted for and his office two or more times does not constitute two or more tickets folded together.—People v. Holden, 28 Cal. 123.

§ 67. —— Mutilation.

[a] On an election contest, torn ballots are properly counted, on the assumption that they were torn after delivery to the election officers, there being no evidence when or how they were torn.—Pratt v. O'Neill, 140 Cal. 539, 74 Pac. 27.

[b] The tearing of a ballot by an election officer does not justify its exclusion from the count.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

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FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 365; 18 Cent. Dig., cols. 272, 273, § 164.

VIII. CONDUCT OF ELECTION.

IN GENERAL, § 68.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 69.
POLLING PLACES, § 70.
TIME FOR VOTING—OPENING POLLS, § 71.
MODE OF VOTING AND EXERCISE OF RIGHT, IN GENERAL—CHALLENGES TO VOTERS, § 72.
—— ASSISTANCE TO VOTERS, § 73.
—— REJECTION OF VOTE BY ELECTION OFFICERS, § 74.
—— CONCLUSIVENESS OF OATH OF VOTERS, § 75.
IRREGULARITIES, ERRORS, AND DEFECTS—IRREGULARITIES AND ERRORS IN GENERAL, § 76.
—— RECEIVING VOTES IMPROPERLY CAST, § 77.
—— FAILURE TO OPEN POLLS IN CERTAIN PRECINCTS, § 78.
—— ILLEGAL VOTES, § 79.
—— ABSENCE OF OFFICERS, § 80.
—— INTIMIDATION AND VIOLENCE, § 81.

§ 68. In General.

[a] Validity of election does not depend upon eligibility of candidates voted for, but upon its being held and conducted at the proper time and place, in the manner and by the proper persons and officers as required by law.—Satterlee v. San Francisco, 23 Cal. 315.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 362-374; 18 Cent. Dig., cols. 282-335, §§ 169-205.

§ 69. Constitutional and Statutory Provisions.

[a] Disregard of directory provisions of election laws, in absence of actual fraud, is no ground for rejecting entire vote of precinct.—Russell v. McDowell, 83 Cal. 77, 23 Pac. 183.

[b] It is only provisions relating to time and place of holding elections, qualification of voters, and such others as are expressly made essential to validity of election that are mandatory.—Russell v. McDowell, 83 Cal. 77, 23 Pac. 183.

[c] There must be a reasonable observance of all the prescribed conditions for the holding of an election, including not only mandatory provisions, but also the essential terms of directory provisions, and it is not sufficient to show that, from the failure substantially to comply with the statute, no fraud or injury was involved or resulted in the individual case.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 362, 363; 18 Cent. Dig., cols. 284-287, § 170.

§ 70. Polling Places.

[a] If persons appointed inspectors and judges of elections hold the election at a place several miles distant from that appointed by the board of supervisors, it is misconduct enough to invalidate the election. Knowles v. Yeates, 31 Cal. 82.

[b] The polls for a certain precinct were opened a short distance from and in plain view of the place appointed by the supervisors, but it did not appear that any voter was misled or deprived of his vote by the change. Held, that the court did not err in refusing to reject the vote of the precinct.—Preston v. Culbertson, 58 Cal. 198.

[c] The existence of outside windows in the portion of an election place where the booths are situated does not invalidate the election if the windows are securely fastened, and are the cause of no improper conduct.—Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30.

[d] The fact that two electors occupy the same election booth for a short time, but are discovered, and informed that they must occupy separate booths, which they do, is not sufficient to invalidate the election in the precinct.—Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30.

[e] An election was held in a building having a partition, and the election booths were behind the partition, but in front of a door through which the booths could be seen from a portion, though not all, of the room where the election officers and bystanders were. The door was closed several times, but was immediately opened. Held a sufficient compliance with Political Code, section 1203, providing that election booths shall not be hidden from the view of the bystanders.—Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 292-302, §§ 176-181.

§ 71. Time for Voting—Opening Polls.

[a] A notice of an election to be held in a school district for the imposition of a tax, stating that the polls would be open "between the hours of 1 o'clock and 6 o'clock P. M.," held not to comply with Political Code, section 1160, requiring the polls to be open "at one hour after sunrise on the morning of the election."—People v. Seale, 52 Cal. 71.

[b] An election held for the purpose of imposing a tax in a school district must be held in strict conformity with the law, and the polls must be kept open from one hour after sunrise until sunset.—People v. Seale, 52 Cal. 620.

[c] Where the polls at an election precinct were not opened until nearly 10 o'clock and an adjournment was made at noon, and the ballot-box was taken by one of the election officers and left on the table while eating dinner, and the ballots and other

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election materials were left in the poll-room in the presence of bystanders during the adjournment, the provisions of the law are substantially violated and the vote of the precinct is void, and the votes cast thereat should be rejected.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

[d] Some latitude must be allowed for judgment as to the time of sunrise in the opening of polls; and where delay in opening them precisely at sunrise is not alleged to be inconsistent with honest intent, and the violation of the letter of the law is not alleged to have operated to obstruct the full and fair expression of the suffrage of the precinct, the bald fact of such delay is not sufficient to disfranchise the precinct.—Packwood v. Brownell, 121 Cal. 478, 53 Pac. 1079.

[e] It is a sufficient compliance with Political Code, section 1597, providing that "the polls must not be opened before 9 o'clock A. M. nor kept open less than four hours," if the polls are open from 2 o'clock P. M. until sunset on May 23d.—People v. Lodi High School Dist. of San Joaquin County, 124 Cal. 694, 57 Pac. 660.

[f] Under Political Code, section 1597, permitting trustees in a school election notice to designate any four consecutive hours for the polls to be kept open, a failure to open the polls for thirty minutes after the time set does not invalidate the election; no one being prevented by the delay from voting.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

[g] Under Salinas City charter, section 5, providing that the general law shall apply to city elections as far as practicable, but that the polls shall not be opened later than 2 P. M., nor closed before sundown, the vote of wards closing before sundown should be disregarded, notwithstanding the general law had subsequently fixed an earlier hour, this law being made applicable to state and county elections only; and this though a majority of the voters are thus disfranchised.—People v. Hill, 125 Cal. 16, 57 Pac. 669.

[h] The true test to be applied to departures from the laws relating to the conducting of elections on the proper day and at the proper time, under requirements either mandatory or directory, is as to whether the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, if fraud had been committed or anything done which would affect the result. Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

[i] Failure to open polls on time will not, in absence of fraud, invalidate vote of precinct, when no injury resulted therefrom.—Kenworthy v. Mast, 141 Cal. 270-273, 74 Pac. 841.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 364; 18 Cent. Dig., col. 303, § 182.

§ 72. Mode of Voting and Exercise of Right in General—Challenges to Voters.

[a] The administering of the oath to a person who is challenged for not being a qualified voter, is a matter in the discretion of the judges of the election.—People v. Gordon, 5 Cal. 235.

[b] If the person challenged for not being a qualified voter should admit that he had not been naturalized, or that his certificate of naturalization had been issued by a court known to have no jurisdiction of the subject matter, or in case of a citizen whose right to vote was well known, the judges could very properly decline administering the oath.—People v. Gordon, 5 Cal. 235.

[c] Judges of election have no right to require the production of the certificate of naturalization by the party challenged as not being a qualified voter.—People v. Gordon, 5 Cal. 235.

[d] The burden of proof is upon the party who contests the right of another to vote.—People v. Riley, 15 Cal. 48.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 367; 18 Cent. Dig. cols. 312-314, § 192; cols. 316, 317, § 194.

§ 73. —— Assistance to Voters.

[a] A disregard of Political Code, section 1208, authorizing election officers to assist electors to mark their ballots in case of inability of the latter so to do, declared under oath at the time of registration, and requiring the officers to return a sworn statement thereof, and to keep a list of electors so assisted, renders illegal the ballots of persons receiving assistance from the officers in marking their ballots.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821.

[b] Where the blank form of affidavit used by a voter was so filled in as to show that he declared under oath at the time of registration, as required by Political Code, section 1208, that he could not read the Constitution in English, he was entitled to assistance, irrespective of whether he also stated he could not mark his ballot.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[c] Where election officers assisted the voter in preparing his ballot, the fact that they did not take the oath prescribed, to the effect that they would not give any information regarding the manner in which it was marked until after they had assisted him, did not invalidate his vote.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[d] Under Political Code, section 1096, subdivision 11, and section 1208, and section 1097, providing that the affidavit for registration of the voter must show all the facts required to be stated in the entry on the register, except the date of entry, the fact that the register showed that an elector had declared on oath that he could not write his name did not entitle him to assistance.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 366; 18 Cent. Dig., cols. 309-311, § 190.

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§ 74. —— Rejection of Vote by Election Officers.

[a] Where the court below, when trying a contested election case, allowed one of the contestant's votes not in fact received, although offered to and rejected by the election board, it was held that such act of the court was manifest error, whether the proffered votes were properly or improperly rejected.—Webster v. Brynes, 34 Cal. 273.

[b] The following questions arise for decision by the election board, under the registry act, when a vote is proffered: 1. Is the person offering to vote a qualified elector of the precinct where the vote is offered? 2. Is his name at the time on the great register and on the poll list? And unless both questions are answered in the affirmative by the board, the vote should be rejected.—Webster v. Byrnes, 34 Cal. 273.

For Authorities From Other States:

See 18 Cent. Dig., cols. 314-317, §§ 193, 194.

§ 75. —— Conclusiveness of Oath of Voters.

[a] When the judges have administered the oath, the right to vote is concluded, and it is error to deny it.—People v. Gordon, 5 Cal. 235.

§ 76. Irregularities, Errors, and Defects—Irregularities and Errors in General.

[a] An election is not invalidated by an irregularity which is not shown to have affected the result.—(Cal. 1866) Sprague v. Norway, 31 Cal. 173.

[b] Irregularities on the part of the election board and clerks in conducting the election which were so explained by members of the board and other witnesses as to show that no injurious result followed, and that none of them had any fraudulent design or affected in any way the result of the election, cannot have the effect to invalidate it or warrant the court in defeating the will of innocent voters.—Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30.

[c] Where, in an election contest, the finding of the trial court, supported by the evidence, was that there was no malconduct on the part of the boards of judges whereby contestee was injured in his candidacy in any way, no misconduct which in any way prevented a full and fair expression of the will of the qualified electors of the precinct, or that diminished the number of legal votes that the contestee would have otherwise received, the court properly counted the ballots from the contested precincts.—Abbott v. Hartley, 143 Cal. 484, 77 Pac. 410.

[d] Rights of voters should not be prejudiced by errors or wrongful acts of election officers unless it appear that a fair election and honest count were thereby prevented.—Davis v. Grunig, 143 Cal. 336, 76 Pac. 1102.

For Authorities From Other States:

Irregularities which will avoid elections: 90 Am. St. Rep. 46, note. See, also, 15 Cyc. 372, 373; 18 Cent. Dig., cols. 219-335, §§ 197-205.

§ 77. —— Receiving Votes Improperly Cast.

[a] Rule is well settled that mere receiving and counting votes, improperly given, will not invalidate an election.—Whipley v. McKune, 12 Cal. 352.

§ 78. —— Failure to Open Polls in Certain Precincts.

[a] That polls were not opened in every precinct of the county will not invalidate an election to authorize a subscription to railroad stock.—Hobart v. Butte County Supervisors, 17 Cal. 23.

[b] The election having been regularly called, and all the persons interested having been duly notified of the time and places at which they would have the privilege of voting, the neglect to hold an election in one of the school districts does not vitiate the election.—People v. Union High School District of Solano County, 101 Cal. 655, 36 Pac. 119.

§ 79. —— Illegal Votes.

[a] The contestant proved that the number of male persons over twenty-one years of age who resided on particular lots in certain precincts on the election day, and for thirty days prior thereto, was less than half the number of votes cast. Held that, though the proof was consistent with the supposition that a voter may have resided in different places in the precinct during that period, it was negative proof, and, there being none in rebuttal, it would be held to establish material malconduct on the part of the election boards. Russell v. McDowell, 83 Cal. 70, 23 Pac. 183.

[b] The reception of illegal votes cannot be contested on account of the malconduct of the election boards as provided for by Code of Civil Procedure, section 1111, subdivision 1, where it does not appear in what particular precinct they were cast.—Russell v. McDowell, 83 Cal. 70, 23 Pac. 183.

For Authorities From Other States:

See 15 Cyc. 371; 18 Cent. Dig., cols. 325-329, § 201.

§ 80. —— Absence of Officers.

[a] Receipt of votes during the absence of some of the members of the board of judges does not vitiate the election, the law not requiring all the members to be present during all the time voting is in progress.—Packwood v. Brownell, 121 Cal. 478, 53 Pac. 1079.

§ 81. —— Intimidation and Violence.

[a] The fact that a threat was made that no one would be allowed to vote, unless he

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was registered, does not invalidate the election; no one in fact being challenged for that reason.—People v. Prewett, 124 Cal. 7, 56 Pac. 619.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 369-371; 18 Cent. Dig., cols. 334, 335, § 205.

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

DETERMINATION OF RESULT, IN GENERAL, § 82.
—— SCOPE OF INQUIRY, § 83.
—— CONCLUSIVENESS OF DETERMINATION, § 84.
NUMBER OF VOTES NECESSARY TO CHOICE—ELECTIONS ON SPECIFIC QUESTIONS—IN GENERAL, § 85.
COUNT OF VOTES—IRREGULARITIES AND ERRORS, § 86.
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PRESERVATION OR DISPOSITION OF BALLOTS, § 88.
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CERTIFICATE OF ELECTION, § 90.
COMPELLING CANVASSING BOARD TO RECONVENE TO ENABLE ELECTION OFFICERS TO COMPLETE DUTY, § 91.

§ 82. Determination of Result in General.

[a] That the candidate who stood highest on the list is ineligible does not give the election to the next highest.—(Cal. 1859) Saunders v. Haynes, 13 Cal. 145; (1877) Crawford v. Dunbar, 52 Cal. 36.

[b] Whether votes cast for "M. A. Edwards" could be counted for "M. A. Edmonds," query?—Coffey v. Edmonds, 58 Cal. 521, 526.

[c] It is only where some other person than the one returned has received the highest number of legal votes that he can be declared elected.—Snibley v. Palmtag, 128 Cal. 283, 60 Pac. 860.

FOR AUTHORITIES FROM OTHER STATES:

Election of ineligible candidate does not entitle person receiving the next highest number of votes to the office: 12 Am. Rep. 341, note. See, also, 18 Cent. Dig., cols. 335-343, §§ 206-209.

§ 83. —— Scope of Inquiry.

[a] The supervisors, in canvassing the returns of an election, act ministerially, and not judicially, and can only examine the face of the regular returns made, and must declare the result therefrom. They have no power, where returns are missing, to send for and use a duplicate tally-list kept by an inspector; but, in such case, they must wait six days for the missing returns before making the canvass, and can then only canvass the returns made to them, and must declare the result therefrom.—People v. Stewart, 132 Cal. 283, 64 Pac. 285.

§ 84. —— Conclusiveness of Determination.

[a] The determination of the board of supervisors that a place voted for for county seat had received a majority of the votes cast at the election is prima facie evidence of the fact so determined, but is not conclusive, and evidence may be adduced to show fraud or mistake and to ascertain the true result.—Calaveras County v. Brockway, 30 Cal. 325.

§ 85. Number of Votes Necessary to Choice—Elections on Specific Questions—In General.

[a] The provision of the constitution requiring that a "majority of the electors voting at a general election" must determine the question of reorganization imports that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize, notwithstanding a majority of all the electors who vote upon the proposition to reorganize were in favor of it.—People v. Town of Berkeley, 102 Cal. 298, 36 Pac. 591.

[b] Under Constitution, article 11, section 18, providing that no county shall incur liability exceeding a certain amount without the assent of two-thirds of the electors thereof voting at an election to be held for that purpose, it is necessary only that two-thirds of those voting on the question vote to incur the liability, and not that two-thirds of all those voting at the general election, held at the same time, vote for it.—Howland v. San Joaquin County Supervisors, 109 Cal. 152, 41 Pac. 864.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 388-391. See 18 Cent. Dig. cols. 343-355, §§ 210-215.

§ 86. Count of Votes—Irregularities and Errors.

[a] If the judges and inspector of an election cannot read, and for that reason a person who is not a member of the election board takes the ballots from the box and reads them to the tellers, at the request of the judges, it is not an irregularity which will vitiate the election.—Sprague v. Norway, 31 Cal. 173.

[b] Political Code, section 1252, provides that the canvass of votes cast at an election must be public, in the presence of bystanders. The action of the election board in removing from the polling place all but two bystanders, and keeping the doors locked for one-half hour, did not invalidate the votes cast, no fraud being shown.—Atkinson v. Lorbeer, 111 Cal. 419, 44 Pac. 162.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 361, 362, § 221.

§ 87. Returns.

[a] When a board of supervisors has canvassed the returns of an election, as required by Political Code, section 1281, and the record thereof is entered in the minutes, as by section 4030, and has been authenticated by the signature of the chairman and clerk, as

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by section 4029, a copy of such record is the "abstract" which the clerk is, by sections 1344, 1345, required to make and transmit to the secretary of state, and on which the secretary must act in estimating the number of votes cast in the county for each person voted for as a representative in Congress.—Pacheco v. Beck, 52 Cal. 3.

[b] If the clerk of a county transmits to the secretary of state a statement of what transpires in relation to the canvass made by the board of supervisors of the votes cast therein, such statement, if not in the record, but merely something in addition thereto or in explanation thereof, is to be rejected by the secretary.—Pacheco v. Beck, 52 Cal. 3.

[c] Where an election was conducted properly, and the records and canvass of the votes cast duly made, certified, and authenticated, and transmitted and delivered, in all respects in conformity with the law, except that the board of election officers failed to forward to the board of supervisors, as required by law, the tally list, and list attached thereto, such failure did not preclude the consideration of the ballots cast at the election, on a contest thereof.—Davis v. Grunig, 143 Cal. 336, 76 Pac. 1102.

[d] On an election contest, an objection to the ballots from a certain precinct on the ground that the election officers had not written their names across the seal of the envelope, as required by Political Code, section 1259, held of no avail.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[e] Extrinsic evidence considered, and held to overcome the prima facie effect of the record of supervisors, under Political Code, section 1282, and Code of Civil Procedure, sections 1920, 1926, showing that a certain candidate was elected.—People v. Davidson (Cal. App.), 83 Pac. 161.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 375-379; 18 Cent. Dig., cols. 363-376, §§ 223-230.

§ 88. Preservation or Disposition of Ballots.

[a] The fact that ballot-box was temporarily out of possession of officers of the election will not invalidate the election, especially when no fraud, collusion, or suspicious circumstances are shown.—Whipley v. McKune, 12 Cal. 352.

[b] Where the ballots cast at an election are not returned sealed, and there is evidence tending to show that the packages of ballots have been opened and changed after they were received by the clerk, the board of canvassers may determine who is elected by the returns made by the officers of election, and the court may adopt the result arrived at by the board of canvassers.—People v. Burden, 45 Cal. 241.

[c] Sections 1265 and 1266 of the Political Code, providing for the preservation and custody of the ballots cast at an election, impose upon the clerk or registrar the duty of keeping the packages of ballots unopened and unaltered for twelve months, after which time he is to burn them, unless a contest has been commenced in some tribunal of competent jurisdiction.—Brown, Ex parte, 97 Cal. 83, 31 Pac. 840.

[d] The requirements of the statute as to the mode of preservation of ballots are construed as directory merely, the object looked to being the preservation inviolate of the ballots, and, if this is established, they cannot be rejected merely because the precise mode of reaching it has not been followed.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

[e] The ballots, election returns, and spoiled ballots were placed in separate envelopes after an election, closed by placing the flap or tongue in a slit, and sealed with sealing wax, and the three were tied together, and given to a member of the election board to be mailed the following morning, at which latter time it was discovered that the sealing wax on the envelope containing the ballots had been broken, probably because the envelopes were too tightly tied, and the postmaster sealed the envelopes, and they were sent to the county clerk. There was no claim of actual fraud. Held not sufficient to invalidate the election in the precinct.—Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30.

[f] Question whether ballots have been sufficiently taken care of so as to preclude suspicion that they are not in their original condition is within discretion of trial court.—Davis v. Grunig, 143 Cal. 336, 76 Pac. 1102.

[g] Political Code, sections 1264, 1265, provide that election returns shall be delivered to the county clerk, who shall be their custodian. Section 1075 makes the common council of a city the election commissioners for city elections. Section 1077 makes the clerk of the city clerk of the board of election commissioners, and section 1078 provides that the county clerk of each county, and the clerk or secretary of the common council of a city, shall, within their respective counties or cities, exercise all the powers conferred, and shall discharge all the duties imposed by law on such officers in respect to the conduct, management, and supervision of elections held within the respective counties or cities. Held, that ballots on a city election are to be returned to the city clerk and kept in his custody.—Trafton v. Quinn, 143 Cal. 469, 77 Pac. 164.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 377, 378, § 231.

§ 89. Canvass of Returns.

[a] Under the statute of 1883, page 93, a board of supervisors, in canvassing the votes given at an election called to determine whether or not a town should be incorporated need not actually count the ballots; it is sufficient if it canvass the return.—People ex rel. Beasley v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937.

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[b] Under Political Code, section 1280, providing that if, at the time of the meeting of the supervisors to canvass election "returns," all the returns have not been received, the canvass must be postponed from day to day until all the returns are received, or until six postponements have been made, the supervisors have no authority at the first meeting to send for the duplicate list of voters, tally list, and list attached thereto, and retained by the inspector of a precinct, and use them in the canvass in place of a missing return.—People v. Stewart, 132 Cal. 283, 64 Pac. 285.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 379-386; 18 Cent. Dig., cols. 278-403, §§ 232-239.

§ 90. Certificate of Election.

[a] Certificate of election is prima facie evidence of title to the office. Nor is it the only evidence by which the title may be established. Fact of election gives title to office, and this fact may be established not only without, but against, the evidence of the certificate.—Magee v. Supervisors, 10 Cal. 376.

[b] Certificate of election is only prima facie evidence of right to office. The real right or title comes from the will of the voters as expressed at the election, and one not having the real title, but only the color of title given by the certificate, "holds unlawfully," within the meaning of that term as used in the statute.—People ex rel. Wicks v. Jones, 20 Cal. 50.

[c] When a board of supervisors, authorized by Political Code, sections 1278-1284, to act as a canvassing board, has issued a certificate of election, it is prima facie evidence of the right of the holder to the office, and the only remedy for setting aside or canceling the certificate is that provided by Code of Civil Procedure, section 1111 et seq., relating to election contests.—Gibson v. Twaddle, 1 Cal. App. 126, 81 Pac. 727.

[d] The rule that a certificate of the election issued by the proper authority is prima facie evidence of right to the office cannot apply where two certificates were issued to two persons for the same office.—People v. Davidson (Cal. App.), 83 Pac. 161.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 386-388. See 18 Cent. Dig., cols. 403-411, §§ 240-244.

§ 91. Compelling Canvassing Board to Reconvene to Enable Election Officers to Complete Duty.

[a] When a board of supervisors, authorized by Political Code, sections 1278-1284, to act as a canvassing board, has completed its labors and adjourned sine die, it cannot be compelled by mandamus to reconvene and permit election officers to sign and attest a tally sheet which they had omitted to sign and attest, as required by section 1260, on account of which the board refused to canvass the returns or count the votes of the precinct.—Gibson v. Twaddle, 1 Cal. App. 126, 81 Pac. 727.

X. CONTESTS.

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§ 92. Constitutional and Statutory Provisions.

[a] Courts should so far adhere to the substantial requirements of the law in relation to elections as to preserve them from abuses subversive of the inherent and constitutional rights of the people.—Knowles v. Yates, 31 Cal. 82.

[b] Law authorizing elector to bring private suit to contest validity of officer's election is valid, though contesting elector has personal interest in result.—Maddux v. Walthall, 141 Cal. 414, 74 Pac. 1026.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 394-397; 18 Cent. Dig., cols. 415-417, § 247.

§ 93. Nature and Rights of Action in General—Nature and Existence of Remedy.

[a] Proceedings instituted to contest election of county officers are special and summary in their character.—Keller v. Chapman, 34 Cal. 635.

[b] An election contest, being an investigation in which the public at large are deeply concerned, is not an ordinary adversary proceeding; for, as against the high public interest involved, there can be no recognized adversary.—Minor v. Kidder, 43 Cal. 229.

[c] The right to contest an election is purely statutory, and must be determined by the terms of the statute; nor is it given merely to enable a candidate to vindicate his rights, but is given to any elector; and public policy requires that it should be inaugurated speedily, and before the commencement of the terms of the person declared elected.—Carlson v. Burt, 111 Cal. 129, 43 Pac. 583.

[d] Contest attacks election itself and is not concerned with certificate of election or proceedings subsequent thereto.—Sweeney v. Adams, 141 Cal. 560, 75 Pac. 182.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 393-397; 18 Cent. Dig., cols. 412-415, §§ 245, 246.

§ 94. —— Form of Remedy.

[a] The statutory proceeding contesting an election is a special case provided for by section 9 of article 6 of the constitution, wholly distinct in form and substantially different from the common-law remedy.—Dorsey v. Barry, 24 Cal. 449; Casgrave v. Howland, 24 Cal. 457.

[b] Proceedings in the nature of quo warranto are not necessary instead of proceedings in the nature of a contest where one has been merely shown by election returns to be elected.—Sweeney v. Adams, 141 Cal. 558, 75 Pac. 182.

§ 95. —— Grounds of Contest in General.

[a] That the successful candidate aided and abetted the registering officer in the illegal registry of a voter is no ground for contesting the election, under Code of Civil Procedure, section 1111, and Penal Code, title 4, part 1, providing on what grounds an election may be contested.—Meredith v. Christy, 64 Cal. 95, 27 Pac. 863.

[b] Code of Civil Procedure, section 1111, providing that any elector of a county, or political subdivision thereof, may contest the right of any person "declared elected" to an office to be exercised therein, for causes enumerated, only authorizes an examination of the right of a person "declared elected" at an election, the canvass of which is questioned, and does not authorize a recanvass of votes where the election has been declared to have resulted in the election of no one, in which case a new election must be held.—Austin v. Dick, 100 Cal. 199, 34 Pac. 655.

[c] A contest may be made on account of illegal votes; but it is not a ground of contest merely that some other person received a higher number of votes than the one declared, or an equal number of votes with him.—Snibley v. Palmtag, 128 Cal. 283, 60 Pac. 860.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 398; 18 Cent. Dig., cols. 417-419, § 248.

§ 96. Consolidation of Several Contests.

[a] The trial court has discretion to consolidate for the convenience of trial fifteen separate contests of the election of eighteen supervisors under the charter of the city and county of San Francisco, instituted by candidates who were not declared elected.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

§ 97. Right of Incumbent to Salary Pending Contest.

[a] The provision of section 936 of the Political Code that the person holding the certificate of election, who discharges the duties of the office, shall receive the salary of the office, notwithstanding a pending contest of the office, the same as if no such contest or proceeding were pending, is too clear for construction; and the right to receive such salary will be enforced by mandamus.—Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850.

[b] Section 936 of the Political Code is not unconstitutional. The drawing of a warrant by the auditor in favor of the incumbent under the certificate of election, pending a contest, will relieve those officers and their bondsmen from any further liability in the premises.—Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850.

[c] The holder of a certificate of election who had become a qualified incumbent of the office, and who continued to exercise its functions pending an appeal from a judgment in favor of his opponent upon a contest of the election, is entitled, pending such appeal, to receive the salary, the same as if no

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contest was pending. The appeal stays the operation of the judgment, and leaves the certificate unimpaired until the appeal is decided. (The case of Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850, is affirmed.)—Anderson v. Browing, 140 Cal. 222, 73 Pac. 986.

§ 98. Defenses.

[a] Code of Civil Procedure, section 1111, provides that an elector may contest the right of a person declared elected to an office on certain enumerated grounds, and by section 1123 it is the duty of the court to declare "any other person" elected if the result of the recount disclose such person's election. The punishments imposed for violation of the purity of election law are highly penal. Held, that on an election contest it was proper to refuse to allow the contestee to show a violation of the purity of election law on the part of the contestant, such question not being in issue under the statutes, and the commission of such offense being a matter for determination in another proceeding.—Maddux v. Walthall, 141 Cal. 412, 74 Pac. 1020.

§ 99. Jurisdiction.

[a] The contest came on for trial on July 8th; and on the following day the court, on its own motion, continued the case until July 14th, without objection, after consultation with the attorneys of both parties. The trial was concluded on the 14th, without objection by either party. Held, that the court did not lose jurisdiction by the adjournment. Falltrick v. Sullivan, 119 Cal. 613, 51 Pac. 947.

[b] Jurisdiction of court to entertain a right of elector to commence contest does not depend upon whether person declared elected qualifies by filing official oath and bond or not.—Sweeney v. Adams, 141 Cal. 560, 75 Pac. 182.

For Authorities From Other States:

See 15 Cyc. 393-397; 18 Cent. Dig., cols. 421-434, §§ 250-256.

§ 100. —— Jurisdiction of Legislative Bodies.

[a] Consolidation act, page 16, section 67, providing that the board of supervisors of the city and county of San Francisco shall be the judge of elections, returns and qualifications of its own members, does not deprive the superior court of jurisdiction of proceedings in the nature of a quo warranto to oust a member of such board of supervisors from office; such jurisdiction being conferred on it by Constitution, article 6, section 5, giving the superior court power to issue writs of quo warranto.—People v. Bingham, 82 Cal. 238, 22 Pac. 1039.

[b] The provision of the city charter of Oakland, granted in 1854, giving the common council exclusive jurisdiction to determine an election contest for the office of councilman, was impliedly repealed by Code of Civil Procedure, section 1111 et seq., providing that any elector of a county or city, or of any political subdivision of either, may contest for causes therein stated, and that such contest must be determined by a special session of the superior court.—McGivney v. Pierce, 87 Cal. 124, 25 Pac. 269.

[c] Under the existing municipal charter of the city of Santa Rosa, as amended in 1876, the determination by the common council of all contests of election for city offices is made final and conclusive, and its jurisdiction to determine such contest is exclusive.—Carter v. Superior Court of Sonoma County, 138 Cal. 150, 70 Pac. 1067.

§ 101. —— Jurisdiction of Particular Courts.

[a] The election of the district judge may be contested before the county judge.—Saunders v. Haynes, 13 Cal. 145.

[b] The county court of the county of Sacramento has jurisdiction to hear and determine a contest concerning the right to hold a municipal office in the city of Sacramento. Kirk v. Rhoads, 46 Cal. 398.

[c] Constitution, article 11, section 18, specially providing for an election to determine the policy of creating a bonded indebtedness, prohibiting the issuance of bonds without consent of a certain number of voters, and providing no method of enforcing such provision, by implication confers upon the court of chancery jurisdiction to determine the validity of such election.—Gibson v. Trinity County Supervisors, 80 Cal. 359, 22 Pac. 225.

[d] Section 1111, Code of Civil Procedure, conferring jurisdiction over election contests on superior court, repealed all former statutes inconsistent with its intention.—McGivney v. Pierce, 87 Cal. 125.

§ 102. Limitation and Laches.

[a] A party is not deprived of a remedy to contest an election because the board of canvassers assumed to meet more than forty days after the return of the legal votes, and, acting on returns then made, declared a person elected to an office who was not elected by the legal votes first returned.—Day v. Jones, 31 Cal. 261.

[b] The forty days within which proceedings may be commenced to contest an election commence running from the day on which the returns are made on which the board of canvassers made the canvass which was the subject of controversy.—Day v. Jones, 31 Cal. 261.

[c] The "return day," within Code of Civil Procedure, section 1115, providing that when an elector contests the right of a person declared elected, he must, within forty days after the return day of such election, file a statement, is not the day on which the result of the election is declared, but the day on which the canvass begins, under Political

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Code, sections 1278, 1280, 1281, declaring that the board of supervisors shall meet on the first Monday after the election to canvass the returns.—Carlson v. Burt, 111 Cal. 129, 43 Pac. 583.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 400, 401; 18 Cent. Dig., cols. 435-442, §§ 258-262.

§ 102½. Limitations Affecting Amendments to Petition.

[a] In an election contest, the "statement" provided for in Code of Civil Procedure, section 1115, omitted to allege the "return day" of the election. An amended complaint was filed, alleging the return day as of a date more than forty days prior to the filing of the amended complaint, but less than forty days prior to the filing of the original complaint. Held, that the amended complaint, not alleging a cause of action against any new party, related to the commencement of the contest.—Preston v. Culbertson, 58 Cal. 198.

§ 103. Process and Notice.

[a] No particular form of citation is necessary in a contested election case.—Norwood v. Kenfield, 30 Cal. 393.

[b] In a contest concerning an election to an office each party, if he relies on illegal votes cast for the other, must furnish the opposite party, three days before the trial, with a list of the names of the voters alleged by him to have voted illegally.—Norwood v. Kenfield, 30 Cal. 393.

[c] In a contest concerning an election to an office, the three days' notice, which a party who relies on illegal votes given for his adversary must give of the illegal votes he expects to prove, is to be computed by including the first day and excluding the last.—Misch v. Mayhew, 51 Cal. 514.

[d] Code of Civil Procedure, section 1116, requiring that the contestant shall serve a notice containing "the number of illegal votes and by whom given," does not require that the names should be written out in full on the list.—Preston v. Culbertson, 58 Cal. 198.

[e] An election contest is a special proceeding, and the requirements of the code in reference thereto must be strictly followed. The object of the law is plainly to require notice in advance of the trial to the defendant, who is declared elected, and whose right to the office is questioned, of the grounds on which his right to the office is contested.—Freshour v. Howard, 142 Cal. 501.

[f] Under Code of Civil Procedure, section 1709, providing that citation in an election contest must be served in the same manner as a summons in a civil action, and sections 410, 411, providing that a copy of the complaint must be served with the summons, and the summons must be served by delivering a copy, a citation was sufficiently served by delivering to contestee personally a copy of the citation attached to a copy of the statement of the contest and of order.—Hannah v. Green, 143 Cal. 19, 76 Pac. 708.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 398-402; 18 Cent. Dig., cols. 444-447, § 264.

§ 104. Persons Entitled to Bring Proceedings.

[a] No special right of contest is given to candidate as such. The right is conferred upon any elector and can only be invoked as an elector.—Sweeney v. Adams, 141 Cal. 561, 75 Pac. 182.

[b] Under Code of Civil Procedure, sections 475, 1111, 1117, a statement filed in an election contest held not fatally defective for failure to allege that plaintiff was an elector when the statement was filed.—Chatham v. Mansfield (Cal. App.), 82 Pac. 343.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 419-421, § 249.

§ 105. Persons Against Whom Proceedings may be Brought.

[a] Code of Civil Procedure, section 1111, providing that any elector of a county may contest the right of any person declared elected to any office therein, authorizes a contest where one is merely shown by the election returns to be elected, and it is not necessary that he shall have filed his official oath and bond.—Sweeney v. Adams, 141 Cal. 558, 75 Pac. 182.

§ 106. Parties.

[a] In an election contest a voter is not a party unless such of record.—Lauer v Estes, 120 Cal. 652, 53 Pac. 262.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 402-404; 18 Cent. Dig., cols. 442-444, § 263.

§ 107. Abatement on Death of Party.

[a] Under Code of Civil Procedure, section 1125, providing that, if an election contest proceeding be dismissed for want of prosecution, or if the election be affirmed, judgment must be rendered against the party contesting for costs, an election contest is not abated by the death of the contestant occurring after appeal by contestee from a judgment vacating the decisions of the board of supervisors declaring contestee elected, but may be continued by contestants' personal representative.—Snibley v. Palmtag, 127 Cal. 31, 59 Pac. 200.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 415.

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§ 108. Pleading—Complaint, Petition or Statement.

[a] The statement in a contested election case need not contain a prayer for relief.—Norwood v. Kenfield, 30 Cal. 393.

[b] Under the statute of March 23, 1850, providing for the contesting of elections of county officers (Stats. 1850, p. 101, sec. 56), it is sufficient for the contestant to allege that he is, at the time he files the written statement of contest, a qualified elector of the county, without alleging that he was so at the time of the election.—Minor v. Kidder, 43 Cal. 229.

[c] The degree of certainty required in a statement of the cause of contest in an election case is not the highest degree of certainty known in pleading, but only such as will suffice to inform the defendant of the particular proceeding or cause upon which the contest is founded. Such statement need not detail the particular means or measures resorted to for the purpose of accomplishing a misconduct, but only the ultimate facts.—Minor v. Kidder, 43 Cal. 229.

[d] The affidavit in the written statement of the grounds of the contest of an election may be in the form of an ordinary verification to a pleading.—Kirk v. Rhoads, 46 Cal. 398.

[e] Allegations of fraud in general terms and that a defendant is not entitled to vote are conclusions of law, and present no issuable fact.—People v. Neil, 91 Cal. 465, 27 Pac. 760.

[f] A complaint in an election contest which alleges that the plaintiff, who was one of the candidates, is an elector of the county in which the election took place, shows sufficient authority in him to commence the proceedings, and although the complaint does not allege that he possesses the qualifications required by the constitution to make him eligible to the office, and does not, therefore, entitle him to a judgment that he was elected instead of the defendant, yet the failure to make such allegations does not deprive him of the right as an elector to a judgment annulling the election of the defendant.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779.

[g] A statement of contest of election should show how the poll may be purged of illegal votes, the mere fact of receipt thereof being no ground for rejection of the whole vote.—Packwood v. Brownell, 121 Cal. 478, 53 Pac. 1079.

[h] The complaint showing that defendant wrongfully procured his nomination, or had his name illegally placed upon the tickets, does not show a statutory ground for contesting the election.—Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076.

[i] Where an election contest for the office of justice of the peace is defended and decided on the theory that but one justice was to be elected, a statement of the grounds of contest, from which it does not appear that the township was not entitled to two justices, under Statutes of 1901, page 686, chapter 234, providing that, except as otherwise provided, the officers of a township are two justices of the peace, and in townships having a population of less than six thousand "there shall be but one justice of the peace," is not defective, in the absence of proof that the township had a population of six thousand or more; the statement in all other respects complying with Code of Civil Procedure, section 1115, relating to election contests and section 1117, requiring that no statement shall be rejected if the grounds are alleged with sufficient certainty to advise the defendant of the cause of the contest.—Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

[j] An averment in the complaint that one hundred and twenty-four ballots were cast by voters who were registered after the commencement of forty days next preceding the general election is not sufficient, where there is no showing in the complaint that such ballots, if improperly received, could have changed the result of the election.—People v. Woswick, 142 Cal. 71, 75 Pac. 663.

[k] A complaint in quo warranto, to determine the validity of an election for mayor of the city of San Jose, which merely alleges that copies of an old great register were used at the polls instead of copies of a new one required by law, but which does not aver that the names of all the voters were not on the new register, does not state a cause of action.—People v. Woswick, 142 Cal. 71, 75 Pac. 663.

[l] Allegations of a statement of contest consisting of separate allegations of malconduct in counting votes as to each of the seventy-six precincts, being relevant and material, it is not error to refuse to strike them out, though the subject matter might be more concisely stated.—Merkley v. Trainor, 142 Cal. 265, 75 Pac. 656.

[m] Under Code of Civil Procedure, section 1115, requiring the particular ground of an election contest to be stated, and section 1117, declaring that no statement of the grounds of contest will be rejected, nor the proceedings dismissed for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the election was contested, a complaint alleging that the contestant had received a higher and greater number of votes for the office than had the contestee, "but that, ... through . . . . the carelessness, negligence and malconduct of the boards of judges of each and every of the said four election precincts comprising said . . . . township, and of the clerks thereof, in canvassing and counting the votes given at said election, ... it was erroneously and wrongfully made to appear from said returns that said contestee had received the highest number of votes," was sufficient.—Abbott v. Hartley, 143 Cal. 484, 77 Pac. 410.

[n] Under Code of Civil Procedure, section 1117, a statement alleging various acts of

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misconduct by the election boards by which votes were counted for contestee which should not have been counted for him, and votes which should have been counted for contestant were not so counted, and averring that contestant actually received the more and that contestee actually received the less legal votes, was sufficient to present the question as to which of the parties actually received the greater number of legal votes, and a further averment that a tabulated list attached thereto showed the votes actually cast for the contestee, did not preclude the contestant from claiming or the court from finding that the contestee received less than the number of legal votes stated in such list.—Treanor v. Williams, 145 Cal. 315, 78 Pac. 884.

[o] An election contest may be instituted by the filing of the petition verified like an ordinary pleading, which is a sufficient verification "by affidavit" within the requirement of Code of Civil Procedure, section 1115. McCardle v. Barstow, 145 Cal. 135, 78 Pac. 371.

[p] Under Code of Civil Procedure, section 1111, subdivision 2, and section 1115, held that, where on an election contest ineligibility it relied on by contestant, it must be alleged in the statement.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 404-410; 18 Cent. Dig., cols. 448, §§ 66-277.

§ 109. —— Answer.

[a] A failure to deny an averment in an election contest statement that contestant was an elector at the time and period mentioned therein is an admission of that fact rendering proof unnecessary.—Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 410, 411; 18 Cent. Dig., cols. 467-469, §§ 278-279.

§ 109½. —— Demurrer.

[a] Code of Civil Procedure, section 1115, does not require that the "statement" shall show by averment that it has been filed within forty days, and therefore the objection that the complaint was not filed in time cannot be taken by demurrer.—Preston v. Culbertson, 58 Cal. 198.

§ 110. —— Amendment.

[a] In a contested election case, if the statement of the cause of contest lack the clearness and distinctness of allegation desirable in judicial proceedings, it should not for that reason be peremptorily dismissed, but an opportunity afforded to amend.—Minor v. Kidder, 43 Cal. 229.

[b] It is not necessary that the court grant leave to amend an election contest statement in some particular form.—Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104.

[c] An amendment to a statement of contest for the office of county supervisor, adding to an allegation of residence and electorship in the state and county an averment of residence and electorship in the supervisorial district, so as to comply with Code of Civil Procedure, section 1111, giving the right to contest only to electors in the district in which the office is to be exercised, must be construed as taking effect as if originally incorporated in the statement, so as to mean that plaintiff was at the time of filing the statement an elector in the district.—Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104.

[d] Where, within the forty days allowed by law for the institution of election contests, plaintiff filed an amendment to the contest statement previously filed, it could, if necessary, be considered a new contest, and being filed within the jurisdictional time, and the contestee, making no motion to dismiss for want of jurisdiction, would be deemed to have appeared and waived all objection to irregularities in the manner in which he was brought before the court.—Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104.

[e] An amendment to a statement of election contest is to be construed by the same rules as an amendment to a complaint.—Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104.

[f] Where the original statement of the grounds of contest did not allege any fraudulent or corrupt misconduct of the election officers in failing to remove the numbers from ballots at a certain precinct, but assailed the ballots as having an identifying mark, it was not error to refuse to allow the statement to be amended at the close of the trial, by charging that such failure was for the intended purpose of enabling a record to be made of how each voter voted, and to prevent a fair election at that precinct. Freshour v. Howard, 142 Cal. 501.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 412, 413; 18 Cent. Dig., cols. 469-472, §§ 280-283.

§ 111. —— Issues, Proof and Variance.

[a] Where, on an election contest over the office of mayor of a city, contestee admitted the election and prayed judgment confirming his title to the office, a contention on his part that there was no law for holding the election was outside the issues.—Trafton v. Quinn, 143 Cal. 469, 77 Pac. 164.

§ 112. Evidence—Presumptions and Burden of Proof.

[a] Where irregularities have occurred, it rests with the contestant to show them. The returns are prima facie evidence of the fact they import; and the returned candidate, after being commissioned, is prima facie entitled to the office.—Whipley v. McKune, 12 Cal. 352.

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[b] The presumption of law is that the ballots are all returned to the county clerk, and that they have not been mutilated, and if such is not the case it should be shown by evidence.—People v. Holden, 28 Cal. 123.

[c] In an election contest, the ballots are the primary and best evidence of the number of votes received by any candidate, if they have not been tampered with, and the burden of showing tampering is on the contestant. Coglan v. Beard, 67 Cal. 303, 7 Pac. 738.

[d] Burden is on contestant to show that illegal votes were cast for contestee.—Russell v. McDowell, 83 Cal. 73, 23 Pac. 183.

[e] If the requisite number of inspectors, judges, and clerks of election was not appointed, the presumption is, in the absence of a showing to the contrary, that the deficiency was supplied by the electors present at the time of opening the polls.—People v. Union High School District of Solano County, 101 Cal. 655, 36 Pac. 119.

[f] When a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the person contesting the use of the ballots to establish that they have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place, but the law cannot guard against a mere possibility, and the ballots cannot be rejected as evidence upon a mere naked showing that it was possible for one to have molested them.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

[g] Under Political Code, section 1188, providing that a candidate for a public office may be nominated by a petition signed by voters equal in number to three per cent of the vote cast at the last election, where a complaint alleged that no convention of the township had assembled nominating defendant as justice of the peace, and that his nomination had never been certified to the county clerk, in the absence of an averment to the contrary, it will be presumed that he was nominated by a petition of voters equal to three per cent of the votes cast at the last election.—Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 416, 417; 18 Cent. Dig., cols. 477-480, § 286.

§ 113. —— Admissibility.

[a] Ballots are not functus officio at time of canvass, but may be shown in a proceeding to try the right to an office.—Budd v. Holden, 28 Cal. 132.

[b] A party who has offered evidence of the statements of a voter at one election precinct as to his right to vote cannot object to evidence offered by the adverse party as to statements on the same subject by the same voter at another precinct.—Norwood v. Kenfield, 30 Cal. 393.

[c] When a package of votes comes into court properly sealed, the object of the law requiring it to be sealed is accomplished, and if, while in the custody of the officers of the court, the seal is broken, in the absence of any proof, the law would not presume an act of bad faith on their part and the ballots are admissible.—Coffey v. Edmonds, 58 Cal. 521.

[d] The fact that for a certain time the ballots were in the possession of the contestant as de facto county clerk will not of itself render them inadmissible as evidence. Coglan v. Beard, 67 Cal. 303, 7 Pac. 738.

[e] On a second trial of a contested election proceeding, the result of the court, as shown by the tabulated statement taken on the first trial, is admissible as tending to show whether the ballots have been tampered with pending the second trial.—Coglan v. Beard, 67 Cal. 303, 7 Pac. 738.

[f] Evidence of a change of ballots after the officers had counted them is admissible in favor of the defendant in an election contest to disprove an allegation by plaintiff, which the answer denies, that the officers had been guilty of malconduct in counting them.—Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

[g] Evidence that more men voted for respondent than the recount showed is competent on the issue as to whether the officers conducting the election were guilty of fraud; as the fact that the ballots were changed after they were cast tended to disprove the inference of fraud, arising from the result of the recount.—Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

[h] A ballot is to be construed as any other writing, and while a resort to parol evidence of extrinsic circumstances may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown by such or any evidence that the intention of the voter was anything different from what plainly appears upon the face of the ballot.—Rutledge v. Crawford, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779.

[i] Where a statute prescribes a mode of preservation of ballots, on proof by a contestant of a substantial compliance therewith, the ballots are admissible to overcome the prima facie correctness of the official canvass.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673.

[j] Upon the trial of an election contest, testimony of the officers of the election to the effect that the same was properly conducted, that the ballots were properly counted, and that the tally sheets were properly filled up, etc., and the tally sheets themselves, are admissible in evidence.—Packard v. Craig, 114 Cal. 95, 45 Pac. 1033.

[k] In an election contest, the declaration of a voter as to how he voted is admissible. Lauer v. Estes, 120 Cal. 652, 53 Pac. 262.

[l] Under Code of Civil Procedure, section 1116, requiring the contestant of an election canvass to serve a list of alleged illegal votes

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on defendant, evidence offered by contestant to prove the illegality of a vote not so specified was properly excluded, though it was named on a similar list served on contestant by contestee.—Smith v. Thomas, 121 Cal. 533, 54 Pac. 71.

[m] Where an elector receives assistance in marking the ballots, evidence of the elector so receiving assistance, or persons other than the election officers, is admissible in an election contest to show for whom his vote was cast, though the officers may be incompetent under Statutes of 1891, page 178, prohibiting election officers from disclosing the name of any candidate for whom an elector has voted. Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, 975.

[n] The contestant, in order to succeed to the office, has the burden of showing title in himself.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

[o] Intent of voter cannot be shown other than what appears on face of ballot.—Maddux v. Walthall, 141 Cal. 415, 74 Pac. 1026.

[p] The burden of proving any spoliation of the ballots by the election officers is on him who asserts it; and in the absence of such evidence it will be presumed that the officers obeyed the law, and preserved the ballots unaltered.—McMenomy v. Ruch, 142 Cal. 77, 75 Pac. 661.

[q] It may be shown that certain alleged distinguishing marks were made by the election officers.—Hannah v. Green, 143 Cal. 19, 76 Pac. 708.

[r] Where the contestant for a county office who charged irregularities in all or nearly all of the precincts offered in evidence the ballots from certain precincts until the judicial count of such precincts, taken with the official count of the remaining precincts, gave him a plurality, it was within his legal right to withdraw his objections to the vote of the uncounted precincts, and the contestee, by offering the ballots therefrom in evidence, waives the right to object that they were not so preserved as to be admissible.—McCardle v. Barstow, 145 Cal. 135, 78 Pac. 371.

[s] On an election contest, an objection to contain ballots on the ground that the returns were not properly and safely kept by their legal custodian, the county clerk, was of no avail, where it appeared that, while the clerk might have kept the ballots in a more secure manner, the envelopes containing the ballots were in the same condition as when received by the clerk, and unopened, and there was no evidence tending to show that they were disturbed or tampered with. Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[t] Under Code of Civil Procedure, section 1116, prohibiting the introduction of testimony of illegal votes in an election contest unless the contestant deliver to the defendant, at least three days before trial, a written list of the votes which he intends to prove were illegal, evidence as to the illegality of a vote is properly excluded which did not appear on the list served on the defendant, although it did appear on a list served by the defendant on the contestant.—Smith v. Thomas, 52 Pac. 1079.

[u] Where ballots were not preserved in unbroken packages, as required by Political Code, sections 1259, 1264, 1265, they were inadmissible as evidence in the contest.—Chatham v. Mansfield (Cal. App.), 82 Pac. 343.

FOR AUTHORITIES FROM OTHER STATES:

Evidence to explain ambiguities in ballots: 10 Am. St. Rep. 317, note.

Contesting elections because of illegal votes, admissibility of evidence to show what votes were illegal and for whom they were cast, and power to compel unqualified voter to disclose for whom he voted: 84 Am. Dec. 268, note.

Ballots produced at contests, when are and when are not the best evidence of the vote cast: 11 Am. St. Rep. 798, note.

See, also, 15 Cyc. 418-428; 18 Cent. Dig., cols. 482-499, §§ 288-296.

§ 114. —— Best and Secondary Evidence.

[a] The ballots cast at an election are better evidence than the tally list made from them of the number of votes.—People v. Holden, 28 Cal. 123.

[b] Ballots are primary and best evidence of number of votes received, if shown not to have been tampered with.—Coglan v. Beard, 65 Cal. 58 2 Pac. 737.

[c] Although the printed copy of an election proclamation with the affidavit of publication is not primary evidence of the contents of the original proclamation, yet, since it is admissible to prove the publication of the proclamation, an objection to its admission, upon the ground that absence of the original was not sufficiently accounted for, is properly overruled if the court is not requested to limit the evidence to the purpose for which it is admissible.—County of San Luis Obispo v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

[d] In an election contest the ballots are the best evidence of the manner in which the electors have voted only when their integrity can be satisfactorily established. Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

[e] Though the ballots are the best evidence of their contents, and must prevail over the official returns when in conflict therewith, yet the official returns are prima facie correct, and constitute legal evidence of the true vote and result in any precinct, in the absence of impeaching evidence.—Markley v. Trainor, 142 Cal. 265, 75 Pac. 656.

§ 115. —— Weight and Sufficiency.

[a] When admitted allegations as to whole number of votes corresponds with returns in

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evidence, it sufficiently appears that all returns were in evidence.—People v. Holden, 28 Cal. 124.

[b] The returns of the election boards are prima facie true, and, to overcome them by a recount, the contestants must affirmatively show that the ballots have remained in the same condition as they were when delivered to the proper custody by the election judges. Coglan v. Beard, 65 Cal. 58, 2 Pac. 737.

[c] In an action to contest an election, the ballots are not only competent and material evidence, but evidence of a very high order. Gibson v. Trinity County Supervisors, 80 Cal. 359, 22 Pac. 225.

[d] The contents of the original proclamation are sufficiently proved by the testimony of the clerk of the board of supervisors that he drafted the original of which the printed advertisement held in his hand, which was afterward introduced in evidence, is a copy, if such testimony was received without objection.—County of San Luis Obispo v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

[e] Where a ballot was found at the recount to be so marked that it could be identified, and there was some evidence that the mark was not on the vote when first taken from the box, the court's finding that it was made subsequently was warranted.—Smith v. Thomas, 121 Cal. 533, 54 Pac. 71.

[f] In an election contest, clear evidence must be furnished as to how an illegal voter cast his ballot, before his vote can be deducted from the total of contestee.—Smith v. Thomas, 121 Cal. 533, 54 Pac. 71.

[g] An admission, on the last day of trial of an election contest, that plaintiff and defendant were electors of the district, would be construed as an admission of electorship as alleged in the respective pleadings, and was sufficient to support a finding or residence as alleged.—Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104.

[h] Where a ballot bore on the back thereof the initials "W. H." and "R. L. O.," in different handwriting, in the upper left-hand corner, and on an election contest there was no pretense that the initials were not those of some of the election officers, placed on the ballot by them at some time during the canvass by the board of election, a finding that they were not placed thereon by the voter was warranted.—Huston v. Anderson, 145 Cal. 320, 78 Pac. 626.

[i] Evidence considered, and held sufficient to show that illegal ballots cast at an election were sufficient in number to make a difference in the result of the election.—People v. Davidson (Cal. App.), 83 Pac. 161.

[j] Evidence considered, and held sufficient to show that illegal ballots were cast in all of the precincts of a township.—People v. Davidson (Cal. App.), 83 Pac. 161.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 419; 18 Cent. Dig., cols. 499-505, §§ 297-299.

§ 116. Proceedings Before Trial in General.

[a] Under the laws, no power is conferred on a county judge, at chambers, to grant a continuance of a cause to determine an election contest, which was pending and set down for trial at a future day in the county court. Norwood v. Kenfield, 34 Cal. 329.

[b] Defendant had been certified as elected by a majority of fifty-eight votes. The recount under the direction of the court showed no material change, except in one precinct, where it showed a difference, in favor of contestant, of one hundred and thirty-two votes out of a total vote of three hundred and fifteen. This result was announced on Saturday, and on Monday, before a decision was made, defendant moved a continuance, and presented the affidavit of the three commissioners of election at that precinct, stating that steps were being taken to discover the authorship of the fraud. Accompanying it was a certificate signed by more men, who claimed to have voted for defendant, than the recount showed him to have received votes; and the affiants alleged that they could procure many more signatures, and the personal attendance of these voters, all of whom had stated that they would swear that they voted for defendant. It was impossible to have procured the attendance of these witnesses without an adjournment of the case. Held, that the court erred in refusing an adjournment.—Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

[c] Statute contemplates speedy trial of election contests but court has power to adjourn special session for several days on account of prior engagement.—Falltrick v. Sullivan, 119 Cal. 616, 51 Pac. 947.

§ 117. —— Dismissal Before Trial.

[a] Court has no discretion to dismiss or entertain case as it deems the public interest requires. Nor has the state's attorney such discretion. The case is prosecuted like any other action instituted by a private citizen, subject only to the provisions of the statute. Searcy v. Grow, 15 Cal. 117.

[b] Notwithstanding the consolidation of the contests for the convenience of trial, the contests remain distinct and several, and any one of the contestants may dismiss his contest if he chooses, or may, under ordinary circumstances, dismiss as to such of the contestees as he may choose.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 416; 18 Cent. Dig., cols. 505-507, §§ 300, 302.

§ 118. —— —— Operation and Effect of Dismissal.

[a] The dismissal of a contest practically operates to confirm the election of a contestee who holds the certificate of election.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

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§ 119. —— Discontinuance.

[a] In a proceeding in the county court to contest an election, a continuance for seven days, granted against the objections of the respondent, and without affidavit showing cause, was held to operate a discontinuance. Keller v. Chapman, 34 Cal. 635.

§ 120. Scope of Inquiry and Powers of Court or Board.

[a] The form and manner of proceeding, before the board of delegates, in deciding upon a contested election, is for the board to determine. And the courts will not undertake to say what is, or is not, sufficient for the board to proceed upon in the first instance. It is requisite simply that at some point of the proceedings it appear that the case is within the terms of the law.—People v. Board of Delegates, 14 Cal. 479.

[b] In an election contest the injury is limited to the examination of the right of the person "declared elected" at the election, the canvass of which is questioned; and the legality of another special election called after the result of a canvass declaring that no one was elected is not a question which can be tried in a contest of the first election. Austin v. Dick, 100 Cal. 199, 34 Pac. 655.

[c] Where the order of the board of supervisors, entered in the minutes, as required by Statutes 1883, page 94, section 3, under which an election as to town incorporation was held, shows that a majority of the votes "cast" were for incorporation, the fact that it also shows that such majority was less than a majority of votes "polled" may be explained, in an action attacking the incorporation, by a count of the ballots in court. People v. Town of Sausalito, 106 Cal. 500, 39 Pac. 937.

[d] Where, in an election contest for the office of supervisor of a county, the contestee rested his case on the question whether he or the contestant had received the highest number of votes, the contestee could not require the court to count ballots which did not show a vote for the contestant or contestee, for the purpose of showing that, though contestant received more votes than the contestee, other persons, not declared elected, and not parties to the proceeding, had received more votes than the contestant, though it would prevent a judgment declaring the contestee elected.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

[e] An election contest for the office of supervisor of a county—the board consisting of eighteen members—was instituted by contestants against all the eighteen persons declared elected. The contestants alleged misconduct on the part of the canvassing board in miscounting the vote received by the eighteen contestees, and in failing to count votes for the contestants which, if counted, would have made their poll higher than either of the persons declared elected. The contest was dismissed, except as to four. Held, that the remaining contestees had the right to have all the ballots claimed to be votes for the eighteen original contestees counted, for the purpose of showing, if possible, that when all were counted the four contestees would stand among the eighteen having the highest number of votes.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

[f] Only matters for court to inquire into on election contest are those prescribed in subdivisions 1, 2, 3 and 4 of section 1111, Code of Civil Procedure.—Maddux v. Walthall, 141, 415, 74 Pac. 1026.

[g] Though contestant in his statement of contest attacks the returns from all the precincts, and as to certain precincts attempts to prove the integrity of the ballots therefrom, yet at any time before actual admission of the ballots he may abandon the contest as to those precincts, accept as true the denial of the answer that there is no error in the returns thereof, and introduce the official returns therefrom, which are prima facie correct.—Merkley v. Trainor, 142 Cal. 265, 75 Pac. 656.

[h] On an election contest, the question whether the ballots were shown to have been so guarded as to preclude suspicion that they were not in their original condition was not largely within the discretion of the trial court.—Trafton v. Quinn, 143 Cal. 469, 77 Pac. 164.

[i] The legality of a vote in an election contest will not be determined where it was not claimed to have been cast for plaintiff, and it was not counted for defendant.—Smith v. Thomas, 52 Pac. 1079.

For Authorities From Other States:

Admissibility of evidence to show what votes were illegal and for whom they were cast, and power to compel unqualified voter to disclose for whom he voted: 84 Am. Dec. 268, note. See, also, 18 Cent. Dig., cols. 507-517, §§ 303-307.

§ 121. —— Sessions.

[a] Where an order was made December 1st fixing December 11th as the date for a special session of court to hear an election contest, the date of hearing "was not less than ten days" from the date of the order, contrary to the express provisions of Code of Civil Procedure, section 1118.—Hannah v. Green, 143 Cal. 19, 76 Pac. 708.

§ 122. Trial or Hearing.

[a] Objections, in an election contest case, as to the reception of illegal votes which will not affect the result, will not be considered. Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821-975.

[b] When the objection, in an election contest case, that testimony as to certain illegal votes is inadmissible because the contestant did not serve a list of the alleged illegal votes on the incumbent, which is necessary

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to render the evidence admissible under Code of Civil Procedure, section 1116, is not made when the evidence is offered, it is an admission that the statute was complied with, or at least a waiver of compliance.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, 975.

[c] It was within the discretion of the court to consolidate fifteen election contests for the office of supervisor—the board consisting of eighteen members—instituted by fifteen different candidates for the office of supervisor against all the eighteen persons declared elected, thereby allowing them to be tried as one proceeding.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

[d] On an election contest, it having been found that one of the parties did not receive a majority of the votes, a failure to find that he was eligible to the office was not material.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[e] On an election contest it was not necessary for the court to find on such allegations in the statement as were admitted by the answer either by specific statement or failure to deny.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[f] On an election contest it was not necessary that the court should find as to the successful party's eligibility; no question thereto having been made under the pleadings.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 432; 18 Cent. Dig., cols. 517-522, §§ 308-313.

§ 123. —— Questions for Court and Jury.

[a] Where, in a contested election case, the ballots are introduced in evidence, the question whether they have been tampered with is one of fact for the jury.—Tebbe v. Smith, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673.

§ 124. New Trial.

[a] The proceedings of the county court under Act of 1850 in contested election cases are "special cases," within Constitution, article 6, section 9, requiring the jurisdiction to be conferred by the legislature, thereby precluding such court in such proceedings from granting a new trial, there being no statute conferring such power.—Dorsey v. Barry, 24 Cal. 449.

[b] County court has no power to grant a new trial in an election contest.—Casgrave v. Howland, 24 Cal. 457.

[c] Code of Civil Procedure, sections 1111-1127, regulating election contests, are special and summary; and, the only remedy provided therein for a party aggrieved by the decision of the superior court being an appeal to the supreme court, a motion for a new trial cannot be made.—Packard v. Craig, 114 Cal. 95, 45 Pac. 1033.

[d] Upon a new trial ordered as the result of an appeal the court need not recount ballots to which no objection was made at the first trial, but should take the results of such ballots as then ascertained; and election officers should not be compelled to disclose the contents of ballots of assisted voters.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 435; 18 Cent. Dig., cols. 522-523, §§ 314.

§ 125. Dismissal and Nonsuit.

[a] Where two persons were found, on an election contest, to have received an equal and the highest number of votes, the contest was properly dismissed.—Wright v. Ashton, 143 Cal. 544, 77 Pac. 477.

§ 126. Judgment.

[a] Under act of March 25, 1857, regulating the fire department of San Francisco, and providing, in section 2, that the board of delegates thereof should have power to decide contested claims to offices, such board cannot, where it is conceded that one of the claimants was elected, the dispute being merely as to which received the more votes, decide that neither was elected, and declare the election void.—People v. Board of Delegates of San Francisco Fire Dept., 14 Cal. 479.

[b] Where respondent defaults in an election contest it is not sufficient that ample causes of contest be set forth in the statement filed by a contestant; their truth must be established by clear proof, before an election can be annulled.—Searcy v. Grow, 15 Cal. 117.

[c] It is absolutely essential to the validity of a judgment in election contest that it be rendered by a court of competent jurisdiction, at the time and the place and in the form prescribed by law.—Norwood v. Kenfield, 34 Cal. 329.

[d] Proceedings to contest the election of county officers, being special and summary, the contestant will not be permitted to take judgment by default, but must prove his allegations.—Keller v. Chapman, 34 Cal. 635.

[e] The judgment in an election contest cannot properly adjudge that the defendant is unlawfully holding the office; and the provision of section 949 of the Code of Civil Procedure, which provides that an appeal does not stay proceedings where the judgment "adjudges the defendant guilty of usurping or intruding into, or unlawfully holding public office," etc., applies only to the judgment in an action of quo warranto, or for the usurpation of office, and not to any judgment proper to be entered in an election contest.—Day v. Gunning, 125 Cal. 527, 58 Pac. 172.

[f] A finding upon an election contest that the contestant and the contestee have "re-

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ceived an equal and the highest number of votes cast for said office,'' cannot sustain a judgment annulling the election. The judgment should be that the contestant take nothing by the proceeding, and that it be dismissed.—Snibley v. Palmtag, 128 Cal. 283, 60 Pac. 860.

[g] The consolidation of several election contests for the office of supervisor of a county, so as to allow them to be tried as one proceeding, does not make each contestant responsible for the pleadings or course of proceeding of any other contestant; and the findings and judgment, respectively, though each embraced in one document, must determine the right of each party with respect to his particular pleading as if there had been no consolidation.—Coghlan v. Alpers, 140 Cal. 648, 74 Pac. 145.

FOR AUTHORITIES FROM OTHER STATES:

See, also, 15 Cyc. 433, 434; 18 Cent. Dig., cols. 523-526, §§ 315, 316.

§ 127. —— Conclusiveness, Operation and Effect.

[a] Where the board of delegates of the San Francisco fire department, invested by act of March 25, 1857, section 2, with power to decide contested claims to fire offices, in hearing such a contest exceeded its jurisdiction by declaring the election void, and the contestant acquiesced, and took no further action to compel a decision of the contest, such action of the board amounted to dismissal, and he is concluded.—People v. Board of Delegates of San Francisco Fire Dept., 14 Cal. 479.

[b] Code of Civil Procedure, section 1127 held applicable only to such election contests as are specified in the title in regard to offices within section 1111.—Wilson v. Fisher (Cal. Sup.), 82 Pac. 421.

[c] Under Code of Civil Procedure, section 1127, the lapse of 10 days after judgment vacating a certificate of election, in a contest under sections 1111-1127, without an appeal, held to render such certificate finally ineffectual as evidence of title to the office. Wilson v. Fisher (Cal. Sup.), 82 Pac. 421.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 433; 18 Cent. Dig., cols. 525, 526, § 316.

§ 128. Appeal and Error—Right of Review in General.

[a] An appeal lies from a judgment in a contested election case to the supreme court. Dorsey v. Barry, 24 Cal. 449.

[b] In an election contest, an appeal lies from the judgment of the county court to the supreme court.—Day v. Jones, 31 Cal. 261.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 435-439; 18 Cent. Dig., cols. 526-538, §§ 317-332.

§ 129. —— Preservation of Grounds of Review.

[a] The rulings of the trial court in counting the ballots will not be reviewed by the appellate court unless exceptions were reserved thereto at the trial.—Lay v. Parsons, 104 Cal. 661, 38 Pac. 447.

[b] Where, in an election contest, a ballot was not objected to on the ground that the voter had marked a cross after the words ''No Nomination,'' such objection cannot be considered on appeal.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[c] Where, in an election contest, a ballot was not objected to on the ground that the writing of a name was unauthorized because it was also printed on a ballot, such objection cannot be considered on appeal.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[d] An objection to ballots not made in the superior court will not be considered upon appeal.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[e] Where, in an election contest, before the ballots were opened, preliminary proof was made that they were in the same condition as when inclosed in the sealed packages by the election officers at the close of the count at the respective polling places, and the contestee at no time during the trial made any objection to the integrity of the ballots, he could not object for the first time on appeal that there was no sufficient proof that the objectionable identifying marks on certain of the ballots were placed there by the voters before they were handed to the election officers to be deposited in the box. McMenomy v. Ruch, 142 Cal. 77, 75 Pac. 661.

[f] The supreme court will not review the ruling of the trial court on any particular ballot in an election contest, in the absence of an exception reserved thereto by the party complaining.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[g] On an appeal in an election contest, no objection to a ballot will be considered by the supreme court unless it has been specifically made in the trial court.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

§ 130. —— Proceedings for Review.

[a] The policy of the law, as regards contested election cases, is that the proceedings should be summary; and it is proper, in case of appeal, that the whole case should be taken to the appellate court for final decision, if possible.—Webster v. Byrnes, 34 Cal. 273.

[b] The objection that the judgment in a contested election case is not sustained by the evidence cannot be made on appeal, under Code of Civil Procedure, section 1126, authorizing such appeal subject to rules of law regulating appeals in other cases, unless the appeal has, as required in other cases, been taken within sixty days after judgment. Packard v. Craig, 114 Cal. 95, 45 Pac. 1033.

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[c] Under Code of Civil Procedure, section 1127, where no appeal was taken from a judgment in an election contest within ten days, the judgment became final, and the subsequent filing of a bill of exceptions would have been ineffectual.—Wilson v. Arnot (Cal. App.), 84 Pac. 293.

[d] Under Political Code, section 936, where a judgment annulling an officer's certificate of election was not appealed from within ten days, under section 1127, Code of Civil Procedure, he was not entitled to salary pending an appeal subsequently taken.—Wilson v. Fisher (Cal. Sup.), 82 Pac. 421.

§ 131. —— Record on Appeal.

[a] In a special case to contest an election under the statute, the county court has no power to grant a new trial, and an appeal to the supreme court must be taken from the judgment, and a statement on appeal be made and settled, to enable the supreme court to review the proceedings below outside the judgment-roll.—Casgrave v. Howland, 24 Cal. 457.

[b] In an election contest, a ruling excluding a ballot on account of the insufficiency of the marking will not be reviewed unless the record contain the original ballot, or a fac simile copy thereof, a verbal description of the mark being insufficient.—Lay v. Parsons, 104 Cal. 661, 38 Pac. 447.

[c] In an election contest the court refused to allow ballots introduced in evidence to be incorporated into the bill of exceptions, on the ground that he had not ordered them to be marked as exhibits in the case. It appeared elsewhere in the bill of exceptions that the ballots were marked as exhibits, with the knowledge of the court, and that the court had ordered the clerk to preserve the ballots, and seal them up. Held that, since the ballots could be identified with certainty, plaintiff is entitled to have them certified to the supreme court.—Jennings v. Brown, 109 Cal. 290, 41 Pac. 1085.

[d] Where the only objection shown to ballots which are part of the record on appeal in an election contest case is that contestant or incumbent objected thereto, the failure to state the grounds of objection will prevent a consideration thereof on appeal.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, 975.

[e] It is the duty of the court to afford to counsel an opportunity for such an inspection of the ballots as may be necessary to properly present the questions raised by the bill of exceptions.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[f] Upon an election contest, in cases where original ballots cannot be reproduced or described in a bill of exceptions so as to show the precise question raised, this court, under rule 25, will order original ballots to be reproduced; but this rule is not intended to dispense with the description of all disputed ballots in the bill of exceptions, and in cases where the question is such that the condition of the ballots may clearly be exactly shown in the bill of exceptions it devolves upon the person seeking the judgment of this court thereon so to show it; and it is not proper practice in such cases to abandon all description of ballots in the bill of exceptions, and merely to refer to the originals therein.—Langley v. Head, 142 Cal. 368, 75 Pac. 1088.

[g] Where a statement for the contest of an election did not allege that the contestant and contestee were the only candidates for the office, and the grounds of contest merely alleged that the contestant received a higher number of votes than the contestee, but not that he received the highest number of votes, the irregularity was cured by a recital in the judgment, "No other person received any votes for said office at said election in said township."—Abbott v. Hartley, 143 Cal. 484, 77 Pac. 410.

[h] Where an appealing contestee in an election contest did not bring up any of the ballots the counting or rejection of which was complained of by him, the supreme court could not reverse the judgment on any point arising out of the rulings on particular ballots.—Treanor v. Williams, 145 Cal. 315, 78 Pac. 884.

§ 132. —— Review.

[a] Where court below rejected equal number of votes cast for each contestant, upon a state of facts equally applicable to each voter, the error, if such it was, is rendered immaterial.—Webster v. Byrnes, 34 Cal. 273.

[b] When the bill of exceptions taken upon an election contest fails to show error, or to show all that occurred at the trial in respect to the counting of ballots, the judgment of the court below will not be reversed because the court declined to recount the votes, after they had once been counted, and a tally kept by two clerks and the court reporter, all of whom agreed in the tally, and the court being satisfied that no mistake had been made.—Jennings v. Brown, 114 Cal. 307, 46 Pac. 77.

[c] In an election contest, error in counting or in receiving a ballot is harmless where a ballot similarly defective is received, and counted for the opposing candidate.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[d] Where one ballot appears to have been improperly counted for the appellant, and another for the respondent, a correction thereof cannot alter the result of the election.—Pratt v. O'Neil, 140 Cal. 539, 74 Pac. 27.

[e] Error in refusing to allow contestee to prove that certain distinguishing marks on account of which ballots were excluded were made by the election officers was harmless to contestee, where more of the excluded ballots were for contestant than for contestee.—Hannah v. Green, 143 Cal. 19, 76 Pac. 708.

[f] Code of Civil Procedure, section 939, subdivision 1, in relation to appeals, held ap-

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plicable to an appeal in an election contest. McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[g] On appeal in an election contest, a contention that a review of the findings was sought to determine whether they were sustained by the evidence so as to call for an appeal within sixty days under Code of Civil Procedure, section 939, subdivision 1, held without merit.—McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

[h] The ruling of the court on an objection to each particular ballot in an election contest when excepted to by the injured party is reviewable on appeal from the judgment. McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243.

§ 133. —— Questions of Fact.

[a] Where the record did not clearly show where a precinct line ran, and the judge below visited the locality, held, that his decision as to where a certain man should vote would not be reversed.—Preston v. Culbertson, 58 Cal. 198.

[b] Whether attempted erasure on ballot has been canceled so as to let the ballot stand is a question for the court below to find, and with the finding the appellate court is not inclined to interfere.—Coffey v. Edmonds, 58 Cal. 521, 526.

[c] On appeal in an election contest the action of the court in rejecting ballots having straight lines instead of a cross opposite some of the names would be held conclusive.—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

[d] In an election contest the question as to whether the ballots have been so cared for as to preclude any reasonable suspicion that they are not in their original condition is one largely in the discretion of the trial court, and its decision will not be disturbed if fairly supported by the evidence.—Hannah v. Green, 143 Cal. 19, 76 Pac. 708.

[e] In an election contest the question whether ballots have been so taken care of as to preclude any reasonable suspicion that they are not in their original condition is one largely within the judgment and discretion of the trial court, and its determination of it will not be disturbed on appeal if the evidence fairly warrants the conclusion which the court below reached.—McCardle v. Barstow, 145 Cal. 135, 78 Pac. 371.

§ 134. —— Determination and Disposition on Appeal.

[a] Where, on appeal from an election contest, the record discloses no exceptions to the rulings of the court in the admission of ballots cast for the appellant, so that it might appear that the errors relied on by him were without prejudice, and the judgment is reversed, the appellate court will not order the trial court to enter judgment in favor of appellant, but will remand the contest for further hearing.—Farnham v. Boland, 134 Cal. 151, 66 Pac. 200, 366.

[b] The supreme court, in an appeal from an election contest case, will remand the cause on reversal, though all the evidence essential to the final determination of the cause is before the court.—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, 975.

[c] Where a finding of the superior court as to malconduct of the election board was not sustained by the evidence as to one precinct, which was decisive of the election, this court cannot order final judgment, but will order a new trial, in which the court will determine the case in accordance with the views expressed by this court.—Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

[d] Under the amendment of 1903 to subdivision 4 of section 1211 of the Political Code, a distinguishing mark does not invalidate a ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot; and in view of such amendment an appeal taken in a contest begun prior thereto, and disposed of after the amendment, will be decided according to the previous law as to distinguishing marks, without discussion thereof, which would have no value as a precedent.—Chubbuck v. Wilson, 142 Cal. 599.

[e] Where judgment upon election contest was in favor of contestant, and upon appeal all errors found in this court resulted in a net gain for contestant, judgment must be affirmed.—Taut v. Hawkins, 143 Cal. 104, 76 Pac. 897.

§ 135. Costs.

[a] In a suit under our statute by an elector to contest an election, he becomes a party, and is responsible for costs if he fail.—Searcy v. Grow, 15 Cal. 117.

[b] Where it was determined, in a contested election case, that it was a tie vote, neither party can recover costs.—Soto v. Vannoy, 65 Cal. 285, 3 Pac. 895.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 440, 441; 18 Cent. Dig., cols. 538-540, §§ 333, 334.

XI. VIOLATIONS OF ELECTION LAWS.

"PURITY OF ELECTIONS" ACT, § 136.
—— APPLICABILITY TO PRIMARY ELECTIONS, § 137.
OFFENSES AND RESPONSIBILITY THEREFOR IN GENERAL—VIOLATION OF REGISTRATION LAWS, § 138.
—— BRIBERY, § 139.
—— ILLEGAL VOTING, IN GENERAL, § 140.
—— WILLFUL NEGLECT OF ELECTION OFFICERS TO PERFORM OFFICIAL DUTY, § 141.
—— DEFENSES, § 142.
PROSECUTION AND PUNISHMENT—PRELIMINARY PROCEEDINGS, § 143.

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—— INDICTMENT AND INFORMATION, § 144.
EVIDENCE, § 145.
—— WEIGHT AND SUFFICIENCY, § 146.

§ 136. "Purity of Elections" Act.

[a] Section 32 of Purity of Election Law is to be construed as intended to secure evidence for conviction of offenders against provisions of other sections of the statute which require co-operation of two or more persons. Cohen, Ex parte, 104 Cal. 524, 43 Am. St. Rep. 127, 38 Pac. 364.

[ab] A statement made and filed under the Purity of Elections Act, by a successful candidate for office, which shows that no money was received by him, that two hundred dollars was contributed by him to a party committee for campaign purposes, and that twenty-two dollars and sixty-five cents was paid by him for sundries and incidentals, without specially itemizing them, does not disclose any substantial defect or bad faith, and the failure to itemize the sundries and incidentals, if it be a defect, is trivial and unimportant. The statement, as a whole, is sufficient to prevent a forfeiture of the office.—Land v. Clark, 132 Cal. 673, 63 Pac. 1071.

[b] The statute only contemplates a record of affirmative matters, and does not require negative declarations. The declaration in the statement that no money was received goes beyond the demands of the statute.—Land v. Clark, 132 Cal. 673, 64 Pac. 1071.

[c] A contribution for campaign purposes, paid to the regularly constituted committee of a political party, is allowable and proper under the law; and it will be presumed that the money so contributed was to be expended in a lawful way. A statement showing the nature and amount of such contribution, to whom it was paid, and for what purpose, is in substantial compliance with the law.—Land v. Clark, 132 Cal. 673, 64 Pac. 1071.

§ 137. —— Applicability to Primary Elections.

[a] The provisions of section 19 of the Purity of Elections Act of 1893 do not apply to primary elections for delegates to a political convention, which are purely a creation of political parties and associations, and an indictment charging the defendant with giving money to influence the choice of such delegates at a primary election duly and regularly called by the central committee of a certain political party states no offense.—People v. Cavanaugh, 112 Cal. 674, 44 Pac. 1057.

§ 138. Offenses and Responsibility Therefor in General—Violation of Registration Laws.

[a] Persons who falsely registered as voters in a precinct at defendant's procurement are not for that reason accomplices of his in the procurement of another to so register.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 443; 18 Cent. Dig., cols. 544, 545, § 337.

§ 139. —— Bribery.

[a] Under Penal Code, section 57, which provides that every person who gives or offers a bribe to any member of a political convention, and every member of such a body who receives or offers to receive any such bribe, is punishable with imprisonment in the state prison, one who offers to receive a bribe, with intent to influence his vote, is guilty, though no offer of bribery is made to him.—People v. Hurley, 126 Cal. 351, 58 Pac. 814.

[b] One elected as a delegate to a political convention not yet organized is a member thereof, within the meaning of Penal Code, section 57, which provides that every person, a member of such a convention, who receives or offers to receive a bribe, is punishable by imprisonment in the state prison.—People v. Hurley, 126 Cal. 351, 58 Pac. 814.

[c] A complaint charging defendant with a promise of patronage to a person named, with intent to promote defendant's own election, charges an offense.—Bradley v. Clarke, 133 Cal. 196, 65 Pac. 395.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 445; 18 Cent. Dig., cols. 556, § 343.

§ 140. —— Illegal Voting—In General.

[a] A guilty intent is a necessary element in the offense created by the statute, which declares that a person voting twice at the same election shall be deemed guilty of a felony, and therefore a person who votes a second time when so intoxicated that he has no knowledge that he has voted before is not guilty under the statute.—People v. Harris, 29 Cal. 678.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 442; 18 Cent. Dig., cols. 545-549, §§ 338, 339.

§ 141. —— Willful Neglect of Election Officers to Perform Official Duty.

[a] On the prosecution of an election inspector for violation of Penal Code, section 41, prescribing punishments for election officers' willful neglect to perform official duties, and for knowingly and fraudulently acting in contravention of existing election laws, the court properly charged that "defendant is presumed, as inspector, to know at his peril what the law was, and it would furnish him no excuse that he may have supposed that the law was different from what it was. But, in order that you may find him guilty, it must appear that he acted knowingly and fraudulently."—People v. Burns, 75 Cal. 627, 17 Pac. 646.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 443, 444; 18 Cent. Dig., cols. 549-554, §§ 340, 341.

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§ 142. —— Defenses.

[a] That in a civil case, under Political Code, section 1109, against the clerk, to procure cancellation of votes alleged to have been illegally placed on the voting register, one testified that he was deputy register, without testifying as to any offense, does not protect him from prosecution for procuring, "as deputy register," one to falsely register as a voter, in violation of "Purity of Election Law" (Stats. 1893, p. 24, sec. 22), under section 32, declaring that one testifying against a person offending against section 22 shall not himself be prosecuted for the offense with reference to which his testimony was given.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 460; 18 Cent. Dig., cols. 559-561, § 348.

§ 143. Prosecution and Punishment—Preliminary Proceedings.

[a] Political Code, section 1265, provides that, on receipt of the package of ballots cast at an election, the clerk must file it, and keep it unopened for a year, after which he shall burn it, without examining the contents, if there is no contest about such election. Section 1266 provides that, if a contest is commenced within a year, he must keep the package unopened, unless ordered to produce it by the court in which the contest is pending, so that evidence may be had of its contents. Held, that a court has no power to compel the production of a package of ballots cast at an election, for the purpose of obtaining evidence in a preliminary investigation of a criminal charge against an election officer for violating election laws.—Brown, Ex parte, 97 Cal. 83, 31 Pac. 840.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 563, 565, § 352.

§ 144. —— Indictment and Information.

[a] Indictment for refusal of election inspector to administer oath prescribed by section 1234, Political Code, to challenged voter held sufficient.—People v. Burns, 75 Cal. 628, 629, 17 Pac. 646.

[b] An information charging that defendant "fraudulently voted at an election when he was not entitled to vote," though in the language of the statute (Pen. Code, sec. 45), is not sufficient to state an offense, but must set forth the facts relied on to show fraudulent voting.—People v. McKenna, 81 Cal. 159, 22 Pac. 488.

[c] An information which merely alleges that the defendant fraudulently voted at an election, when he was not entitled to vote, is insufficient, in the absence of an averment of the particular facts relied upon, to show the fraud and to show the disqualification of the defendant to vote, notwithstanding section 45 of the Penal Code declares that "every person not entitled to vote who fraudulently votes at any election . . . . is guilty of a felony."—People v. Neil, 91 Cal. 465, 27 Pac. 760.

[d] Under section 23 of the act to promote the purity of elections (Stats. 1893, p. 24), which enumerates several separate and distinct acts as constituting the crime of preventing an election or canvass "from being fairly had and lawfully conducted," an indictment charging defendant with willfully and unlawfully acting as election clerk is sufficient, though such act is not one of those enumerated in the statute as constituting the offense.—People v. Lee, 107 Cal. 477, 40 Pac. 754.

[e] The "Purity of Elections Law" (Stats. 1893, p. 24), making "every person who willfully causes, procures, or allows" false registration punishable, applies as well to a private citizen as an officer; and therefore the charge that defendant, "as deputy register," committed the offense, is surplusage, and need not be proved.—People v. Sternberg, 111 Cal. 3, 43 Pac. 198.

[f] The allegation in an indictment that a primary election was duly and regularly called, does not import that it was called under and pursuant to the provisions of the Political Code, inasmuch as it might have been duly and regularly called in entire disregard of those provisions.—People v. Cavanaugh, 112 Cal. 674, 44 Pac. 1057.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 448-460; 18 Cent. Dig., cols. 565-586, §§ 355-363.

§ 145. Evidence.

[a] In a prosecution for offering to accept a bribe, evidence that defendant offered to accept a bribe from a candidate other than the one referred to and charged in the indictment is not admissible, where there is no connection between the two offers.—People v. Hurley, 126 Cal. 351, 58 Pac. 814.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 461-463; 18 Cent. Dig., cols. 586-591, §§ 364-366.

§ 146. —— Weight and Sufficiency.

[a] Evidence held insufficient to sustain conviction for altering election returns.—People v. Buckley, 116 Cal. 147, 149, 47 Pac. 1009.

[b] In the absence of evidence of motive for altering election returns, and of opportunity for doing so, a conviction was not sustained merely by a comparison by the jury of the few words and figures alleged to have been altered, with the same words and figures written by defendant under abnormal conditions.—People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

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[c] Evidence examined and held insufficient to sustain conviction for adding and subtracting from votes cast.—People v. Eagan, 116 Cal. 290, 48 Pac. 120.

ELECTRICITY.

Include regulation of the production and use of electricity and of machinery, structures, and apparatus employed therein, in general; supply of electricity as a motive power or for illuminating, heating, or other purposes; and rights, duties, and liabilities incident thereto.

MUNICIPAL REGULATION OF ERECTION OF POLES, § 1.
—— REFUSAL OF PERMISSION TO COMPETING COMPANY TO ERECT POLES, § 2.
—— ERECTION WITHOUT AUTHORITY, § 3.
INJURIES INCIDENT TO PRODUCTION OR USE —CARE REQUIRED, IN GENERAL, § 4.
—— DEFECTS, ACTS, OR OMISSIONS CAUSING INJURY, § 5.
—— ILLEGAL MAINTENANCE OF WIRES, § 6.
—— CONTRIBUTORY NEGLIGENCE, § 7.
SUPPLY OF POWER OR LIGHT, § 8.

§ 1. Municipal Regulation of Erection of Poles.

[a] Ordinance requiring special permission from supervisors before poles can be erected on streets is valid.—Mutual Electric Light Co. v. Ainsworth, 118 Cal. 6, 50 Pac. 10.

§ 2. —— Refusal of Permission to Competing Company to Erect Poles.

[a] Remedy for granting permit to erect poles to one company and refusing it to another is suit to compel granting of permit.—Mutual Electric Light Co. v. Ainsworth, 118 Cal. 6, 50 Pac. 10.

§ 3. —— Erection Without Authority.

[a] Poles erected in street without authority constitute an illegal obstruction or public nuisance.—Amestoy v. Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. 550.

§ 4. Injuries Incident to Production or Use—Care Required in General.

[a] The mere fact that a dangerous agency is used raises no presumption that the public knows enough of its nature to avoid the danger which may arise from its use; and the public—aside from the consumers using the commodity—owes no duty to those introducing it; but it is the duty of those making a profit from the use of a dangerous element, such as electricity, to use the utmost care to prevent injury to any class of people, and they must protect those possessing less than ordinary knowledge of the character of the commodity.—Giraudi v. Electric Imp. Co. of San Jose, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108.

FOR AUTHORITIES FROM OTHER STATES:

Duties and liabilities of electric corporations: 100 Am. St. Rep. 516, note. See, also, 15 Cyc. 471-475; 18 Cent. Dig., cols. 603, 604, § 7.

§ 5. —— Defects, Acts or Omissions Causing Injury.

[a] Plaintiff was a dish washer in a restaurant, the wires to light which ran about sixty feet over the roof of the building at an average height of two feet. Plaintiff had seen the employees of defendant electric company placing the wires, and had been upon the roof in the daytime when the wires were in position. The night of the accident was stormy, and plaintiff, with his employer, went upon the roof to secure the business signs of the latter. Plaintiff, not knowing or forgetting the location of the wires, came in contact with them. Held, that defendant was negligent in not raising the wires so high above the roof that those having occasion to go there would not come in contact with them.—Giraudi v. Electric Imp. Co., 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596.

[b] An electric company is responsible for injury from a live electric wire to an inexperienced servant, who had never performed the work of a "lineman," which required great skill, and to which he was assigned by a superior fellow-servant, and required to ascend a pole and scrape the wire, without being furnished with rubber gloves, or other protective appliances used by linemen, and without any instruction or warning as to the dangers attending the work, of which he was ignorant.—Tedford v. Los Angeles Electric Light Co., 134 Cal. 76, 66 Pac. 76.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 472-474; 18 Cent. Dig., cols. 605-607, § 9.

§ 6. —— Illegal Maintenance of Wires.

[a] In an action for death caused by an improperly insulated electric wire maintained in violation of a city ordinance, the right of recovery is not precluded by the mere fact that the original position of the wire may have been subsequently changed by some extrinsic cause.—Wales v. Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932, 1120.

§ 7. —— Contributory Negligence.

[a] The fact that an employee in a building had been on the roof after electric wires were placed thereon did not show that he knew their location, so as to render him negligent in coming in contact with them on a stormy night while trying to secure certain articles on the roof.—Giraudi v. Electric Imp. Co., 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596.

[b] If the insulating material with which the wires were covered was not in good condition it is the fault of the electric company; and if the fact that the wires were wet destroyed the insulation for the time, it cannot be presumed that the effect of moisture upon

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insulation is a fact generally known, and, if there is no evidence tending to show that plaintiff had knowledge of that fact, he cannot be charged with contributory negligence in coming in contact with the wires.—Giraudi v. Electric Imp. co. of San Jose, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 475; 18 Cent. Dig., cols. 607, 608, § 10.

§ 8. Supply of Power or Light.

[a] A plaintiff held entitled to recover for breach of a contract to deliver electricity under a complaint charging breach of a contract for the sale and delivery of "personal property" (Civ. Code, secs. 654, 655, 663).—Terrace Water Co. v. San Antonio Light etc. Co. (Cal. App.), 82 Pac. 562.

[b] Under Civil Code, section 3308, a plaintiff held entitled to recover for breach of a contract to deliver electric power the difference between the contract price and the cost to procure it from another, under a general ad damnum clause in the complaint.—Terrace Water Co. v. San Antonio Light etc. Co. (Cal. App.), 82 Pac. 562.

[c] Where a seller broke a contract to furnish electricity, it was estopped to deny that the injured party had been damaged to the extent of his actual loss and his outlay fairly incurred.—Terrace Water Co. v. San Antonio Light etc. Co. (Cal. App.), 82 Pac. 562.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 470, 471.

ELECTROTYPE MACHINES.

Exemption from forced sale. See Exemption, § 8.

ELEMENTS OF CONTRIBUTORY NEGLIGENCE.

See Negligence, § 26.

ELEMENTS OF CRIME.

See Counterfeiting, § 1; Criminal Law, I; Disorderly Conduct, § 1; Embezzlement, §§ 1-12; Embracery, § 1; Extortion, § 3; Forgery, §§ 2-11; Fornication, § 1; Gaming, § 21; (murder) Homicide, § 1; (manslaughter) Homicide, §§ 27-35; (assault with intent to kill) Homicide, § 38; Incest, § 2; Perjury, §§ 1-9; Kidnaping, § 1; Larceny, § 1; Lewdness, § 1.

ELEMENTS OF DAMAGES.

See Damages, III, VI.

For wrongful death. See Death, §§ 39-46.

ELEMENTS OF FORCIBLE DETAINER.

See Forcible Entry and Detainer, § 22.

ELEMENTS OF FORCIBLE ENTRY.

See Forcible Entry and Detainer, §§ 6-21.

ELEMENTS OF FRAUD.

See Fraud, §§ 2-11.

In conveyances in fraud of creditors. See Fraudulent Conveyances, §§ 5-7.

ELEMENTS OF NEGLIGENCE.

See Negligence, § 2.

ELEMENTS OF NUISANCE.

See Nuisance, §§ 1, 21.

ELEVATORS.

Owners of passenger elevators as common carriers. See Carriers, § 65.

Duty of owners of passenger elevators to keep them in safe condition. See Carriers, § 110.

ELIGIBILITY.

To state office. See California, § 24.
To office of state senator. See California, § 7.
To corporate office. See Corporations, § 269.
To office of county supervisor. See Counties, § 21.
To office of road overseer. See Highways, § 56.
To office of medical superintendent of insane asylum. See Hospitals, § 5.
To city office. See Municipal Corporations, § 47
To public office in general. See Officers, § 9.
To teach in public schools. See Schools and Schoo. Districts, § 29.

ELISOR.

Appointment of elisor to draw jury. See Jury, § 57.

EMANCIPATION OF CHILDREN.

See Infants, § 5; Parent and Child, § 12.

EMBASSADORS.

See Ambassadors and Consuls.

EMBEZZLEMENT.

Include fraudulent appropriation of personal property by one in possession thereof, to whom it has been intrusted by or for the owner, as bailee, servant, agent, trustee, public officer, etc.; nature and elements of the crimes of embezzlement, larceny by bailee, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

NATURE AND ELEMENTS OF OFFENSE, IN GENERAL, § 1.
—— DISTINCTION BETWEEN LARCENY AND EMBEZZLEMENT, § 2.
—— DEMAND AS CONDITION PRECEDENT, § 3.

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—— INTENT, § 4.
—— NATURE OF PROPERTY, § 5.
—— VALUE OF PROPERTY, § 6.
—— OWNERSHIP OF PROPERTY, § 7.
—— POSSESSION OR CUSTODY OF PROPERTY, § 8.
—— CAPACITY OR CHARACTER IN WHICH PROPERTY IS RECEIVED OR HELD, § 9.
—— CONVERSION OR APPROPRIATION OF PROPERTY, § 10.
—— AIDING AND ABETTING, § 11.
—— PROPERTY RECEIVED IN ONE COUNTY AND CONVERTED IN ANOTHER, § 12.
EMBEZZLEMENT BY PARTICULAR CLASSES OF PERSONS—AGENTS, § 13.
—— BAILEES OR OTHERS HAVING POSSESSION UNDER AGREEMENT, § 14.
—— ATTORNEYS, § 15.
—— OFFICERS OR EMPLOYEES OF CORPORATIONS OR ASSOCIATIONS, § 16.
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Of client's funds as ground for disbarment. See Attorney and Client, § 32.
Conversion by trustee, bailee, agent or servant as larceny. See Larceny, § 9.

§ 1. Nature and Elements of Offense in General.

[a] Crime of embezzlement is purely statutory offense.—Hedley, Ex parte, 31 Cal. 108.

[b] The essential elements of the offense of embezzlement are the fiduciary relation which arises where one intrusts property to another, and the fraudulent appropriation thereof by the latter.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

What is embezzlement: 98 Am. Dec. 126, note. See, also, 15 Cyc. 486-537; 18 Cent. Dig., cols. 619-738, § 1.

§ 2. —— Distinction Between Larceny and Embezzlement.

[a] The chief distinction between larceny, as defined in section 60 of the Crimes and Punishments Act, and embezzlement, as defined in section 70 of the same act, is that in the former case the guilty party has, and in the latter case he has not, the possession of the property at the time of the commission of the offense.—People v. Belden, 37 Cal. 51.

§ 3. —— Demand as Condition Precedent.

[a] Authority to demand a statement of accounts is not an authority to demand payment, and such demand is not sufficient to sustain charge of embezzlement.—People v. Tomlinson, 66 Cal. 347, 5 Pac. 509.

[b] The fact that the treasurer of an association deposits a check drawn in its favor in a bank, and has the amount credited to his personal account, does not justify a conviction, in the absence of evidence of a demand by the association, or of inability to respond to a demand.—People v. Royce, 106 Cal. 173, 39 Pac. 524.

[c] It is not necessary, in order to sustain a conviction for embezzlement of the money, as the property of the one from whom the collection was made by the defendant without authority after his discharge from employment, that such person should have made a demand on the defendant for the return of the money.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

[d] Penal Code, section 503, defines embezzlement to be the fraudulent appropriation of property by one intrusted with it. Defendant was intrusted with a launch for the purpose of taking it from one place to another, on an understanding that he might have the privilege of purchasing it after arriving at his destination, or else deliver it to the owner, but he did not take it to the place agreed, but took it to another place, and started on a voyage with it. Held, that it was not necessary for the owner to have made a demand for the return of the launch in order to constitute defendant's offense that of embezzlement.—People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

[e] A treasurer of a corporation who is also a member of a special committee appointed to investigate an alleged embezzlement of its funds by a former treasurer, with full power to act in reference thereto, is authorized to make a demand on such former treasurer for the money so embezzled.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[f] An embezzlement being the felonious conversion of money or other property, it is not an indispensable element that a demand should be made upon the person committing the embezzlement for the money so embezzled, but the demand and refusal is only evidence thereof.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[g] Where, on trial for embezzlement, admissions made by the defendant show a fraud-

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ulent and felonious taking of the money, which he is charged with having embezzled, evidence of an independent demand for its return is unnecessary.—People v. Coxe, 134 Cal. xix, 66 Pac. 725.

§ 4. —— Intent.

[a] One who obtains possession of property from the owner with the intention of stealing it, and carries out his intent, is guilty of larceny, but if the intent to steal was conceived after the taking of possession, the crime is embezzlement.—(Cal. 1863) People v. Smith, 23 Cal. 280.

[b] If one hires a horse, having at the time the felonious intent to deprive the owner of him, the offense is larceny. If the original intent was not felonious, but if the felonious intent was formed afterwards, the offense is embezzlement.—People v. Salorse, 62 Cal. 139.

[c] Where there is no evidence tending to show an intent to steal, or to convert the property of another clandestinely or feloniously, the offense of embezzlement is not made out; nor can the statute against embezzlement be used to punish a party for the mere failure to comply with a pecuniary obligation; and where the evidence shows merely a case of disputed mutual accounts between an attorney and client, for which a civil action is the appropriate remedy, the charge of embezzlement is not sustained.—People v. O'Brien, 106 Cal. 104, 39 Pac. 325.

[d] The fact that defendant drew money out of savings bank, deposited there to credit of his ward, does not show criminal intent to misappropriate money.—People v. Page, 116 Cal. 395, 48 Pac. 326.

[e] It is good defense that property was openly appropriated under claim of title made in good faith though legally untenable—e. g., agent retaining excess of sale price as commission.—People v. Lapique, 120 Cal. 26, 52 Pac. 40.

[f] Where it appears that the owner gave up all control of the money to the defendant, while he slept, and that the defendant accepted the trust to safely keep it in the same room until morning, the place where the money was kept was immaterial; and if the defendant violated the agreement, and either stole the money, or connived at its being stolen, with the intent to deprive the owner of it, the defendant was guilty of embezzlement.—People v. McMahan, 133 Cal. 278, 65 Pac. 571.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 491; 18 Cent. Dig., cols. 621-625, § 3.

§ 5. —— Nature of Property.

[a] Shares of stock constitute property, and are therefore the subject of embezzlement.—People v. Williams, 60 Cal. 1.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 492; 18 Cent. Dig., cols. 625, 626, § 4.

§ 6. —— Value of Property.

[a] The embezzlement of a horse or any other of the animals specified in Penal Code, section 487, subdivision 3, is a felony, irrespective of the value of the animal.—People v. Salorse, 62 Cal. 139.

[b] Under Penal Code, section 514, providing that "every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled," the embezzlement of a horse is a felony without regard to its value; the stealing of a horse being grand larceny, by the terms of the statute.—People v. Wickham, 116 Cal. 384, 48 Pac. 329.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 492; 18 Cent. Dig., cols. 626, § 5.

§ 7. —— Ownership of Property.

[a] Any legally recognizable interest in property is sufficient to sustain averment of ownership in information for embezzlement.—People v. Treadwell, 69 Cal. 236, 10 Pac. 502.

[b] Ownership of property embezzled by agent is immaterial.—People v. Neyce, 86 Cal. 395, 24 Pac. 1091.

[c] The secretary of a company, authorized to draw and sign checks (to be signed also by the vice-president), received from the vice-president two blank checks signed by him to pay two certain bills, and filled out said checks for much larger sums, drew the money from the bank, and absconded. Held that, since the checks were drawn against an existing balance, the bank had no option but to pay them, and the defense that the money embezzled was the bank's, and not the company's, could not be maintained.—People v. Gallagher, 100 Cal. 466, 33 Pac. 890, 35 Pac. 80.

[d] If the title passed to the defendant when the launch was sold, he could not embezzle it; and if it was a sale on condition that the purchase money should be paid, it was incumbent on the prosecution to prove that it had not been paid.—People v. Goodrich, 138 Cal. 472, 71 Pac. 509.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 492; 18 Cent. Dig., cols. 626-629, § 6.

§ 8. —— Possession or Custody of Property.

[a] Criminal Practice Act, section 70 (Wood's Digest, p. 339, art. 1930), providing that if any clerk or servant to whom money or property "shall be intrusted by his master or employer" shall withdraw from his master or employer, etc., he shall be

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punished, etc., does not include all embezzlements or fraudulent conversions of money or property which shall have come into the possession of the servant by virtue of his employment, but is confined to cases where the employee received the money or property directly from the employer.—People v. Bailey, 23 Cal. 577.

[b] Possession of property embezzled at time of offense is essential.—People v. Belden, 37 Cal. 51.

[c] Possession of horses by servant is possession of master, and will not support embezzlement.—People v. Belden, 37 Cal. 51.

[d] The evidence showed that defendant, pretending to illustrate the manner of drawings at the Louisiana lottery, placed upon a table a paper covered with squares and figures, and induced witness to place his money upon the table with the understanding that it would be returned as soon as defendant had completed the illustration; that as soon as the money was placed upon the table defendant took the same, and refused to return it. Held, that the evidence established larceny, and would not support a conviction for embezzlement.—People v. Johnson, 91 Cal. 265, 27 Pac. 663.

[e] If the servant or agent has merely the custody of the goods which he feloniously appropriates, the offense is larceny. If he has the possession, it is embezzlement.—(Cal. 1892) People v. Perini, 94 Cal. 573, 29 Pac. 1027.

[f] Embezzlement is statutory crime, unknown to common law, and consists of fraudulent appropriation of property by a person to whom it has been intrusted, and may cover a case in which the personal property fraudulently converted had not been in the possession of the prosecutor.—People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

For Authorities From Other States:

See 15 Cyc. 493; 18 Cent. Dig., cols. 629-632, § 7.

§ 9. —— Capacity or Character in Which Property is Received or Held.

[a] Penal Code, sections 503, 508, define embezzlement as the fraudulent appropriation of property by a person to whom it has been intrusted, and declare that a clerk, agent, or servant who fraudulently appropriates to his own use any property of another which has come into his control or care by virtue of his employment is guilty of embezzlement. Defendant informed witness that he could sell certain goods dealt in by witness to a certain person, and would do so for a certain commission. The witness was to collect the price and defendant to return for his commission. Witness shipped the goods, and defendant went with them, sold them as his own, and appropriated the proceeds. Witness testified that defendant was not in his employ and had no authority to collect the money. Held, that defendant was not guilty of embezzlement.—People v. Dougherty, 143 Cal. 593, 77 Pac. 466.

For Authorities From Other States:

See 15 Cyc. 494; 18 Cent. Dig., cols. 632, 633, § 8.

§ 10. —— Conversion or Appropriation of Property.

[a] Fraudulent misappropriation is gist of offense.—People v. De Lay, 80 Cal. 56, 22 Pac. 90.

[b] In order to warrant the conviction of a defendant charged with embezzlement it is necessary for the people to prove that he had before the date of the complaint for his arrest for the offense, fraudulently converted to his own use the money alleged to have been embezzled.—People v. Wyman, 102 Cal. 552, 36 Pac. 932.

[c] Where an officer in charge of the funds of a bank takes therefrom such funds, and deposits in place thereof securities known by him to be worthless, and appropriates to his own use the funds thus taken, he is guilty of embezzlement.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

[d] A conviction of a guardian of an insane person for embezzlement is not sustained by evidence merely that he drew the ward's money out of the bank, and that he did not make payment, as ordered by court, to the asylum where the ward was confined.—People v. Page, 116 Cal. 386, 48 Pac. 326.

[e] The unlawful appropriation of money belonging to a corporation by its treasurer, who has been authorized by the corporation to withdraw the funds from a bank, constitutes an embezzlement, though the withdrawal was ordered for the purpose of defeating the creditors of the corporation.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[f] Under an information charging embezzlement of jewelry intrusted to accused as agent and bailee, to be sold or the proceeds returned, that accused agreed to return the jewelry or its proceeds, and did neither, and when arrested was detected hiding some of the jewelry, and stated that he did not have the remainder of it, is sufficient to sustain a conviction, since, having been intrusted with the property and having fraudulently converted it, the crime was complete.—People v. McLean, 135 Cal. 306, 67 Pac. 770.

[g] Property must have been converted to defendant's use either temporarily or permanently.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

[h] In a prosecution for embezzlement of a check, the evidence showed that one T employed defendant as a broker to obtain a loan for him; that defendant went to complainant, who agreed to make the loan, and defendant was directed by her to attend to the matter of looking after the title to the

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land, and taking of a mortgage thereon; that defendant found the title satisfactory; that T made the mortgage, and gave it to defendant, to be delivered to complainant on receipt of the money; that afterwards she drew the check in question for the balance in favor of defendant, who cashed it, and with the proceeds paid certain of T's obligations; and that defendant refused to deliver to complainant the mortgage until she settled with him for his services in the matter, and for certain other services which he claimed to have rendered her. Held, that the evidence was insufficient to sustain a conviction.—People v. Van Sciever, 42 Pac. 451.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 495, 496; 18 Cent. Dig., cols. 633-637, §§ 9, 10.

§ 11. —— Aiding and Abetting.

[a] The president of a corporation, to pay an indebtedness of the corporation, signed a blank check, payable to the secretary, with directions to fill in the amount, and pay the debt. He filled it in for a larger amount, and appropriated the entire sum. By previous appointment defendant went to a saloon near a bank, while the secretary drew the funds. They immediately went to another city, where defendant registered under a fictitious name, procured currency for part of the coin, took most of the funds, in a valise, to a railroad station, where he obtained two tickets, paying therefor from the appropriated funds. Defendant, when arrested, had some of them on his person. Held to warrant a conviction for aiding and abetting in the embezzlement.—People v. Gallagher, 33 Pac. 890.

§ 12. —— Property Received in One County and Converted in Another.

[a] Offense of embezzlement in county where horse was received was complete the moment it was taken with intent wrongfully to appropriate it, regardless of the subsequent removal of the property to another county and the sale of the horse therein.—People v. Leong Fly, 107 Cal. 497, 40 Pac. 805.

§ 13. Embezzlement by Particular Classes of Persons—Agents.

[a] Agent can commit crime of embezzlement by drawing on his principal, in favor of third person, the same as though he received the money in person, if principal pays draft. Hedley, Ex parte, 31 Cal. 108.

[b] If an agent obtains the money of his principal in the capacity of agent, but still in a manner in which he was not authorized by his agency to receive it, and converts the same to his own use with intent to steal or embezzle it, it is money received "in the course of his employment" as agent.—Hedley, Ex parte, 31 Cal. 108.

[c] To convict an agent on a charge of embezzlement, four propositions must be proved—that he was an agent, that he received the money in the course of his employment, that he received money belonging to his principal, and that he converted the money to his own use with the intent to steal and embezzle it.—Hedley, Ex parte, 31 Cal. 108.

[d] Party receiving money as agent is estopped to deny agency in prosecution for embezzling it.—People v. Treadwell, 69 Cal. 235, 10 Pac. 502.

[e] If an agent obtains the money of his principal in the capacity of an agent, but in a manner not authorized, and fraudulently converts the same to his own use, he receives it "in the course of his employment" as agent, and is guilty of embezzlement.—People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

[f] Terms "bailee" and "agent" are, with respect to persons and property and offense of embezzlement, but different names for the same relation.—People v. Walker, 144 Cal. 1, 77 Pac. 705.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 497-499; 18 Cent. Dig., cols. 641-646, §§ 13-15.

§ 14. —— Bailees or Others Having Possession Under Agreement.

[a] All conversions of money or property by a bailee are not "ipso facto unlawful or felonious under our statute. The word 'bailee,' under our statute must be construed in a limited sense, as designating 'bailees' to keep, transport, and deliver."—People v Cohen, 8 Cal. 42.

[b] Term "bailee," in the seventy-first section of the act of 1850, concerning crimes and punishments, is not used in the limited sense of a bailee "to keep, to transfer, or to deliver," overruling People v. Cohen, 8 Cal. 42. People v. Poggi, 19 Cal. 600.

[c] A defendant cannot be convicted of the embezzlement of money as bailee under Penal Code, section 507, upon evidence which shows without contradiction that he received the money from the complaining witness to be invested for her in stocks, and that he so invested it, and that if he was guilty of any offense it was the conversion of the stocks; the relation between the parties as to the money being one of agency, and not of bailment.—People v. Leipsic, 130 Cal. xviii, 62 Pac. 311.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 500; 18 Cent. Dig., cols. 647-652, §§ 17, 18.

§ 15. —— Attorneys.

[a] Attorney converting money collected for client to his own use is guilty of em-

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bezzlement.—People v. Treadwell, 69 Cal. 228, 10 Pac. 502.

[b] Where, on the decision of a contest before the United States land office, involving the right to purchase government land, the successful party has sixty days in which to make payment to such office, and fourteen days thereafter sends to her attorney the money to make such payment, the attorney is not guilty of embezzlement because he fails within thirteen days after receiving the money to make the payment, in the absence of any demand for a return of the money, or any directions by his client as to the time when he should pay for the land.—People v. Wyman, 102 Cal. 552, 36 Pac. 932.

[c] The fact that the defendant neglected up to the time of his arrest to cash orders sent to him to pay for land to be purchased from the government, and that, when arrested, he did not have on his person all of the money intrusted to him for that purpose, and did not offer to account for the same, are insufficient to prove that he had fraudulently appropriated the money to his own use prior to the filing of the complaint upon which he was arrested.—People v. Wyman, 102 Cal. 552, 36 Pac. 932.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 501; 18 Cent. Dig., cols. 652, 653, § 19.

§ 16. —— Officers or Employees of Corporations or Associations.

[a] Embezzlement by officer of association is punishable regardless of whether officer is or is not member of association.—People v. Mahlman, 82 Cal. 587, 23 Pac. 145.

[b] A company's secretary, authorized to draw and sign checks (to be signed also by the vice-president), who receiving from the vice-president two blank checks, signed by him, to pay two certain bills, fills out said checks for much larger sums, draws the money from the bank, and absconds, obtains control of it "by virtue of his employment," within Penal Code, section 508, defining "embezzlement by servants."—People v. Gallagher, 100 Cal. 466, 33 Pac. 896, 35 Pac. 80.

[c] A de facto officer of a corporation is criminally liable for embezzlement of funds in his hands.—People v. Leonard, 106 Cal. 102, 39 Pac. 617.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 502; 18 Cent. Dig., cols. 654-658, §§ 22, 23.

§ 17. —— Public Officers or Employees.

[a] Acts of a defendant in wrongfully appropriating to his own use public moneys received by him in the official capacity of secretary of a state board constitute an embezzlement, within the meaning of section 504, Penal Code.—People v. Gray, 66 Cal. 271, 5 Pac. 240.

[b] Moneys collected as wharfage and tolls become the property of the state as soon as collected, and are capable of being embezzled before being paid into the state treasury.—People v. Gray, 66 Cal. 271, 5 Pac. 240.

[c] The facts that defendant, the treasurer of a state soldier's home, was required to report at stated periods only, and that the time for reporting a receipt of the money embezzled had not arrived, do not prevent the state from showing that defendant had already embezzled it.—People v. Royce, 106 Cal. 173, 37 Pac. 630.

[d] The willful omission of a public officer to pay over public money received by him is not necessarily embezzlement under section 424 of the Penal Code. The money might be retained for commissions, or under other bona fide claim of right. To sustain a conviction under that section, it must be alleged and shown that the defendant was authorized by law to receive the money, and that it was the duty of the defendant under the law to pay it over to the treasurer, as well as that he willfully omitted to do so.—People v. Westlake, 124 Cal. 452, 57 Pac. 465.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 503-505; 18 Cent. Dig., cols. 658-667, §§ 24-29.

§ 18. —— Assignees for Benefit of Creditors.

[a] Assignee for benefit of creditors who fraudulently misappropriates trust property to payment of his own claim is guilty of embezzlement.—People v. De Lay, 80 Cal. 56, 22 Pac. 90.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 653, 654, § 20.

§ 19. Defenses.

[a] That defendant has given an indemnity bond for the amount of property coming into his hands as assignee is not a defense to a prosecution for embezzlement.—People v. De Lay, 80 Cal. 52, 22 Pac. 90.

[b] Offer to return embezzled funds is no defense.—People v. De Lay, 80 Cal. 56, 22 Pac. 90.

[c] If a defendant has embezzled and converted trust moneys to his own use it cannot affect his guilt in the eye of the law if he afterward repents and restores the money.—People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

[d] The fact that a draft which defendant was alleged to have embezzled was drawn under act of Congress of August 27, 1888, for the support of disabled soldiers and sailors, and was made payable to the order of the governor, instead of the state treasurer, as required by the act of Congress, is no defense, as defendant is estopped to deny the validity of the draft, or that the money belonged to the soldiers' home of which he was

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the treasurer.—People v. Royce, 106 Cal. 173, 37 Pac. 630.

[e] A deputy county assessor charged with embezzlement cannot set up as a defense that the assessor who appointed him never filed his official oath or bond as required by statute, it appearing that when the crime was committed the assessor was in the discharge of the duties of his office.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[f] The fact that an appropriation of an employer's money was made without attempt at concealment is no defense to a charge of embezzlement.—People v. Connelly, 38 Pac. 42.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 507-510; 18 Cent. Dig., cols. 668-671, §§ 31-35½.

§ 20. Jurisdiction.

[a] Property taken from the county, and embezzled anywhere within five hundred yards of the county line, gives jurisdiction.—People v. Salorse, 62 Cal. 139.

§ 21. Venue.

[a] Embezzlement is committed in county where money misappropriated was received. Palmer, Ex parte, 86 Cal. 632, 25 Pac. 130.

[b] Defendant was properly charged with embezzlement of the property in the county in which it was converted to his own use.—People v. McMahan, 133 Cal. 278, 65 Pac. 571.

§ 22. Indictment or Information—Requisites and Sufficiency in General.

[a] Indictment for embezzlement held not to sufficiently charge offense.—People v. Gale, 77 Cal. 121, 19 Pac. 231.

[b] Information for embezzlement substantially in language of statute is sufficient.—People v. Mahlman, 82 Cal. 586, 23 Pac. 145.

[c] Indictment of defendant for embezzlement as guardian need not set out particulars of his appointment or proceedings in matter of guardianship.—People v. Page, 116 Cal. 391, 48 Pac. 326.

[d] An information against the treasurer of a corporation for embezzlement, alleging that he embezzled certain funds "contrary to his trust as such officer," is a sufficient compliance with Penal Code, section 504, providing that every officer of a corporation who appropriates any property under his control, "not in the due and lawful execution of his trust," is guilty of embezzlement; section 958 providing that words used in a statute defining an offense need not be strictly pursued in an indictment.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[e] In an information for embezzlement, an averment that the money "had come into" the hands of the defendant was sufficient on that subject.—People v. Walker, 142 Cal. 90, 75 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 510; 18 Cent. Dig., cols. 672-676, § 37.

§ 23. —— Certainty.

[a] A complaint, under Penal Code, section 1426, requiring that it shall set forth the offense charged with such particulars of time, place, person, and property as shall enable the defendant to understand the offense complained of, alleging that accused was president of a corporation, and had under his control securities of a certain value held by the corporation as a pledgee, the names of the owners of the securities being unknown to the deponent, and that accused did willfully, unlawfully, and feloniously convert the securities to his own use, contrary to the execution of his trust, is a substantial compliance with the statute.—City and County of San Francisco v. Randall, 54 Cal. 408.

§ 24. —— Intent.

[a] Indictment against a servant for withdrawing himself from his employer and taking with him his employer's property intrusted to him, with intent to steal the same and defraud his employer thereof, is sufficient if it charge the offense in the language of the act defining it, and set out fully the circumstances under which it was committed.—People v. Garcia, 25 Cal. 531.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 513; 18 Cent. Dig., cols. 678-680, § 40.

§ 25. —— Description of Property.

[a] An indictment which charges the defendant with converting moneys, goods, and chattels of the value of four hundred thousand dollars, without any particular specification of the different articles, is bad.—People v. Cohen, 8 Cal. 42.

[b] An indictment against a bailee for felonious conversion of coin, etc., must state the description of the coin.—People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313.

[c] An allegation that the property embezzled was of the value of so many dollars, without saying "of the coin of the United States," is sufficient.—People v. Poggi, 19 Cal. 600.

[d] The omission, in an indictment for embezzlement, to state any description or character whatever of the stolen money, is a fatal objection, whenever presented during the progress of the cause.—People v. Cox, 40 Cal. 275.

[e] It is not necessary to specify in information or prove kind of money embezzled.—People v. Treadwell, 69 Cal. 237, 10 Pac. 502.

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[f] Under Penal Code, section 667, providing that, in an indictment for embezzlement of money, the coin, number, denomination, or kind thereof need not be alleged, an indictment which alleges that defendant embezzled "the sum of twelve dollars, lawful money of the United States," sufficiently describes the money.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[g] Penal Code, section 426, declares that the phrase "public moneys" includes all money received or held by county officers in their official capacity. Held, that an allegation that moneys were received by defendant "in his official capacity" was the allegation of a fact which fixed their character as "public moneys."—People v. Hamilton, 32 Pac. 526.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 514-516; 18 Cent. Dig., cols. 680-685, §§ 41, 42.

§ 26. —— Value of Property.

[a] An indictment for embezzlement must show the value of the property embezzled; merely alleging the damages resulting to the complaining witness not being sufficient.—People v. Cohen, 8 Cal. 42.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 516; 18 Cent. Digs., cols. 685, 686, § 43.

§ 27. —— Ownership of Property.

[a] Under Criminal Practice Act, section 243, making immaterial an erroneous allegation as to the person injured, if the offense charged in the indictment is described with sufficient certainty in other respects so as to identify the act, an indictment charging one with embezzling moneys of "the city of J, a municipal corporation of C county," etc., is not fatally defective, although the act of incorporation of the city of J provides for a city government, to be a body politic and corporate by the name and style of "The Mayor and Common Council of the City of J."—People v. Potter, 35 Cal. 110.

[b] Penal Code, section 504, provides that every officer of any association who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, is guilty of embezzlement. Held, that it is not necessary for the information, charging such officer with embezzlement, to state the persons composing the association, as the fact of the officer's being a member would not change the offense.—People v. Mahlman, 82 Cal. 585, 23 Pac. 145.

[c] In an indictment for embezzlement of money collected by defendant as an agent from a debtor of his principal, after his discharge, the debtor may properly be alleged as owner.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 517, 518; 18 Cent. Dig., cols. 686-698, §§ 44, 45.

§ 28. —— Capacity or Character in Which Property was Received or Held.

[a] An indictment against a bailee for felonious conversion of property must state the character of the bailment.—People v. Cohen, 8 Cal. 42; People v. Peterson, 9 Cal. 313; People v. Poggi, 19 Cal. 600.

[b] Averment that money was received as "servant and agent" is sufficient to show capacity in which it was received.—People v. Treadwell, 69 Cal. 236, 10 Pac. 502.

[c] An information for embezzlement which fully states the facts constituting the crime is good, though it does not designate the accused as "bailee," "trustee," or "agent," or formally put him in any of the classes named in the statute defining embezzlement. (1886) People v. Johnson, 71 Cal. 384, 12 Pac. 261; (1890) People v. Neyce, 86 Cal. 393, 24 Pac. 1091.

[d] Penal Code, section 503, defines embezzlement to be the fraudulent appropriation of property by a person to whom it has been intrusted. Held, that an information for embezzlement need not necessarily set out the particulars constituting the fiduciary relation.—People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

[e] Where an information for embezzlement alleged that defendant was intrusted as bailee with a launch for the purpose of taking it to a certain place, and there purchasing it, or, in case he did not purchase it, delivering it to its owner, and that defendant did not take the launch to the place agreed or purchase it, and embezzled the same, etc., the information sufficiently showed that defendant was intrusted with the launch as a bailee.—People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

[f] An information charging defendant with embezzling money of a certain company received by him as its agent and by virtue of his employment is not a departure from the original complaint under which defendant was committed, charging him with embezzling money intrusted to him as bailee.—People v. Walker, 144 Cal. 1, 77 Pac. 705.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 519-521; 18 Cent. Dig., cols. 691-695, §§ 47-50.

§ 29. —— Conversion or Appropriation of Property.

[a] Bailees to keep, transfer, or deliver, being those contemplated by the statute against embezzlement, the character of the conversion must be set forth in an indictment against a bailee under the statute.—People v. Cohen, 8 Cal. 42.

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[b] It is sufficient to state the fact of the conversion by a bailee of the property in his possession in the language of the statute, without specifying any particular mode of conversion.—People v. Poggi, 19 Cal. 600.

[c] In an indictment for embezzlement of money collected by defendant as an agent from a debtor of his principal, after his discharge, a demand by the debtor for the return of the money need not be alleged.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 521, 522; 18 Cent. Dig., cols. 695-699, §§ 51, 52.

§ 30. —— Prosecution of Public Officer.

[a] Where the act of incorporation of a city vested the municipal government in certain officers, including "a city marshal," it was held that an indictment charging a person with embezzling moneys of the city, alleging that he was at the time of the act "the city marshal of," etc., sufficiently averred that he was then an officer of the corporation.—People v. Potter, 35 Cal. 110.

[b] Under section 16, act of April 6, 1863 (Stats. 1863, p. 197), creating the office of "superintendent of public schools," and section 71, providing that the words "public school" or "public schools" shall be understood as having the same meaning as the words "common school" or "common schools," theretofore used in the school laws, an indictment for embezzlement against one as "superintendent of common schools" sufficiently describes the office.—People v. Doss, 39 Cal. 428.

[c] An indictment stating that the money embezzled consisted of public funds of the county, and was received by the defendant as deputy county assessor for the use and benefit of the county, sufficiently states the manner in which the defendant received the money, and the use and purpose for which he held it.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[d] An indictment charging defendant with embezzlement of money which came into his possession by virtue of his trust as "county physician" is bad, there being no such public office as that of county physician; it being impossible to construe it as meaning the superintendent of hospitals and poorhouses, whom the county board of supervisors is authorized by County Government Act of 1897, section 25, subdivision 5 (Stats. 1897, p. 458, c. 277), to appoint; and if it be assumed to mean a graduate in medicine, whom such act authorizes such board to appoint to attend the indigent sick and dependent poor, such appointee is not authorized to receive or have in his possession any money belonging to the county.—People v. Shearer, 143 Cal. 66, 76 Pac. 813.

[e] The allegation that defendant received the money in his official capacity was sufficient, without referring to the statute under which the information was drawn, or to any statute which created a duty, the antecedent existence of which constituted a factor connected with the offense; the general conclusion of the information, "contra formam statuti," being sufficient.—People v. Hamilton, 32 Pac. 526.

[f] An information which alleged that defendant, "having theretofore" been a county clerk, and "charged with the receipt, safekeeping, transfer, and disbursement of public moneys, in his official capacity as such clerk and officer, and his official term . . . . having expired, ... and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity as such clerk," he willfully omitted to pay them over to his successor, the demand therefor "having then and there been made of" defendant by his successor, sufficiently charged that defendant, as county clerk, received money as such officer, and failed to pay it over to his successor; and the use of the participle instead of the past tense of the verb did not make the allegations mere recitals.—People v. Hamilton, 32 Pac. 526.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 523, 524; 18 Cent. Dig., cols. 699-705, §§ 53, 54.

§ 31. —— Issues, Proof and Variance.

[a] It is not necessary that the precise sum alleged in an indictment for embezzlement should be proved to have been taken.—People v. Gray, 66 Cal. 271, 5 Pac. 240.

[b] Where a defendant is charged with embezzlement of moneys as an officer, manager, and servant of a banking corporation, "duly created, organized, and existing under and by virtue of the laws of the state of California," proof that such corporation existed as a corporation de facto, claiming in good faith to be a corporation organized under the laws of California, and doing business as such, is sufficient to sustain the indictment.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

[c] When an information for embezzlement aptly charges the defendant with having received the money of another, and willfully and feloniously appropriated it to his own use, additional averments describing the check or instrument upon which he obtained the money are immaterial, and a discrepancy between such description and the proof does not constitute a variance.—People v. Allen, 129 Cal. xviii, 62 Pac. 170.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 525-527; 18 Cent. Dig., cols. 705-712, §§ 55-59.

§ 32. Evidence—Admissibility in General.

[a] The failure of the defendant to apply the money as directed after his arrest must

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be disregarded in considering the question of his guilt or innocence of the crime charged, and is inadmissible in evidence.—People v. Wyman, 102 Cal. 552, 36 Pac. 932.

[b] A letter written by the defendant to a third person, after the discharge of the prosecuting witness, replying to a letter of inquiry based upon an advertisement by the defendant for another person to take the same situation upon the same terms is admissible in evidence as tending directly to impeach the defendant's good faith in discharging the prosecuting witness, and the fact that it may have tended to show the commission of another offense by the defendant is immaterial.—People v. Tomlinson, 102 Cal. 19, 36 Pac. 506.

[c] On trial for embezzlement, evidence of what the profits of defendant's employer were while defendant was misappropriating the money is irrelevant.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[d] Evidence of conversations with the defendant as to the condition of the books, tending to show the methods and conduct of the defendant touching the moneys charged to have been embezzled, and touching discrepancies occurring in a previous year, tending to show a method so long continued as to preclude the supposition that the later ones were accidental or the result of negligence, is competent and admissible.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[e] The question whether an embezzlement is to be proven only through the failure of the agent to account for or to pay over the money received goes only to the evidence, and not to the fact of embezzlement, which may be proved by other evidence before the period for accounting arrives.—People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

[f] The entries in a cash-book kept in the bank by a bookkeeper under the direction of the defendant, as manager of the bank, are prima facie evidence of the balances of cash on hand at the several dates at which it was important to show such balance, and it is proper to instruct the jury that such entries are evidence tending to show the cash on hand at such dates.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

[g] Where the president of a bank testifies that a draft, the proceeds of which were alleged to have been embezzled, was deposited, and that it was mailed to a bank in New York for collection, he may testify on whom such draft was drawn.—People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

[h] The president could also testify as to the amount paid defendant for such draft.—People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

[i] The fact that a field deputy who assessed and collected taxes on personal property, which is the money alleged to have been embezzled, did not return a statement of the assessment or of the amount received at the assessor's office, and that no entry was made in the assessor's books, does not tend to show that the money collected does not constitute a part of the public funds of the county.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[j] In embezzlement against an agent receipts given by him to debtors of his principal over his own name are admissible in evidence against him.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

[k] Recital in an order removing a guardian of an insane person, "It appearing to the satisfaction of the court that said P. (the guardian) has appropriated to his own use the funds of the said insane person, and that he has rendered no account thereof," is not evidence against him on indictment for embezzlement, being mere hearsay.—People v. Page, 116 Cal. 386, 48 Pac. 326.

[l] In a prosecution of a tax collector for embezzlement, his successor testified that at his first settlement as collector his attention was called to the condition of the retail liquor license book, from which he had procured his retail liquor license. Held, that he could not then be asked what he discovered unusual about the book, since it did not appear that the book was ever in defendant's possession, nor where it had been kept, and that it was in the same condition as when the witness received it.—People v. Westlake, 124 Cal. 452, 57 Pac. 465.

[m] The fact that it was defendant's duty, as secretary of a corporation, to know the contents of its books, which had been falsified while in his custody, to enable him to commit the crime of embezzlement or conceal it, did not make them admissible against him to show receipt of the money, and that he falsified them, without first showing that he was responsible for their condition.—People v. Blackman, 127 Cal. 248, 59 Pac. 573.

[n] Where an embezzlement by a bailee took place in the county where the trial was held, an objection to the owner's testimony as to what took place at the bailment in another county, as being without the jurisdiction of the court, was without merit.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746.

[o] Where a corporation authorizes certain officers to withdraw its funds from banks in which they are deposited, for the purpose of defeating its creditors, and a portion of the various deposits is withdrawn by such officers, and one of their number is indicted for embezzling the portion withdrawn from one bank, evidence of the sums withdrawn from the other banks is admissible against him.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[p] On a prosecution for embezzlement of a specific sum belonging to a society, evidence of indebtedness of the defendant in a large sum on account with the society was inadmissible.—People v. Walker, 142 Cal. 90, 75 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 528-531; 18 Cent. Dig., cols. 713-723, §§ 61-66.

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§ 33. —— Presumptions.

[a] Failure of officer to pay over money unexplained does not raise a legal presumption of embezzlement.—People v. Carrillo, 54 Cal. 63.

For Authorities From Other States:

See 15 Cyc. 528; 18 Cent. Dig., cols. 712-713, § 60.

§ 34. —— Weight and Sufficiency in General.

[a] In a prosecution against a deputy assessor, evidence that neither the statement of the assessment nor the money collected was returned to the assessor's office is sufficient to justify the jury in finding that the money was converted by the defendant to his own use.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[b] On trial of a deputy county assessor for embezzlement, proof that defendant was engaged outside taking statements and collecting personal taxes, and that he received from a firm their statement and collected from them taxes thereon (the moneys charged to have been embezzled), is sufficient to show that he converted the money to his own use, and that the moneys received were public funds, though he did not return the statements to the assessor's office, and no entry was made on the assessment books; it being his duty to return the statements and money to the assessor.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[c] Penal Code, section 503, defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted." Held, that the testimony of a witness that he "intrusted" his money to defendant does not conclusively show that the appropriation of it by defendant was embezzlement, but that expression must be read in the light of his whole testimony and all the circumstances.—People v. Montarial, 120 Cal. 691, 53 Pac. 355.

[d] On a prosecution for embezzlement, the evidence showed that the prosecuting witness, before retiring for the night, asked accused to count his money, and keep the same for him, and that accused counted it, asking another to notice how much there was. She then put the purse in a pocket of the owner's trousers, and hung them on a chair. The money disappeared, and subsequently most of it was found secreted in the roof of the house where accused lived. Held, that the evidence was sufficient to sustain a conviction, under Penal Code, section 503, defining embezzlement as the fraudulent appropriation of property by one intrusted therewith.—People v. McMahan, 133 Cal. 278, 65 Pac. 471.

[e] Evidence that an alleged corporation is a de facto corporation is sufficient proof of its corporate existence to sustain a prosecution against its treasurer for the embezzlement of its funds.—People v. Ward, 134 Cal. 301, 66 Pac. 372.

[f] Where the defendant not only refused to comply with the demand for return of the money, but denied that he ever received any part of the money, alleged to be embezzled, and such denial was disproved, and it was found by the jury that he did receive it, the fact of such receipt renders the denial thereof convincing evidence of the offense charged. People v. Ward, 134 Cal. 301, 66 Pac. 372.

[g] Penal Code, section 507, makes it embezzlement for one to convert property intrusted to him as bailee. Section 511 provides that, on any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and under a bona fide claim of title, though such claim is untenable. On a prosecution for the embezzlement of a mare sold by defendant while in his possession, prosecutor testified that he intrusted her to defendant to have her for her keep until demanded; that prosecutor stated a price that he would sell the mare for, but that, in answer to a statement by defendant that he might buy the mare, prosecutor said that that would be "an after consideration." Defendant testified that prosecutor stated that he might buy the mare at any time for fifty-five dollars. Defendant did not inform prosecutor of the sale of the mare, or remit any of the alleged price. Held, that the evidence was sufficient to sustain a conviction.—People v. Klee, 137 Cal. xix, 69 Pac. 696.

[h] A conviction of embezzlement of a steam launch as being the property of another person, intrusted to the defendant, and feloniously converted by him to his own use, is not sustained by the evidence, where it appears that the steam launch was purchased by the defendant from such other person, and there is no proof that the purchase price was not paid.—People v. Goodrich, 138 Cal. 472, 71 Pac. 509.

For Authorities From Other States:

See 15 Cyc. 532, 533; 18 Cent. Dig., cols. 723-731, § 67-70.

§ 35. Trial—Questions for Jury.

[a] On an information for embezzlement, it appeared that defendant was the assignee of an insolvent debtor, and that the assignment contained preferences. A firm of which defendant was a member was second in the list, but defendant paid its debt first, leaving little for payment of other debts. He also received seven hundred and thirty-seven dollars from sales of milk, and only accounted for four hundred and twenty-seven dollars. Held, that the evidence justifed the verdict of guilty, as it was for the jury to say whether defendant intended fraudulently to appropriate the property.—People v. De Lay, 80 Cal. 52, 22 Pac. 90.

[b] Upon a trial upon a charge of the embezzlement of money fraudulently appropriated by the defendant, to whom it had been intrusted by the prosecuting witness for safekeeping, while the owner slept, the question whether the money was intrusted to the defendant is for the jury to determine, under

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proper instructions.—People v. McMahan, 133 Cal. 278, 65 Pac. 571.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 534.

§ 36. —— Instructions.

[a] Instructions in embezzlement case upheld.—People v. Treadwell, 69 Cal. 237, 10 Pac. 502.

[b] Upon a trial for embezzlement—that is, "the fraudulent appropriation of property by a person to whom it has been intrusted," within section 503, Penal Code, an instruction relating to what constitutes embezzlement, and another relating to the question of fraudulent intent in the offense, both in substance containing the provisions of sections 506, 508 Penal Code, were proper.—People v. Treadwell, 69 Cal. 226, 10 Pac. 502.

[c] Where officer of bank is charged with embezzlement, an instruction to the effect that the prosecution must prove a corporation duly formed, organized, existing, and doing business under the laws of the state of California, is not in conflict with a modification thereof to the effect that if the jury find that the corporation existed as a de facto corporation at the time of the alleged offense, it was a corporation duly formed, organized, existing, and doing business, nor in conflict with another instruction solely relating to the sufficiency of proof of a corporation de facto.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

[d] An instruction that if the defendant knowing his insolvency, took large sums of money from the vaults of the bank, and executed therefor an unsecured promissory note to the bank, such taking of the money was a fraudulent appropriation falling within the definition of embezzlement, must be taken in connection with other instructions to the effect that the making of the note was not of itself a criminal act, and that the jury must find from other evidence independent of the notes that money was taken by defendant from the bank and appropriated contrary to his trust, and, when thus taken together, the instructions were not detrimental to the defendant.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

[e] On trial for embezzlement, it is not necessary to charge that the conversion must be made with intent to steal the money.—People v. Cobler, 108 Cal. 538, 41 Pac. 401.

[f] Where a tax collector was indicted, under Penal Code, section 504, for embezzlement in fraudulently misappropriating public money, it was error to instruct that defendant was guilty, if, after receiving public money, he willfully omitted to pay it over to the county treasurer.—People v. Westlake, 124 Cal. 452, 57 Pac. 465.

[g] An instruction that if one assumes to act as agent or bailee, and in such assumed capacity is intrusted with property, and feloniously converts it, he is guilty of embezzlement, is not erroneous because of the word "assumes," where the jury were further instructed, if they had a reasonable doubt as to whether the accused received the goods as agent or bailee, to acquit him.—People v. McLean, 135 Cal. 306, 67 Pac. 770.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 534-536; 18 Cent. Dig., cols. 731-736, §§ 72-75.

§ 37. —— Verdict.

[a] Where a defendant accused of the crime of embezzlement of a horse, wagon, and harness in the county in which they were received, is proved to have sold and traded off the horse in another county, but to have retained the wagon and harness which were found in his possession in the county where the horse was sold, a verdict finding the defendant guilty of embezzling the horse in the county in which the horse, wagon, and harness were all originally received, and not referring to the wagon and harness, will not be set aside upon the ground of inconsistency of the jury in not finding the defendant guilty of embezzling all of the property described, nor upon the ground that the effect of the verdict is to show that the defendant was prosecuted in the wrong county.—People v. Leong Fly, 107 Cal. 497, 40 Pac. 805.

[b] Where, in a prosecution for embezzlement of a ring by a bailee, the owner testified that defendant took the ring from her finger before she knew it, to have it fixed for an engagement ring, which he never brought back, but sold it, a conviction was not contrary to the evidence, nor to an instruction that if defendant obtained the ring against the owner's will he should be acquitted.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 536; 18 Cent. Dig., cols. 736, 737, § 76.

§ 38. Appeal and Error.

[a] Where the record upon appeal from a conviction of a tax collector for embezzlement shows that the tax collector paid into the public treasury more money than he is alleged and proved to have received between the dates mentioned in the indictment, the judgment must be reversed for insufficiency of the evidence to sustain the verdict.—People v. Westlake, 126 Cal. 154, 58 Pac. 454.

[b] In a prosecution for embezzlement by a bailee, an instruction that the mere taking of property by one from another does not constitute larceny, but there must be felonious taking with intent to steal, was not prejudicial to defendant.—People v. Gordon, 133 Cal. 328, 85 Am. St. Rep. 174, 65 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 537; 18 Cent. Dig., cols. 737, 738, § 78.

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EMBLEMENTS.

See Crops.

EMBLEMS.

See Trademarks and Trade Names.

Party emblems on election ballots. See Elections, § 58.

EMBRACERY.

Include improperly influencing or attempting to influence the action of a juror, arbitrator, or referee, in respect of the verdict, award, or other decision to be rendered, by any means not constituting bribery; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

§ 1. Nature and Elements of Offense.

Interference with proceedings of jury as contempt of court. See Contempt, §§ 21, 22.

Interference with justice. See Obstructing Justice, § 1.

[a] Charge that the accused, who was not an attorney in the criminal case, violated section 95 of the Penal Code, by conspiring with the attorney for the defendant accused of murder, to publish a confession which would increase the difficulty of the court to get a jury, and would place before sworn jurors evidence not introduced at the trial and in court, is not sufficient, without showing a trial and conviction for such violation. Haymond, Matter of, 121 Cal. 385, 53 Pac. 899.

For Authorities From Other States:

See 15 Cyc. 539-542; 18 Cent. Dig., cols. 741-744, §§ 1-6.

EMERGENCIES.

Acts in emergencies as contributory negligence. See Carriers, § 138; Negligence, § 31.

EMINENT DOMAIN.

Include taking property from its owner for public use; nature, extent, and delegation of the power in general; constitutional and statutory provisions relating thereto; what property is subject thereto; for what uses or purposes the power may be exercised, and necessity therefor; necessity and sufficiency of compensation; proceedings for condemnation of property and for assessment of compensation; what constitutes taking of or injury to property, and rights and remedies of the owners; rights acquired by exercise of power of eminent domain, and effect of abandonment of property or of public use thereof.

I. NATURE, EXTENT, AND DELEGATION OF POWER, §§ 1-36.

II. COMPENSATION, §§ 37-81.

A. Necessity and Sufficiency in General, §§ 37-44.

B. Taking or Injuring Property as Ground for Compensation, §§ 45-60.

C. Measure and Amount, §§ 61-76.

D. Persons Entitled and Payment, §§ 77-81.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION, §§ 82-152.

IV. REMEDIES OF OWNERS OF PROPERTY, §§ 153-165.

V. TITLE OR RIGHTS ACQUIRED, §§ 166-168.

Appealability of judgment and orders in condemnation proceedings. See Appeal and Error, § 40.

Power of state to take property without compensation in exercise of police power. See Constitutional Law, § 106.

Taking property for public or private use as deprivation of property without due process of law. See Constitutional Law, §§ 256, 257.

Proceedings to condemn land for ferry. See Ferries, § 3.

Right to enjoin condemnation proceedings. See Injunction, § 28.

Right to jury trial in eminent domain proceedings. See Jury, § 19.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

NATURE AND SOURCE, IN GENERAL, § 1.
DISTINCTION BETWEEN EMINENT DOMAIN AND OTHER POWERS—ACTS CONSTITUTING EXERCISE OF POWER, § 2.
—— POLICE POWER, § 3.
—— TAXATION, § 4.
POWER OF STATE, IN GENERAL, § 5.
—— APPROPRIATION FOR BENEFIT OF UNITED STATES, § 6.
POWER OF UNITED STATES, § 7.
DELEGATION OF POWER, § 8.
—— TO MUNICIPALITY, § 9.
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—— TO INDIVIDUAL, § 11.
—— DELEGATION BY GENERAL LAW AS DISTINQUISHED FROM SPECIAL ACT, § 12.
WHAT CONSTITUTES PUBLIC USE, § 13.
PARTICULAR USES OR PURPOSES—HIGHWAYS OR OTHER ROADS OR WAYS, § 14.
—— FERRIES, § 15.
—— RAILROADS, § 16.
—— WATER SUPPLY, IN GENERAL, § 17.
—— IRRIGATION, § 18.
—— DRAINAGE OF LANDS, § 19.
—— SEWERS, § 20.
—— DEVELOPMENT OR WORKING OF MINES, § 21.
—— LIGHTHOUSES AND FORTS, § 22.
PROPERTY SUBJECT TO APPROPRIATION, § 23.
—— MATERIALS FOR CONSTRUCTION OF WORKS, § 24.
—— WATER RIGHTS, § 25.
—— PERSONAL PROPERTY, § 26.
—— PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE, § 27.
—— LOCATING RAILROAD ON LAND OR RIGHT OF WAY OF ANOTHER RAILROAD, § 28.
—— NECESSITY FOR SECOND APPROPRIATION, § 29.
—— USE NOT CONSISTENT WITH OR INJURIOUS TO EXISTING USE OR FRANCHISE, § 30.

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—— PROPERTY NOT IN ACTUAL USE OR NOT NECESSARY TO ENJOYMENT OF EXISTING FRANCHISE, § 31.
EXERCISE OF DELEGATED POWER, § 32.
—— CONDITIONS UPON WHICH POWER MAY BE EXERCISED, § 33.
NECESSITY AND EXTENT OF APPROPRIATION, § 34.
DETERMINATION OF QUESTIONS AS TO VALIDITY OF EXERCISE OF POWER, § 35.
—— DETERMINATION BY AGENT TO WHOM POWER IS DELEGATED, § 36.

§ 1. Nature and Source in General.

[a] Taxation and eminent domain rest upon same foundation of public use.—Stockton etc. R. R. v. Stockton, 41 Cal. 181.

[b] The right to take private property under the power of eminent domain in no sense depends on any contract between the owner thereof and the public. The owner's assent is not required, and his objections are of no avail; but, under the constitution, his property cannot be taken until paid for.—Lamb v. Schottler, 54 Cal. 319.

[c] Enjoyment of public use need not be unconditional.—Lux v. Haggin, 69 Cal. 304, 10 Pac. 674.

[d] Right of eminent domain is inherent in the state and not conferred by constitution. Moran v. Ross, 79 Cal. 160, 21 Pac. 549.

[e] The power of eminent domain is one of the inalienable incidents of sovereignty, which, treated simply as a question of power, may be exercised in favor of public uses over any and all property, private and even public; and the property and franchises of corporations as well as individuals, although dedicated to public use may be taken for other public uses; but this inalienable power is to be exercised under and by virtue of the legislative wills as expressed by the law-making power, and the right to exercise it must be given expressly or by necessary implication from power expressly given.—S. P. R. R. Co. v. S. Cal. Ry. Co., 111 Cal. 221, 43 Pac. 602.

[f] Proceeding in eminent domain is in exercise of sovereign power of state wherein it appropriates use of land to public.—Pool v. Butler, 141 Cal. 49, 74 Pac. 444.

FOR AUTHORITIES FROM OTHER STATES:

Uses and purposes in favor of which power of eminent domain may be exercised: 102 Am. St. Rep. 809, note: 18 L. R. A. 113, 21 L. R. A. 212, 58 L. R. A. 240, 66 L. R. A. 897, notes. See, also, 15 Cyc. 557-562; 18 Cent. Dig., cols. 753-773, §§ 1-12.

§ 2. Distinction Between Eminent Domain and Other Powers—Acts Constituting Exercise of Power.

[a] Act of 1866 (Stats. 1865-66, p. 552), which provides that the tax collector shall receive the fees allowed by law, but that forty-five per cent of the compensation allowed for the collection of certain taxes shall be paid by him into the county treasury for the benefit of the school fund, is not open to the objection that it takes private property for public use.—Ream v. Siskiyou County, 36 Cal. 620.

§ 3. —— Police Power.

[a] The destruction of a building, to stop the spread of a conflagration, cannot be deemed a taking of private property for public use, within the meaning of that clause in the constitution which prohibits such taking without just compensation.—Dunbar v. Alcalde etc. of San Francisco, 1 Cal. 355.

[b] Destroying property to stop conflagration is not taking for public purposes, but a destruction for individual benefit or for the city, and not for the state.—Surocco v. Geary, 3 Cal. 69.

[c] Necessity for destruction of property to stop conflagration must be clearly shown. But in all such cases the individual must be regulated by his own judgment; and, if done without actual or apparent necessity, he is liable in trespass.—Surocco v. Geary, 3 Cal. 69.

[d] The constitutional provision that requires payment for private property taken for public use does not apply where a house is destroyed to stop a conflagration. This right belongs to the state in virtue of her right of eminent domain.—Surocco v. Geary, 3 Cal. 69.

§ 4. —— Taxation.

[a] An act of the legislature providing that the expense of grading a street shall be assessed on property fronting on such street is not an exercise of the right of eminent domain, and therefore is not unconstitutional for failing to provide for just compensation. Emery v. San Francisco Gas Co., 28 Cal. 345; Walsh v. Mathews, 29 Cal. 123.

[b] Constitution, article 1, section 8, which provides that property shall not be taken for public use without just compensation, merely fixes a limitation on the otherwise unrestrained power of eminent domain inherent in the state government, and does not apply to proceedings to recover an assessment for an illegal street improvement.—Chambers v. Satterlee, 40 Cal. 497.

[c] The provision that the city council may determine that if the cost of the improvement be more than a certain amount per front foot, when more than a certain amount of assessment against a lot remains unpaid a certain time after notice, a bond running for not more than ten years, payable in equal annual installments, shall be issued by the city for the unpaid assessment, payable out of the fund created by the assessment, is not a taking of property for public use without compensation.—German Savings etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89.

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§ 5. Power of State in General.

[a] The right to take private property, for public uses, that is, the right of eminent domain, is inherent in government. The state possesses this right as one of the rights of sovereignty.—Gilmer v. Lime Point, 18 Cal. 229.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 565; 18 Cent. Dig., cols. 774-777, §§ 14-18.

§ 6. —— Appropriation for Benefit of United States.

[a] Statutes of 1859, page 26, providing that the state may, on application of an authorized agent of the United States, condemn lands to be used for the erection of public works of the United States for military or naval purposes, is a valid exercise of the right of eminent domain; for there is no constitutional prohibition against the state's assisting the United States in administering its duties and functions.—Gilmer v. Lime Point, 18 Cal. 229.

§ 7. Power of United States.

[a] The federal government has the right of eminent domain in territory acquired by the United States either by conquest or purchase.—People v. Folsom, 5 Cal. 373.

[b] Federal government does not represent general sovereignty of eminent domain in the state.—Gilmer v. Lime Point, 18 Cal. 254.

[c] Whether federal government can take and appropriate land within state for "forts," etc., without the aid or sanction of the state, query?—Gilmer v. Lime Point, 18 Cal. 229.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 564; 18 Cent. Dig., cols. 778, 779, §§ 19-23.

§ 8. Delegation of Power.

[a] State is not limited to any given mode of applying property to satisfy the want or to meet the exigency. The power which is authorized to take is also empowered to appropriate or apply the thing taken to the use designated. Hence, it may itself make the application, or it may make it through the instrumentality of others.—Gilmer v. Lime Point, 18 Cal. 229.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 566-578; 18 Cent. Dig., cols. 779-796, §§ 24-50.

§ 9. —— To Municipality.

[a] Municipal corporation cannot take private property for public use, unless power is conferred by law.—Dunbar v. Alcalde San Francisco, 1 Cal. 355, 452.

[b] Under Constitution, article 11, section 6, providing that all cities shall be controlled by general laws; and Civil Code, section 1001, and Code of Civil Procedure, section 1238, providing that any person may by exercise of eminent domain acquire private property for the use of "canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants" of any city—a city, though not authorized by its charter so to do, may condemn the waters of a creek for the use of its inhabitants.—City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

[c] Act of April 25, 1863, authorized the board of supervisors of the city and county of San Francisco to widen streets, and to provide compensation to owners of land taken or damaged, but did not authorize condemnation of land for that purpose. Held, that after the board had, by proper proceedings, determined to widen a street, it could acquire the land therefor by condemnation pursuant to Code of Civil Procedure, section 1238.—City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Heffernan v. Superior Court of City and County of San Francisco, 33 Pac. 725.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 568; 18 Cent. Dig., cols. 780-784, §§ 27-34.

§ 10. —— To Private Corporation.

[a] The fact that the board of supervisors of San Francisco, by an order ratified by the legislature, gave the company the privilege of laying pipes along the public streets of that city, does not operate as a restriction upon the right to condemn private lands under the act of 1858 in cases where the purposes of the company require the use of such lands. People v. Blake, 19 Cal. 579.

[b] A corporation organized under the laws of this state, for the purpose of supplying the inhabitants of a town with fresh water, is authorized to exercise the right of eminent domain in behalf of such use.—St. Helena Water Co. v. Forbes, 62 Cal. 182; Spring Valley W. W. v. San Mateo W. W., 64 Cal. 123; Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528.

[c] Power of eminent domain may be delegated by legislature to corporations or individuals.—Moran v. Ross, 79 Cal. 160, 21 Pac. 549.

[d] Under Civil Code, section 465, and Code of Civil Procedure, section 1242, permitting railroad companies to enter on private land and make examinations, surveys, etc., to determine the most advantageous route for a proposed road, a railroad company is not authorized to enter and construct its road without commencing condemnation proceedings.—Robinson v. Southern California Ry. Co., 129 Cal. 8, 61 Pac. 947.

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FOR AUTHORITIES FROM OTHER STATES:

24 L. R. A. 327, note. See, also, 15 Cyc. 570-574; 18 Cent. Dig., cols. 784-795, §§ 35-48.

§ 11. —— To Individual.

[a] Power of eminent domain may be exercised by individuals.—Moran v. Ross, 79 Cal. 164, 21 Pac. 547.

[b] Eminent domain for railroad purposes may be exercised by partnerships.—Moran v. Ross, 79 Cal. 162-164, 21 Pac. 547.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 575; 18 Cent. Dig., cols. 795, 796, §§ 49, 50.

§ 12. —— Delegation by General Law as Distinguished from Special Act.

[a] Right of eminent domain may be granted by general laws to every person complying with terms on which right is given. It need not be specifically granted in every instance.—Moran v. Ross, 79 Cal. 161, 21 Pac. 549.

§ 13. What Constitutes Public Use.

[a] The words "public use," in the eighth section of article 1 of our constitution, mean a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals. But it is not necessary that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public.—Gilmer v. Lime Point, 18 Cal. 229.

[b] If use for which property is taken be to satisfy great public want or public exigency it is a public use in the meaning of the constitution.—Gilmer v. Lime Point, 18 Cal. 229.

[c] The only test of the admissibility of the power of the state to condemn land for "public use" is, that the particular object for which the land is condemned tends to promote the general interest, in its relation to any legitimate object of government.—Gilmer v. Lime Point, 18 Cal. 229.

[d] "Public use" defined.—Turlock I. D. v. Williams, 76 Cal. 369, 18 Pac. 379.

[e] The public use requisite to the exercise of eminent domain held not necessarily by the whole community or by any considerable portion of it.—Madera Ry. Co. v. Raymond Granite Co., 87 Pac. 27.

FOR AUTHORITIES FROM OTHER STATES:

What is taking of property for a public use: 16 Am. St. Rep. 610, note. See, also, 15 Cyc. 578-583; 18 Cent. Dig., cols. 764-766, § 7; cols. 796-800, §§ 51-54.

§ 14. Particular Uses or Purposes—Highways or Other Roads or Ways.

[a] Street cannot be extended over private property previously acquired, without condemnation.—People v. Kruger, 19 Cal. 411.

[b] A law providing for the opening of a road from the farm or residence of A, across the land of B, to a main road leading through the country, upon just compensation being made, does not have the effect of taking the property of B, and applying it to the private use of A, and is constitutional.—Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577.

[c] The mere fact that individuals subscribed money or gave bond to a city to contribute to the expense of laying out a street will not vitiate the proceedings, or prove that the land was taken for the accommodation of private persons, and not for a public use.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[g] An alley in a city or town is declared by statute to be a public use; and in proceeding by a city to condemn a right of way therefor, it need only be shown that the taking is necessary for the purposes of an alley.—Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[h] Political Code, section 2692, authorizing the condemnation of land for private roads, is not unconstitutional as a taking of private property for private use, the road being open to the public.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied, 72 Pac. 989.

[i] Political Code, section 2692, provides that a private road may be opened for the convenience of one or more residents or freeholders in the same manner as public roads are opened, except that only one petitioner shall be necessary. Held, that while the principal use of such private road may be for the petitioner, as a means of egress from his farm, it is also for the use of the public, in deriving the benefit of his products, and in going to his place, and the legislature has the power to declare it a public use, for which the right of eminent domain may be exercised.—Los Angeles County v. Reyes, 32 Pac. 233.

[j] Taking of land by a county for the widening of a public highway is the taking of land for a public use within Code of Civil Procedure, section 1238, subdivisions 3, 4, Political Code, section 2681, and County Government Act, section 25, subdivision 4 (Gen. Laws 1903, p. 121).—Mendocino County v. Peters (Cal. App.), 82 Pac. 1122.

FOR AUTHORITIES FROM OTHER STATES:

Public uses for which power of eminent domain may be exercised: 102 Am. St. Rep. 813, note.

Private roads, right to condemn lands for: 91 Am. Dec. 585, note; 16 L. R. A. 81, note. See, also, 15 Cyc. 585, 586; 18 Cent. Dig., cols. 801-805, §§ 56-58.

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§ 15. —— Ferries.

[a] A person to whom the proper board of supervisors has granted a ferry franchise has the right to maintain an action to condemn land for such ferry.—Pool v. Simmons, 134 Cal. 621, 66 Pac. 872.

For Authorities From Other States:

See 15 Cyc. 599; 18 Cent. Dig., cols. 816, § 68.

§ 16. —— Railroads.

[a] Railroads for carriage of passengers and transportation of merchandise are public highways, for the construction of which, though made by private corporations, the land belonging to private persons may be taken upon paying to the owner a just compensation.—San Francisco etc. R. R. Co. v. Caldwell, 31 Cal. 367.

[b] A taking of land by a railroad company for railroad purposes in the exercise of the power of eminent domain, under authority granted to it by the legislature, is, though the railroad is a private corporation, a taking of private property for "public use," within the constitutional provisions that private property shall not be taken for public use without compensation being made therefor.—Contra Costa R. Co. v. Moss, 23 Cal. 323; Stockton & V. R. Co. v. City of Stockton, 41 Cal. 147.

[c] Constitution, article 1, section 14, providing that private property shall not be taken or damaged for public use without just compensation, and that no right of way shall be appropriated to the use of any private corporation until compensation shall have been made, irrespective of any benefit from any improvement proposed by such corporation, does not restrict the condemnation of land to railways under the control of corporations.—Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Moran v. Farley, 21 Pac. 549.

[d] If Constitution, article 12, section 22, providing for a railroad commission with power to establish rates "for railroad and other transportation companies" applied to corporations alone, it would not limit the power to construct and operate railroads to corporations alone.—Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Moran v. Farley, 21 Pac. 549.

[e] Under Code of Civil Procedure, section 1238, subdivision 4, providing that the right of eminent domain may be exercised "by steam, electric and horse railroads, canals, ditches," etc., "for irrigation, public transportation," etc., a complaint in condemnation proceedings alleging that plaintiff was incorporated to operate a steam railroad for carrying passengers and freight for hire sufficiently alleges a public use, the words "public transportation" in the section quoted only referring to canals, ditches, etc.—San Francisco etc. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.

[f] Neither the length of a railroad nor the fact that it is a spur track bears any necessary relation to the question in condemnation proceedings as to whether the use is a public one.—Madera Ry. Co. v. Raymond Granite Co., 87 Pac. 27.

[g] In condemnation proceedings by a railroad certain facts held not to show that the use was not a public one.—Madera Ry. Co. v. Raymond Granite Co., 87 Pac. 27.

For Authorities From Other States:

20 L. R. A. 434, note. See, also, 15 Cyc. 587-592; 18 Cent. Dig., cols. 805-816, §§ 59-67.

§ 17. —— Water Supply in General.

[a] The supplying of the inhabitants of a town with water is a "public use" for which the right of an individual to enjoy the flow of the water in its natural channel upon his land may be condemned.—St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659.

[b] Since the adoption of the constitution of 1879, individuals or corporations, without special legislation, may lay gas or water pipes in the streets of towns and cities, subject to the direction of the municipal authorities, the towns and cities also having the right to regulate the charges to be imposed for the use of the gas or water thus supplied.—People v. Stephens, 62 Cal. 209.

[c] Code of Civil Procedure, section 1238, declares that supplying a city with water is a public use, in behalf of which the right of eminent domain may be exercised, but does not expressly provide for taking land for reservoir purposes. Section 1239 provides that the fee simple of land may be condemned when needed 'for public buildings, ... reservoirs," etc. Held, that land may be condemned by a water company for its reservoir.—Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659, 8 Pac. 501.

[d] Under Code of Civil Procedure, section 1238, which provides that the right of eminent domain may be exercised in taking land for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, and under Code of Civil Procedure, section 1239, which provides that a fee simple may be taken for a reservoir, a corporation organized for the purpose of supplying the city and county of San Francisco with water may condemn land for a reservoir site.—Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

For Authorities From Other States:

14 L. R. A. 487, 58 L. R. A. 240, notes See, also, 15 Cyc. 593; 18 Cent. Dig., cols. 819-821, § 75.

§ 18. —— Irrigation.

[a] In a proceeding to condemn land for a ditch or canal, the petition averred that

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the design was to conduct water for mining, irrigating, manufacturing, household, and domestic purposes, and alleged that along the line of the canal were many valuable mining claims and such agricultural land, which could not be developed or cultivated unless water was brought upon it by artificial means. Held, that it was sufficiently shown that a public use was intended; Code, section 1238, including in the enumeration of what shall be considered public uses canals, ditches, etc., for supplying mines and farming neighborhoods with water.—Cummings v. Peters, 56 Cal. 593.

[b] Plaintiff water company averred that it owned the water rights in a creek appertaining to the riparian lands on both sides within certain defined limits, and that to supply said "farming neighborhood" with water it was necessary to condemn and take a portion of the waters of the creek. Held, that the averments failed to show that the condemnation was for the use of the public. Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537.

[c] Where the right of eminent domain is sought to be exercised for the purpose of the building of canals and ditches for supplying a farming neighborhood with water, the fact that the owners of the land in the neighborhood are stockholders of the corporation seeking the right, and that a majority of the stock is owned by a few persons, who are also the owners of the greater portion of the land to be supplied with water, does not of itself change the supplying of water to the neighborhood from a public to a private use, although such facts should properly be considered in determining whether the region constitutes a farming neighborhood, and whether the supplying of water therefor is a public use.—Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[d] Section 1238 of the Code of Civil Procedure, giving the right of eminent domain for the construction of canals and ditches for supplying farming neighborhoods with water, is a legislative declaration that the use is a public use, and the declaration must be regarded as falling within the scope of legislative duty in providing for the public welfare.—Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[e] The term "farming neighborhood," as used in the code provision, is an indefinite expression, and whether it can be applied to any particular tract of land must be determined by evidence; and the term "public use" is also an expression of indefinite signification, and its application to the facts of any particular case is to be determined from evidence.—Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[f] A "farming neighborhood" is a region in which there are several tracts of farming land with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors, and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not if it were held in single ownership.—Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[g] It is not necessary, in order to render the supplying of water to a farming neighborhood a public use, that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use.—Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[h] It is the proximity of several tracts of land which constitutes a farming neighborhood, and it is not necessary, in order that the use should be public, that a proprietor should reside upon or cultivate his land in person, but it is sufficient that the lands are cultivated by tenants or employees of the proprietors.—Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[i] Laws of 1887, page 29, authorized plaintiff to construct waterworks for irrigation, and section 12 gave it power to acquire property "necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works . . . . and all necessary appurtenances." Held to authorize taking land for constructing a pipeline.—Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 599; 18 Cent. Dig., cols. 821-822, § 76.

§ 19. —— Drainage of Lands.

[a] The drainage act of 1881 is unconstitutional, in permitting private property to be taken or damages for private use, and only requiring that the condemnation of land for a ditch, drain, or watercourse thereunder shall "be conducive to the general welfare of the land owners petitioning therefor," without requiring or intimating that the land is to be taken for any public use.—Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459.

[b] The drainage act (Stats. 1885, p. 204, c. 158), providing for formation of drainage districts, each consisting of land susceptible of one mode of drainage, does not, in authorizing condemnation by a district of land for a drainage ditch, contravene Constitution, article 1, section 14, providing that private property may be condemned only for a public use; the increase of cultivable land and the promotion of public health by drainage being public uses.—Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.

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[c] It cannot be said, as matter of law, that the condemnation of land for a drain, for a drainage district, is not for a public use, merely because the area of overflowed land in the drainage district is only one hundred and sixty acres.—Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.

FOR AUTHORITIES FROM OTHER STATES:

49 L. R. A. 781, note. See, also, 15 Cyc. 594; 18 Cent. Dig., cols. 822-824, § 77.

§ 20. —— Sewers.

[a] Evidence, in condemnation proceedings for a sewer, that the city had agreed to allow a hotel outside the city limits to use the sewer, was properly excluded, since that fact would not render the proposed use less a public use.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[b] Legislature having declared by statute that sewerage is public use, the inquiry on that head is closed.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 594; 18 Cent. Dig., cols. 824, § 78.

§ 21. —— Development or Working of Mines.

[a] The legislature has no power to authorize the taking of private property to be used by another for mining purposes, though the latter pay the former therefor. Gillan v. Hutchinson, 16 Cal. 153.

[b] The legislature cannot, in the exercise of the power of eminent domain, take private property for a purely private industry; such as to enable a person to build a flume on the land of another, to carry off the tailings from his mine, or to enable him to deposit the tailings on such land.—Consolidated Channel Co. v. Central Pacific R. Co., 51 Cal. 269.

[c] The right of eminent domain cannot be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.—Lorenz v. Jacob, 63 Cal. 73.

[d] Section 1238 of the Code of Civil Procedure does not authorize the condemnation of a right of way through a mining claim for the private use of another mine owner in working his mine.—Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 601; 18 Cent. Dig., cols. 824, 825, § 79.

§ 22. —— Lighthouses and Forts.

[a] A "fort" is an object of "public use," and a state may, for its own purposes, condemn land for a fort, or may authorize the land to be condemned for such purpose, for and on behalf of the federal government.—Gilmer v. Lime Point, 18 Cal. 229.

[b] Act of February 14, 1859, providing for relinquishment of land to the United States for lighthouses and other purposes, and authorizing proceedings by the United States to condemn land for forts or other military or naval purposes, is a taking of private property for public use, within Constitution, article 1, section 8.—Gilmer v. Lime Point, 18 Cal. 229.

§ 23. Property Subject to Appropriation.

[a] Authority to condemn private lands for use by a corporation includes the right to condemn any estate or interest therein for the same object.—People v. Blake, 19 Cal. 579.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 602-629; 18 Cent. Dig., cols. 835-878, §§ 91-130.

§ 24. —— Materials for Construction of Works.

[a] Under Political Code, section 3454, providing that the trustees of a reclamation district shall have power to acquire, by purchase or condemnation, a right of way, and the right to take material for the construction of all works necessary to accomplish that object, including levees and embankments, the trustees of a reclamation district may acquire levees built by the owners of land for their own protection, where such levees are necessary to the reclamation of land within their district.—Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. 1038.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 603; 18 Cent. Dig., cols. 845, 846, § 105.

§ 25. —— Water Rights.

[a] Rights of a riparian proprietor are part of realty, and may be condemned for public use.—St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659.

[b] Riparian owner's property in water may be taken to supply farming neighborhoods with water.—Lux v. Haggin, 69 Cal. 299-307, 10 Pac. 674.

[c] Water collected by a water company supplying public is property which cannot be taken without just compensation.—Spring Valley W. W. v. San Francisco, 82 Cal. 307, 16 Am. St. Rep. 116, 22 Pac. 910, 1046.

[d] Means of access to navigable waters over lands of private owner of shore can only be obtained by exercise of eminent domain and just compensation.—Oakland v. Oakland W. F. Co., 118 Cal. 185, 50 Pac. 277.

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§ 26. —— Personal Property.

[a] The property which can be taken by right of eminent domain is something other than money.—Burnett v. City of Sacramento, 12 Cal. 76; Emery v. San Francisco Gas Co., 28 Pac. 345.

§ 27. —— Property Previously Devoted to Public Use.

[a] A public square in a village cannot be condemned for the site of a schoolhouse, such public uses being inconsistent.—McCullough v. Board of Education of San Francisco, 51 Cal. 418.

[b] Land dedicated as a street cannot be condemned as such.—City of San Jose v. Freyschlag, 56 Cal. 8.

[c] Civil Code, section 1112, provides that "a transfer of land bounded by a highway passes the title to the soil of the highway to the center thereof." Held, that the owner of land abutting on a street cannot complain of its use for railroad purposes conducive to the public good, and not interfering with his right to its use as a highway. Montgomery v. Santa Ana etc. Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654.

[d] Land of a private person subject to an easement for a public highway may be taken by a water company for a dam and reservoir as for a more necessary public use.—Marin County Water Co. v. Marin County, 145 Cal. 586, 79 Pac. 282.

FOR AUTHORITIES FROM OTHER STATES:

Power of the legislature to authorize the taking of lands already held for public use: 24 Am. Rep. 551, 40 Am. Rep. 748, notes. See, also, 15 Cyc. 612-629; 18 Cent. Dig., cols. 847-873, §§ 107-120.

§ 28. —— Locating Railroad on Land or Right of Way of Another Railroad.

[a] The grant of a corporate franchise to build a road does not exclude the right of another to build a road on or near the same line.—Indian Canyon Road Co. v. Robinson, 13 Cal. 519.

[b] The general railroad law gives no right to one railroad to use any lands previously located and appropriated by another company, except for the purpose of crossing, particularly when the second company is proceeding in good faith, and with reasonable diligence, to construct its road.—Contra Costa Coal-Mines R. Co. v. Moss, 23 Cal. 323.

[c] A railroad can under Code of Civil Procedure, section 466, providing for a location on an improved line, condemn the land of defendant for that purpose, though at the time of the first location a right of way was acquired over the same defendant's land. Eel River etc. R. Co. v. Field, 67 Cal. 429, 7 Pac. 814.

[d] Under Code of Civil Procedure, section 1240, to condemn a right of way by one railroad over the right of way of another company is to take private property for public use.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

§ 29. —— Necessity for Second Appropriation.

[a] Under Code of Civil Procedure, section 1240, providing that property appropriated for a public use shall not be taken unless for a more necessary public use than that to which it has already been appropriated, plaintiff railroad company had the right to appropriate part of a street which was purchased by defendant railroad company, subject to the right of the public for highway purposes, and on which it had laid its tracks; such appropriation being necessary for the construction of plaintiff's road, but not materially curtailing defendant's right to operate its road.—Southern Pac. R. Co. v. Southern Cal. Ry. Co., 111 Cal. 221, 43 Pac. 602.

§ 30. —— Use not Inconsistent with or Injurious to Existing Use or Franchise.

[a] Code of Civil Procedure, section 1241, subdivision 3, providing that before property already appropriated to some public use can be taken it must appear that the public use to which it is to be applied is a more necessary public use, does not apply to condemnation proceedings to subject a highway to a right of way for a sewer, since the second servitude will not disturb the first.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

§ 31. —— Property not in Actual Use, or not Necessary to Enjoyment of Existing Franchise.

[a] The construction of a spur track across the line of plaintiff's road without necessary use therefor, and for the purpose of preventing the plaintiff from having and using the portion of the right of way sought to be condemned, cannot give the defendant any advantage, or prevent the condemnation for a more necessary public use.—Southern Pac. R. R. Co. v. Southern Cal. R. Co., 111 Cal. 221, 43 Pac. 602.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 866-868, § 115.

§ 32. Exercise of Delegated Power.

[a] In initiating eminent domain proceedings corporations act as agents of state.—California Central Ry. Co. v. Hooper, 76 Cal. 407, 18 Pac. 599.

[b] A railroad corporation cannot condemn a crossing fifteen miles beyond the terminal of its road, as designated by its articles of incorporation.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

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[c] A railroad corporation legally incorporated cannot claim the right to condemn a right of way as a de facto corporation.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

[d] Civil Code, section 465, subdivision 4, gives a railroad company no authority to condemn a crossing on its branch road not authorized by its articles of incorporation.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

[e] Code of Civil Procedure, section 1238, gives a railroad company no greater power to condemn property than authorized by its articles of incorporation.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

[f] Under Civil Code, section 291, subdivision 2, a railroad corporation, by describing where one branch is to run, cannot exercise the right to condemn property for different branches.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

[g] Civil Code, section 297, gives a railroad corporation no right to begin an action to condemn a right of way not authorized by its articles of incorporation, and then support the complaint by amended articles subsequently filed.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

[h] Under Civil Code, section 291, held that plaintiff was entitled to condemn a railroad crossing three-fourths of a mile east of the town of Beckwith.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 881-914, §§ 135-160.

§ 33. —— Conditions upon Which Power may be Exercised.

[a] San Francisco Water Works Company, organized in June, 1857, under the act of 1853, and the act 1855 amendatory thereof, has power to condemn private lands in accordance with the act of April, 1858, "For the incorporation of water companies," whether the company be reincorporated under the act of 1858 or not.—People v. Blake, 19 Cal. 579.

[b] Civil Code, section 299, providing that any corporation holding property in a county shall not maintain an action in relation to such property without filing a copy of its articles of incorporation with the clerk of the county in which such property is situated, does not apply to corporations seeking to acquire property by condemnation.—Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 Pac. 1061.

§ 34. Necessity and Extent of Appropriation.

[a] Where, in condemnation proceedings by a water company to secure an additional source of supply, it appears that such company already owns sources which would, if utilized, increase its supply to a practically unlimited extent, it is no ground for a right to take the lands sought that its resources could be utilized at much less expense than could those of the lands which the company already owns.—Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 Pac. 447.

[b] No such "necessity," as contemplated by Code of Civil Procedure, section 1241, exists for the condemnation of land, by a water company to secure an additional source of supply, where it is shown by its own evidence that it already owns sources which would, if utilized, increase its supply to a practically unlimited extent.—Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 Pac. 447.

[c] Whether quantity of water sought to be condemned is necessary to supply the public use is for court to determine.—Lux v. Haggin, 69 Cal. 306, 10 Pac. 674.

[d] Route sought to be condemned by railroad is not rendered unnecessary by reason of existence of other route equally good and convenient.—California Central Ry. Co. v. Hooper, 76 Cal. 412, 413, 18 Pac. 599.

[e] Under Code of Civil Procedure, which provides (sec. 1238, subd. 8) that private property may be taken for sewerage in any city or town, whether incorporated or unincorporated, and (section 1241, subdivision 2) that before property can be taken it must appear that the taking is necessary to a use authorized by law, it is only necessary to show that the property to be taken is necessary for the sewer, and not that the sewer is necessary for the town.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[f] Under Civil Code, section 3482, providing that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance," a sewer, the construction of which is authorized by section 1238, though a necessary evil, is not a nuisance per se; and, in proceedings to condemn land for a right of way therefor, it is unnecessary to show that the proposed route is least injurious to private rights.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[g] Where the waters of the creeks from which a water company receives its supply are insufficient in the summer time to supply the present wants of the inhabitants of a growing city to whom the company furnishes water, the city shows a necessity for condemning the waters of a stream sufficient in quantity and superior in quality, all other streams nearer the city being used by the water company.—City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

[h] In an application to condemn land for a pipe-line for an irrigation district, it is not necessary to show that the water could be brought no other way.—Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484.

§ 35. Determination of Questions as to Validity of Exercise of Power.

[a] In taking private property for "public use" the legislature is the final judge of the

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public necessity or advantage.—Gilmer v. Lime Point, 18 Cal. 229.

[b] The inquiry into the necessity of any particular railroad will very seldom be entered on by the courts. It is a political, rather than a judicial, question, and rests principally in the sound discretion of the legislature.—Contra Costa Coal-Mines R. Co. v. Moss, 23 Cal. 323.

[c] Whether a proposed road will subserve the public need or convenience is a question for the legislature, and not for the judiciary.—Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577.

[d] The "public use" mentioned in the constitution (art. 10, sec. 8), upon which the power of eminent domain is to be exerted, is left in large measure to legislative determination; and the legislative resolve, by which a tax is imposed or private property taken is such a legislative determination that the public use is to be promoted by the tax or the taking directed.—Stockton etc. R. R. Co. v. City of Stockton, 41 Cal. 147.

[e] Although, as a general rule, a legislative declaration that a certain business is a public use, for which the right of eminent domain may be exercised, is not open to review by the courts, yet, when it appears plain that property is sought to be taken for a purely private use, courts are not bound by the declaration.—Consolidated Channel Co. v. Central Pac. R. R. Co., 51 Cal. 269.

[f] Whether a use is public is a question of law.—Lux v. Haggin, 69 Cal. 301, 306, 10 Pac. 674.

[g] Whether use is public is to be determined by legislature except when property is sought to be taken for a use in no sense public.—Lux v. Haggin, 69 Cal. 303, 304, 306, 10 Pac. 674.

[h] Whether public improvement is of sufficient importance to justify exercise of right of eminent domain is question for legislature. Moran v. Ross, 79 Cal. 161, 21 Pac. 547.

[i] Right of eminent domain can only be exercised through medium of court, though legislature may regulate and restrict the power.—Stevens, In re, 83 Cal. 331, 332, 17 Am. St. Rep. 252, 23 Pac. 379.

[j] Where the legislature has designated the uses in behalf of which the right of eminent domain may be exercised the designation is a legislative declaration that such uses are public, and will be recognized by the courts; but whether, in any individual case, the use is a public use must be determined by the court from the facts and circumstances of that case.—Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[k] Legislative department is the source of power to determine what shall be held to be a public use, as a general rule; and its action on the question is not, except in extreme cases, open to review by the courts.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[l] The determination as to whether or not the right of eminent domain shall be exercised, and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question, and not a judicial one. If the use is a public use, the power of the court is confined to seeing that the burdens cast upon the citizen are in conformity with the methods prescribed by the legislature, and that those methods are not in conflict with the fundamental rights of the people.—Wulzen v. Board of Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

[m] Under act of March 6, 1889, section 18 (Stats. 1889, p. 70), relating to the condemnation of realty, and declaring that resolutions ordering the work to be done shall be conclusive evidence of the necessity in condemning realty for an alley, the court may properly instruct the jury that the resolution ordering the alley opened was conclusive proof of the necessity for opening of the way, and they were only to determine whether it was necessary for the city to take a strip of ten feet, and, if the whole of such strip was not necessary, then to find how much of it was necessary for the alley.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

FOR AUTHORITIES FROM OTHER STATES:

Public use and necessity for taking, whether a legislative or a judicial question: 42 Am. St. Rep. 406, note.

Public use, question of, when may be considered by the courts: 88 Am. St. Rep. 926, note.

See, also, 15 Cyc. 630-632; 18 Cent. Dig., cols. 920-928, §§ 165-170.

§ 36. —— Determination by Agent to Whom Power is Delegated.

[a] As acts of 1889, page 70, giving the city council power to open streets, imposes on it the duty of determining the necessity, and makes the official order opening the street conclusive evidence of the necessity, the question of necessity is purely for the council, and will not be passed upon by the courts.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

II. COMPENSATION.

A. Necessity and Sufficiency in General, §§ 37-44.
B. Taking or Injuring Property as Ground for Compensation, §§ 45-60.
C. Measure and Amount, §§ 61-76.
D. Persons Entitled and Payment, §§ 77-81.

A. NECESSITY AND SUFFICIENCY IN GENERAL.

NECESSITY FOR COMPENSATION OR PROVISION THEREFOR, IN GENERAL, § 37.
—— EFFECT OF GENERAL LAWS OR SUBSEQUENT ACT AS SUPPLYING OMISSION, § 38.

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SUFFICIENCY OF STATUTORY PROVISIONS FOR COMPENSATION, § 39.
NECESSITY FOR PAYMENT BEFORE TAKING OR ENTRY, § 40.
—— ENTRY ON GIVING SECURITY OR ON MAKING DEPOSIT OR PAYMENT INTO COURT, § 41.
WAIVER OF, OR ESTOPPEL TO CLAIM COMPENSATION, § 42.
—— EFFECT OF CONVEYANCE OR AGREEMENT TO CONVEY BY LAND OWNER, § 43.
FAILURE TO MAKE COMPENSATION AS ABANDONMENT OF RIGHT TO TAKE, § 44.

§ 37. Necessity for Compensation or Provision Therefor in General.

[a] Property of citizen cannot be taken from him for public use unless ample means of remuneration are provided.—McCann v. Sierra County, 7 Cal. 121.

[ab] Act of legislature appropriating private property, without providing compensation, is unconstitutional and void. It may not be absolutely essential that the compensation should be provided in the same act which authorizes the seizure, but it is essential that it should be provided before the seizure can be enforced or justified.—McCauley v. Weller, 12 Cal. 500.

[b] The provision of our constitution that "just compensation" be made for private property taken for public uses only requires that a certain and adequate remedy be provided by which the owner can obtain his compensation without unreasonable delay.—Gilmer v. Lime Point, 18 Cal. 229.

[c] Statute which fails to provide method of ascertaining compensation to be paid to the owner, and the way and means of paying the same before the road is opened, is unconstitutional.—Curran v. Shattuck, 24 Cal. 427.

[d] Private property can only be taken for a public use after just compensation adjudged the owner.—Charnock v. Rose, 70 Cal. 191, 11 Pac. 625.

[e] Law providing for taking private property for public use without compensation is void.—Green v. State, 73 Cal. 34, 14 Pac. 610, 11 Pac. 602.

[f] To take land compensation must be made or provided for in advance.—Green v. State, 73 Cal. 34, 11 Pac. 602, 14 Pac. 610.

[g] Legislature cannot authorize public use, natural result of which will be to deprive owners of property of its beneficial use, without allowing compensation to party injured. Rudel v. Los Angeles County, 118 Cal. 288, 50 Pac. 400.

FOR AUTHORITIES FROM OTHER STATES:

Compensation when property is taken in the exercise of the right of eminent domain: 31 Am. Dec. 373, note.

Damages allowable in proceedings in exercise of the right of eminent domain: 88 Am. Dec. 113, note.

Compensation where lands are taken for right of way of a railroad: 19 Am. St. Rep. 458, note.

See, also, 15 Cyc. 638-804; 18 Cent. Dig., cols. 929-1410, §§ 171-447.

§ 38. —— Effect of General Laws or Subsequent Act as Supplying Omission.

[a] An act changing the grade of a certain street is not necessarily unconstitutional because it modifies, pro tanto, general statutes, and makes no provision for compensation. As to the latter point, the provisions of the general laws will be deemed to apply.—Jennings v. Le Roy, 63 Cal. 397.

§ 39. Sufficiency of Statutory Provisions for Compensation.

[a] Statutes of 1859, page 26, providing for the condemnation of lands by the state for public works or military or naval stations for the United States, and making it the duty of the district court to impanel a jury to assess the value of the land and all damages sustained by the owner thereof, and providing that the amount so assessed, with the costs, shall be paid into the county treasury of the county in which the proceedings are had until ordered to be paid out by a court of competent jurisdiction, provides a just compensation for the taking of the lands.—Gilmer v. Lime Point, 18 Cal. 229.

[b] Statutes of 1867-68, page 283, concerning roads and highways in the county of San Mateo, in reference to the notice to be given of a proposed alteration of a public road, and requiring persons claiming compensation for land to be taken to present their claims for damages within a certain time, or to be deemed as waiving all damages, is not in violation of Constitution, article 1, section 8, guaranteeing to a party whose lands are appropriated to public use compensation therefor.—Potter v. Ames, 43 Cal. 75.

[c] A state legislature may prescribe the several steps to be pursued in the assertion of a right to compensation for land appropriated for public use, but the prescribed procedure must not destroy or substantially impair the right itself.—Potter v. Ames, 43 Cal. 75.

[d] That portion of the railroad act of 1861, as amended in 1863, which permits the court or judge on proceedings for the condemnation of land to make an order allowing the company to enter into possession and use the land sought to be condemned during the pendency of the proceedings, without providing compensation for the use and waste committed if the proceedings finally fail, is in violation of that clause in the constitution which prohibits private property from being taken for public use without compensation.—Davis v. San Lorenzo R. R. Co., 47 Cal. 517.

[e] Section 1249 of the Code of Civil Procedure which provides that for the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the

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date of the summons is not inconsistent with section 14 of article 1 of the constitution.—California Southern R. R. v. Kimball, 61 Cal. 90.

[f] The provisions of act of March 18, 1885, relative to the formation of assessment districts, and levying assessment for street improvement according to the frontage of the lots, and not in proportion to the benefits received, are not in conflict with Constitution, article 1, section 14, prohibiting the taking of property without just compensation, since there is merely a possibility that an assessment might be unjust.—Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

[g] The state constitution provides that private property shall not be taken or damaged for public use without compensation to the owner. Held, that as change of grade act of March 9, 1893 (Stats. 1893, p. 89), provides for a petition for damages by a lot owner, the act is not void for not giving such right to a lienholder.—German Savings etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89.

For Authorities From Other States:

See 15 Cyc. 640-647; 18 Cent. Dig., cols. 947-959, §§ 180-187.

§ 40. Necessity for Payment Before Taking or Entry.

[a] Private property cannot be taken for public use without compensation being made before the citizen is devested of his rights.—City of San Francisco v. Scott, 4 Cal. 114.

[b] No title nor any right of possession comes from mere condemnation of private property for public use. Just compensation actually made, or secured according to law, is a condition precedent.—Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

[c] Where the compensation for land taken by a county for public use, as for a road, does not precede or accompany the taking, the entire action of the county authorities is void.—Johnson v. Alameda County, 14 Cal. 106.

[d] The legislature has no authority to authorize the taking of private property for a public use unless it also provide that compensation to the owner of the property taken shall precede or accompany the taking.—Gillan v. Hutchinson, 16 Cal. 153.

[e] A right of way cannot be acquired by the public unless the owner of the land, or his authorized agent, has been tendered compensation.—Curran v. Shattuck, 24 Cal. 427.

[f] The second clause of Constitution, article 1, section 14, providing that no right of way shall be appropriated by any private corporation until full compensation be first made and paid into court for the owner, is violated by Code of Civil Procedure, section 1254, authorizing an order for a railway company to enter into possession of land during proceedings seeking to condemn it for a right of way.—Steinhart v. Superior Court of Mendocino County, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404.

[g] The state has power to authorize the appropriation of water running through its own lands, and such an appropriation would vest in the appropriator a right in the water thus appropriated superior to that of a subsequent purchaser from the state of the lands through which such water had previously run. But neither the state nor federal government has power to authorize the appropriation of water running through private lands for a private purpose, nor for a public purpose until just compensation is first made therefor.—Lux v. Haggin, 4 Pac. 919, 938.

For Authorities From Other States:

See 6 Cyc. 270; 15 Cyc. 775-782; 18 Cent. Dig., cols. 959-992, §§ 188-204.

§ 41. —— Entry on Giving Security or on Making Deposit or Payment into Court.

[a] That clause in the constitution which provides that private property shall not be taken for public use without just compensation does not prohibit the legislature from authorizing private lands to be entered on and taken possession of for public use while proceedings for condemnation are pending and before the compensation is paid, upon security being given for the payment of the damages when ascertained.—Fox v. Western Pacific R. R. Co., 31 Cal. 538.

[b] When land is sought to be taken for a public use by a private corporation, under proceedings in the exercise of the right of eminent domain, the court has no power to make a preliminary order, placing the corporation in possession of the land during the pendency of the proceedings, upon giving security to pay damages.—Davis v. San Lorenzo R. Co., 47 Cal. 517; California Pac. R. Co. v. Central Pac. R. Co., 47 Cal. 528; San Mateo Waterworks v. Sharpstein, 50 Cal. 284; Sanborn v. Belden, 51 Cal. 266.

[c] Code, section 1254, allowing bond for damages for taking private property for public use, is unconstitutional. The bond is not "just compensation."—Vilhac v. Stockton etc. R. Co., 53 Cal. 208.

[d] Code of Civil Procedure, section 1254, allowing the court in condemnation proceedings to authorize plaintiff, on the payment of a sufficient amount into court, to take possession of and use the property "during the pendency of and until the final conclusion of the litigation," is not unconstitutional; and the court may, upon payment into court by plaintiff of a sufficient sum, allow him to take and retain possession pending determination of an appeal by the landowner from its judgment, and pending a new trial on the question of damages ordered by the appellate court on reversing the judgment.—Spring Valley Waterworks v. Drinkhouse, 95 Cal. 220, 30 Pac. 215.

[e] A city will be enjoined from changing the course of a natural stream flowing within

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its limits so as to make it flow along a public street in such a manner as to impair free access to property abutting thereon, where compensation for damage to such property has not, as required by Constitution, article 1, section 14, been first made or paid into court for the owners.—Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570.

[f] Code of Civil Procedure, section 1254, provides that during condemnation proceedings the plaintiff may obtain an order to take possession of the property by paying into court sufficient money to compensate the defendant for the land if eventually condemned, or for damages if it is not condemned. Constitution, article 1, section 14, provides that private property shall not be taken for public use without just compensation having first been made to or paid into court "for the owner." Held, that the statute is unconstitutional, since the money cannot be considered as "first" paid into court "for the owner" unless he can take it, and, if the condemnation proceedings should fail, the money would be only a security for his damages, not available by him until judicially determined.—Steinhart v. Superior Court of Mendocino County, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 980-991, §§ 200-203.

§ 42. Waiver of, or Estoppel to Claim Compensation.

[a] Legislature may prescribe mode of obtaining compensation for land taken by eminent domain, and mode prescribed must be pursued, or claim is waived.—Harper v. Richardson, 22 Cal. 251.

[b] Where a person through whose premises a new road has been laid is a party to the proceedings, a failure to bring an action of damages therefor within the time of limitation, under the provisions of the road law, is a waiver of all claim for such damages.—Harper v. Richardson, 22 Cal. 251.

[c] It is competent for legislature to fix mode of condemnation of land for public highways and the method by which damages shall be ascertained, and the proceedings to be had for their recovery, and as strict a compliance with the act is required by those claiming damages, as by the public making the condemnation.—Lincoln v. Colusa County, 28 Cal. 662.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 782, 804; 18 Cent. Dig., cols. 992-1006, §§ 205-214.

§ 43. —— Effect of Conveyance or Agreement to Convey by Land Owner.

[a] An award by the commissioners of damages for land over which the railroad company had already obtained a valid deed of the right of way will be set aside. The grantor must look to his contract for compensation.—Western Pac. R. Co. v. Reed, 35 Cal. 621.

§ 44. Failure to Make Compensation as Abandonment of Right to Take.

[a] Compensation must be made within short period, or the privilege of taking the property under the condemnation will be deemed abandoned.—Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

[b] Where more than thirty days have elapsed after the final judgment without the payment or deposit in court of the sum of money assessed by the verdict of the jury, in a proceeding brought by the county, upon order of the board of supervisors, to condemn the right of way for a road, the defendant is entitled, under sections 1251 and 1252 of the Code of Civil Procedure, to have the entire proceedings in the superior court vacated and annulled.—Glenn County v. Johnston, 129 Cal. 404, 62 Pac. 66.

B. TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

PROPERTY AND RIGHTS SUBJECT TO COMPENSATION, § 45.
—— FEE OF ABUTTING OWNER IN STREET OR HIGHWAY, § 46.
—— RIGHTS IN PUBLIC LANDS, § 47.
—— WATER OR RIPARIAN RIGHTS, § 48.
NATURE OF INJURY TO PROPERTY NOT TAKEN—GENERAL OR SPECIAL INJURIES, § 49.
—— PROPER OR IMPROPER CONSTRUCTION OR OPERATION OF WORKS, § 50.
ELEMENTS OF COMPENSATION FOR INJURIES TO PROPERTY NOT TAKEN, § 51.
—— ALTERATION OF FLOW OR DISCHARGE OF WATER AND FLOODING LANDS, § 52.
—— OPENING OR VACATING STREET OR OTHER HIGHWAY, § 53.
—— ALTERATION OF GRADE OF STREET OR OTHER HIGHWAY, § 54.
—— INCONVENIENCE IN USE OF PROPERTY AND EXPENSES OCCASIONED, § 55.
—— OBSTRUCTION OF ACCESS, § 56.
—— EFFECT OF FOUL ODORS, § 57.
—— INJURIES FROM CONSTRUCTION OR OPERATION OF WORKS, § 58.
—— RAILROAD RIGHTS OF WAY, § 59.
—— EFFECT ON VALUE OF PROPERTY OF CONSTRUCTION OF PROPOSED WORKS, § 60.

§ 45. Property and Rights Subject to Compensation.

[a] Under Political Code, section 2619, where a franchise to keep a toll road has expired, the road thereupon becomes a free public highway, and the owner has no claim to compensation for the land covered by it.—People v. Davidson, 79 Cal. 166, 21 Pac. 538; People v. O'Keefe, 79 Cal. 171, 21 Pac. 539.

[b] A toll road, at the time of its construction, becomes a public highway by dedication, subject to the right of the company to

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collect tolls for the period prescribed by statute; and, after the expiration of that period, neither the company nor its stockholders have any interest in the road for which they are entitled to compensation.—McMullin v. Leitch, 83 Cal. 239, 23 Pac. 294.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 646-652; 18 Cent. Dig., cols. 1006-1032, §§ 215-232.

§ 46. —— Fee of Abutting Owner in Street or Highway.

[a] The legislature can grant the right to lay down and construct a railroad upon public streets without providing for compensation for the damage to the owners of property along the line of such streets, provided such owners are not the owners of the contiguous land ad filum viae.—Carson v. Central R. Co., 35 Cal. 325.

[b] The right to a just compensation for the injuries inflicted on private property by the appropriation of the street to a public use not contemplated when it was opened and dedicated as a highway for ordinary travel, as for a railroad, is in no wise affected by the question whether the city authorities did or did not consent to such appropriation.—Southern Pac. R. Co. v. Reed, 41 Cal. 256.

[c] A steam railroad corporation cannot acquire a right of way for its road over a street in a municipality, the fee in which is owned by an abutting proprietor, except upon compensation first made to him.—Weyl v. Sonoma Val. R. Co., 69 Cal. 202, 10 Pac. 510.

[d] A street railway company may use a street for its track without compensating the owner of the fee.—Finch v. Riverside etc. Ry. Co., 87 Cal. 597, 25 Pac. 765, distinguishing (1886) Weyl v. Sonoma Valley R. Co., 69 Cal. 203, 10 Pac. 510.

[e] An abutting owner's easement, in the street is "property," within Constitution, article 1, section 14, providing that private property cannot be taken for public use without compensation.—Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307.

[f] Damages special and peculiar to an abutting owner, authorizing recovery by him, may be caused by the construction of a railroad in a highway on his side of the street, and close to his property, though the rails are flush with the surface of the street, and the construction works no change of grade.—Smith v. Southern Pac. R. Co., 146 Cal. 164, 79 Pac. 868.

[g] Under Constitution, article 1, section 14, providing that private property cannot be taken or damaged for public use save upon compensation first made, a railroad company is not entitled to right of way over a public highway for a steam railroad save on compensation to the owner of the fee, allowed by a jury.—Porter v. Pacific Coast Ry. Co., 18 Pac. 428.

§ 47. —— Rights in Public Lands.

[a] The act of Congress of August, 1852, giving railroad companies certain rights of way over public lands, refers only to such lands as are vacant, and relinquishes to the company any claim for compensation that might belong to the United States as proprietor, under any proceeding under the state law to appropriate the land for public use; but any one in actual possession of such land, though with no other title or right than that of bare occupancy, is still entitled to recover from the company damages for the land taken from him.—California N. R. Co. v. Gould, 21 Cal. 254.

[b] The city of San Francisco, as successor of the pueblo of that name, had the right to take pueblo lands, in the possession of others, for public squares, without making compensation therefor.—Hoadley v. City and County of San Francisco, 70 Cal. 320, 12 Pac. 125.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1014-1016, § 220.

§ 48. —— Water or Riparian Rights.

[a] A lot of land in the harbor of San Francisco, lying within the line of streets as laid down and recognized by the city on its official map, and being in the actual possession of a person who claims to be the owner, cannot be taken from him and appropriated to the public use without paying him a just compensation. (Per Bennett, J.)—Gunter v. Geary, 1 Cal. 462.

FOR AUTHORITIES FROM OTHER STATES:

48 L. R. A. 698, note. See, also, 15 Cyc. 648; 18 Cent. Dig., cols. 1021-1030, §§ 227-230.

§ 49. Nature of Injury to Property not Taken—General or Special Injuries.

[a] Where a railroad company so lays its track as to cause special damage to an owner of land, not necessary, nor contemplated by the city granting permission to lay the track, the company is liable, and cannot shelter itself behind the authority conferred by the city.—Ford v. Santa Cruz R. Co., 59 Cal. 290.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1035-1039, §§ 234, 235.

§ 50. —— Proper or Improper Construction or Operation of Works.

[a] Where a public work, authorized by the city, is skillfully performed and in strict accordance with the law, incidental damages to private property do not amount to a taking of private property within the meaning of the constitution, providing that private property shall not be taken without due compensation.—Moulton v. Parks, 64 Cal. 166, 30 Pac. 613.

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[b] Damages caused by seepage from faulty construction of canal could not be anticipated and are not included in damages awarded in condemnation proceeding.—Turpen v. Turlock Irr. Dist., 141 Cal. 3, 74 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1039-1044, § 236.

§ 51. Elements of Compensation for Injuries to Property not Taken.

[a] In proceedings to condemn land taken for public uses, the land owner should not be allowed damages for the cost of removing his personal property from the premises.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

FOR AUTHORITIES FROM OTHER STATES:

47 L. R. A. 782, note; 18 Cent. Dig. cols. 1055-1176, §§ 239-300.

§ 52. —— Alteration of Flow or Discharge of Water, and Flooding Lands.

[a] If act is passed authorizing channel of river to be turned or straightened where it empties into another river, and the performance of the work causes the current of the river emptying into the other to destroy land on the opposite side of such other river, the damage thus sustained is not taking land for public use, and the act is a sufficient defense to an action brought to recover such damages. Green v. Swift, 47 Cal. 536.

[b] An overflow of lands on the Sacramento river, caused by a levee built on the other side of the stream, two miles above the lands flooded, when the overflow comes seven years after the erection of said levee, is not an exercise of the power of eminent domain, so as to entitle the owner to compensation therefor.—Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625.

[c] Under the constitution as it existed prior to 1879, where the state, for public purposes, turns or straightens the channel of a river where it empties into another river, so that the land on the opposite side is, five years afterward, injured or destroyed by the increased velocity of the current, such damage is not a taking of land for public use, and does not entitle the owner to compensation. —(1886) Green v. State, 73 Cal. 29, 11 Pac. 602, 12 Pac. 683, 14 Pac. 610; (1887) Todhunter v. State, 12 Pac. 684, 14 Pac. 615; (1889) Hoagland v. State, 22 Pac. 142.

[d] A city ordinance passed under legislative authority, providing for an improvement of the banks of a stream, is not void because it fails to provide for compensation to one whose land is injured by a change in the channel of the stream caused by such improvement.—De Baker v. Southern California Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

[e] Constitution, article 1, section 14, prohibiting the damaging of private property for public use without compensation first made, prevents the legislature from authorizing the construction of channels, for the benefit of a certain district, to collect surface water, and take it where it will injure other property not compensated therefor.—Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400.

[f] In determining the value in condemnation proceedings of percolating waters as distinguished from a watercourse, it is competent to consider whether the owner might not at any time be deprived of them by the exercise by others of the same right in their lands as claimed by him with respect to his own.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 660, 661, 707; 18 Cent. Dig., cols. 1072-1085, §§ 252-255.

§ 53. —— Opening or Vacating Street or Other Highway.

[a] A grant made, with the necessary formalities, by the alcalde of the pueblo of San Francisco, after the acquisition of California by the United States, and before the incorporation of the city, was valid, and operated to deprive the pueblo and its successor, the city, of the right to open streets through the land granted, except upon compensation paid or secured, and in pursuance of proceedings prosecuted for the purpose.—Scott v. Dyer, 54 Cal. 430.

[b] The vacation of a highway established by statutory proceedings is not a taking of property from an abutting owner for a public use, requiring compensation to be first made to him, since he has no interest in such highway that is not common to the public, and must be held to have acquired and improved his property in view of the statute authorizing the vacation of such highways.—Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 Pac. 569.

§ 54. —— Alteration of Grade of Street or Other Highway.

[a] Under the constitution, providing that private property shall not be taken or "damaged" for public use without compensation, a city is liable for injuries to the foundation of a house caused by the soil sinking on account of dirt placed on the street to raise the grade.—Reardon v. City and County of San Francisco, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; Van Daalen v. City and County of San Francisco, 6 Pac. 689.

[b] Under Constitution, of 1879, article 1, section 14, providing that private property shall not be taken or damaged for public use without just compensation being made to the owner, a municipal corporation is liable to the owner of an abutting lot for damages caused by the excavation of a street.—Eachus v. City of Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829.

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[c] Under Constitution, of 1879, article 1, section 14, providing that private property shall not be taken "or damaged" for public use without just compensation having been first made, damages peculiar to property of an abutting owner may be recovered of one who fills earth into a street to conform to a new grade to which it had been lawfully changed, though he is duly authorized to do so.—De Long v. Warren, 36 Pac. 1009.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 662-664, 703; 18 Cent. Dig., cols. 1110-1116, §§ 269, 270.

§ 55. —— Inconvenience in Use of Property and Expenses Occasioned.

[a] If, by the construction of a railroad through the inclosure of a farmer, it is made necessary to construct fences on either side of the road, to protect his crops, the cost of such fences must be included in the compensation paid for land.—Sacramento Valley R. R. Co. v. Moffatt, 6 Cal. 74.

[b] The fact that Code of Civil Procedure, section 1248, subdivision 4, requires that, when lands are condemned for a railroad right of way, the cost of fencing the line shall be assessed as damages, does not, by implication, preclude an assessment for the cost of fencing in other cases, if fences are rendered necessary by the taking.—Butte County v. Boydston, 64 Cal. 110, 29 Pac. 511.

[c] Although there was a "No-fence Law" (Stats. 1873-74, p. 310), in the county, under which no person is bound to fence land, the cost of fencing the remainder of land, for restraining the cattle of the owner and other purposes, by one whose land has been condemned, may be considered as an element of injury.—Butte County v. Boydston, 64 Cal. 110, 29 Pac. 511.

[d] Where there is no evidence of circumstances existing, making the cost of fencing an element of damage, the statutory provisions which require fencing of a railroad, or payment for fencing, are not to be considered in fixing compensation to be paid for taking land.—California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123. 128.

[e] The cost of fencing is not necessarily an element of damage.—California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123, 128.

[f] Cost of fencing land not taken is proper element of damages.—Colusa County v. Hudson, 85 Cal. 637, 24 Pac. 791,

[g] Where the land through which a right of way is sought to be taken is adapted to cultivation, the increased cost of cultivating it, caused by building the road, may be considered in assessing damages.—San Bernardino etc. Ry. Co. v. Haven, 94 Cal. 489, 29 Pac. 875.

[h] Under the provisions of sections 1253 and 1251 of the Code of Civil Procedure the cost of maintaining fences after their erection is not a subject of damage in condemnation proceedings; and under section 485 of the Civil Code, construed in connection with section 1248 of the Code of Civil Procedure, the duty of maintaining a fence after its erection is upon the owner, and the expense of doing so is included in the damages allowed for the right of way.—Los Angeles etc. Ry. Co. v. Rumpp, 104 Cal. 20, 37 Pac. 859.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 737; 18 Cent. Dig. cols. 1116-1133, §§ 271-277.

§ 56. —— Obstruction of Access.

[a] Abutting owner's right of access to street is property which he cannot be deprived of without just compensation.—Schaufele v. Doyle, 86 Cal. 109, 24 Pac. 834.

[b] The owners abutting upon a street which is so diminished in width by the city authorities that thereafter it will have the same width as the majority of the streets of the city, cannot claim that the proposed reduction will interfere with their enjoyment of light and air, or that access to their lots is in any degree impaired.—Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.

[c] A railroad company, occupying a street with its tracks, held liable for injury to right of access to abutting property. Civ. Code, sec. 465 (5).—Coats v. Atchison etc. Ry. Co. (Cal. App.), 82 Pac. 640.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 746; 18 Cent. Dig., cols. 1142-1159, §§ 282-290.

§ 57. —— Effect of Foul Odors.

[a] The probability of the temporary escape of sewer gas, during repairs of a proposed sewer, is a proper element of damages to be considered in fixing compensation for land condemned for the construction of such sewer.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 753; 18 Cent. Dig., cols. 1134-1142, §§ 278-281.

§ 58. —— Injuries from Construction or Operation of Works.

[a] The ordinary use of railroad tracks constructed entirely on the private property of the railroad company, though parallel with and contiguous to an alley, by moving engines and trains along them and leaving cars standing thereon, constitutes no legal damages to a party who has leased property abutting on such alley, opposite the tracks.—Kishlar v. Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1172-1176, §§ 299, 300.

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§ 59. —— Railroad Rights of Way.

[a] If a party dedicates a public street through his land, and a railroad company afterward procures a condemnation of land along the street for its track, and damages are awarded to him therefor, this is no reason why he should not be awarded further damages, to be paid by another railroad company, which seeks to build another track on the same street.—Southern Pacific R. R. Co. v. Reed, 41 Cal. 256.

§ 60. —— Effect on Value of Property of Construction of Proposed Works.

[a] Fact that lot is rendered less valuable for particular business for which owner is using it must be considered on question of damages.—Muller v. Southern Pacific etc. Co., 83 Cal. 245, 23 Pac. 265.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1039-1044, §§ 236; cols. 1061, 1062, § 243.

C. MEASURE AND AMOUNT.

TIME WITH REFERENCE TO WHICH COMPENSATION TO BE MADE, § 61.
—— TIME OF ENTRY OR TAKING, § 62.
—— TIME OF FILING COMPLAINT OR SERVING SUMMONS, § 63.
—— TIME OF TRIAL, § 64.
NATURE AND EXTENT OF RIGHT TAKEN, § 65.
—— LEASEHOLD INTERESTS, § 66.
TAKING ENTIRE TRACT OR PIECE OF PROPERTY—MEASURE OF COMPENSATION, IN GENERAL, § 67.
—— VALUE OF LAND, IN GENERAL, § 68.
—— VALUE ENHANCED BY PROPOSED IMPROVEMENT, § 69.
—— VALUE FOR SPECIAL USE, § 70.
—— IMPROVEMENTS AND FIXTURES, § 71.
TAKING PART OF TRACT OR PROPERTY—DEPRECIATION OF VALUE OF WHOLE TRACT, § 72.
—— INJURIES TO PROPERTY NOT TAKEN, § 73.
DEDUCTION OR SETOFF OF BENEFITS, § 74.
COUNSEL FEES AS ELEMENT OF COMPENSATION, § 75.
AMOUNT AWARDED, § 76.

FOR AUTHORITIES FROM OTHER STATES:

Additional servitudes for which compensation must be made: 56 Am. Rep. 250, note.

New and additional servitudes within highways, what are: 28 Am. Rep. 267, note.

What are additional servitudes: 37 Am. Rep. 224, 106 Am. St. Rep. 237-267, notes.

Damages, elements of in proceedings in the exercise of the power of eminent domain: 85 Am. St. Rep. 291, note.

Elevated railroads, damages for operating in the public streets: 26 Am. St. Rep. 498, note.

17 L. R. A. 474, 24 L. R. A. 721, notes. See, also, 15 Cyc. 684-774; 18 Cent. Dig., cols. 1211-1357, §§ 325-402.

§ 61. Time with Reference to Which Compensation to be Made.

[a] The compensation must be the value of the property at the time of the payment.—Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 719-724; 18 Cent. Dig., cols. 1217-1233, §§ 332-344.

§ 62. —— Time of Entry or Taking.

[a] The time when the value of lands condemned to the use of a railroad corporation should be assessed is not when the plat of the road is filed with the Secretary of State, under section 43, Act of 1861, or when there is an entry upon the land for the purposes of construction, but when the land is taken.—San Francisco etc. R. Co. v. Mahoney, 29 Cal. 112.

§ 63. —— Time of Filing Complaint or Serving Summons.

[a] Section 1249, Code of Civil Procedure, fixing date of summons as time for ascertaining value of land condemned is constitutional. Tehama County v. Bryan, 68 Cal. 65, 8 Pac. 673.

[b] Code of Civil Procedure, section 1249, provides that compensation and damages on condemnation proceedings shall be assessed as of the date of summons. Section 1243 provides that the proceedings "must be commenced by filing a complaint and issuing a summons thereon." The verdict of a jury in a condemnation suit assessed the damages at the present value of the land. Held, that the verdict was to be construed with reference to the issues in the pleadings, which related to the time of the beginning of the proceeding in this case identical with the summons.—Pacific Coast Ry. Co. v. Porter, 74 Cal. 261, 15 Pac. 774.

[c] Code of Civil Procedure, section 1249, making the "actual value" at date of summons the measure of compensation in condemnation proceedings, means the actual market value, and would not include additional elements of intrinsic value not known at that time.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

§ 64. —— Time of Trial.

[a] In an action to condemn land as a right of way for a railroad, where no evidence is given of an increase in the value of the land between the commencement of the action and the trial, an instruction that in assessing the damages the jury should consider the market value of the land on the day after the action was commenced is not erroneous.—Arcata etc. R. R. Co. v. Murphy, 71 Cal. 122, 11 Pac. 881.

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[b] Under Constitution, article 1, section 14, the compensation for land taken is the value of it at the time of trial, and not at the date of the summons, as prescribed in Code of Civil Procedure, section 1249.—California Southern R. Co. v. Colton Land etc. Co., 2 Pac. 38.

§ 65. Nature and Extent of Right Taken.

[a] In trespass for disturbing the bed of a turnpike road by building a railroad thereon, the measure of damages is the damage actually sustained by reason of the acts of the defendant, not the entire value of the land composing the bed of the road.—Stockton & L. Gravel Road Co. v. Stockton etc. R. Co., 53 Cal. 11.

[b] Where there is a substantial difference between the values of the fee and the easement, the value of the easement must be considered in determining the damages.—Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961.

[c] If the ownership in oils underlying the surface is left to the owner of the fee after the surface has been condemned, damages should be assessed only for the value of the surface.—Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961.

FOR AUTHORITIES FROM OTHER STATES:

60 L. R. A. 204, note. See, also, 15 Cyc. 685; 18 Cent. Dig., cols. 1233-1240, §§ 345-351.

§ 66. —— Leasehold Interests.

[a] In measuring damages done to a leasehold interest in land, the value of the lease at the time of the injury is not its value to the lessee for a particular purpose, but is its fair market value.—Kishlar v. Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

§ 67. Taking Entire Tract or Piece of Property—Measure of Compensation in General.

[a] Damage to property is not what owner could realize at forced sale but price he could obtain in making private sale.—San Diego L. & T. Co. v. Neale, 78 Cal. 68, 20 Pac. 372.

[b] There is a difference between damage accruing to owner from taking and value of property taken in estimating damage for latter market value of property and not its value in use to owner is criterion.—San Diego L. & T. Co. v. Neale, 78 Cal. 67, 68, 20 Pac. 372.

[c] In an action against a railroad company for damages for the occupation of a street, one-half of the fee of which is in plaintiff, the latter is entitled to recover the value of his interest in the street taken, subject to the easement for a public street.—Muller v. Southern Pac. etc. Ry. Co., 83 Cal. 240, 23 Pac. 265.

[d] Speculative damages cannot be awarded. Muller v. Southern Pac. etc. Ry. Co., 83 Cal. 244, 23 Pac. 265.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 685; 18 Cent. Dig., cols. 1240-1242, § 352; cols. 1246-1249, §§ 354, 355.

§ 68. —— Value of Land in General.

[a] Question of value is distinct from question of ownership.—San Diego L. & T. Co. v. Neale, 78 Cal. 72, 20 Pac. 372.

[b] Fact that defendant's land is of no value without that of plaintiff cannot be considered in estimating its value.—San Diego L. & T. Co. v. Neale, 78 Cal. 72, 20 Pac. 372.

[c] Value of land condemned in connection with other land for purpose for which it is most suitable seems to be true basis.—San Diego L. & T. Co. v. Neale, 78 Cal. 71, 73, 20 Pac. 372.

[d] Compensation cannot be based on value of land to plaintiff nor his necessities.—San Diego etc. Co. v. Neale, 88 Cal. 62, 25 Pac. 977.

[e] Necessities of public cannot be considered in fixing value.—San Diego etc. Co. v. Neale, 88 Cal. 65, 25 Pac. 977.

[f] Value of land condemned taken in connection with plaintiff's land cannot be considered.—San Diego etc. Co. v. Neale, 88 Cal. 65, 66, 25 Pac. 977.

[g] Defendant is entitled to the market value of the land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally.—Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

[h] The term "present market value" of land means the price he could obtain after such a reasonable and ample time to sell as would ordinarily be taken by an owner.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[i] Where a city condemns realty for an alley, the owner is entitled to receive an amount equal to that for which the strip could be sold in the open market.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1242-1246, § 353.

§ 69. —— Value Enhanced by Proposed Improvement.

[a] Defendant cannot be allowed for enhancement of value of his land brought about by very act of taking it.—San Diego L. & T. Co. v. Neale, 78 Cal. 80, 20 Pac. 372.

[b] Enhancement in value of adjacent lands caused by improvement proposed by plaintiff cannot be considered.—San Diego L. & T. Co. v. Neale, 78 Cal. 75, 20 Pac. 372.

[c] Benefit arising from proposed improvement cannot be considered as element of val-

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ue.—San Diego etc. Co. v. Neale, 88 Cal. 55, 25 Pac. 977.

§ 70. —— Value for Special Use.

[a] Prospective value of land for a particular use is not to be considered in estimating value at time of condemnation.—Gilmer v. Lime Point, 19 Cal. 60.

[b] Compensation to owner is to be estimated by reference to uses for which property is suitable.—San Diego L. & T. Co. v. Neale, 78 Cal. 70, 20 Pac. 372.

[c] All capabilities or uses to which land is adapted should be considered. Same considerations as influence private sale.—Muller v. Southern Pacific etc. Ry. Co., 83 Cal. 245, 23 Pac. 265.

[d] Condition of property, uses to which it may be practically put and such advantages as may be reasonably expected in immediate future may be considered in estimating value. San Diego etc. Co. v. Neale, 88 Cal. 66, 25 Pac. 977.

[e] Neither value in use to plaintiff nor to owner governs in determining value.—San Diego etc. Co. v. Neale, 88 Cal. 56, 25 Pac. 977.

[f] It is proper to show value of land for special purposes though never used for such purposes.—San Diego etc. Co. v. Neale, 88 Cal. 55, 25 Pac. 977.

[g] In condemnation of land for reservoir purposes, estimates of value based on the cost of the proposed waterworks, the increase of population, extension of the water system, and the probable income and profit from the works, are not admissible.—San Diego Land etc. Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

[h] Where the land sought to be condemned is, because of its situation and adaptability for reservoir purposes, regarded by purchasers generally as more valuable than if it did not possess such advantages, defendant should be allowed to show it, and for that purpose should be permitted to ask whether a witness has the means of knowing, and does know, the value of land for reservoir purposes.—Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

[i] In proceedings to condemn land, the present market value is the measure of damages, and not its value in use to the owner or to those seeking to condemn.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[j] In condemnation proceedings, the owner is entitled to show the adaptability of the land to the different practical purposes to which it is naturally adapted, but the proof should be limited to showing the present condition of the property, and the uses to which it is adapted, and not extended to speculative inquiries as to possible future uses under altered circumstances.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[k] The availability of the property for any particular use may be shown; but where all the facts bearing on the use for which the property was adapted and for which it is used are shown, the question to be considered is, what value in the market could be obtained, if the plaintiff wished to sell his property, from parties who wished to buy and would give its fair value.—Kishlar v. Southern Pacific R. R. Co., 134 Cal. 636, 66 Pac. 848.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 1249-1257, § 356.

§ 71. Improvements and Fixtures.

[a] Where a railroad company, under proceedings for condemnation, enters on land under an order of the county judge, and constructs its road across it in such a manner that it is imbedded in the soil and becomes a part of the realty, and the proceedings are dismissed and new ones for the condemnation of the land are commenced, the owner is not entitled to have the value of the ties and iron constituting the track included in his damages upon the final condemnation.—California Pac. R. Co. v. Armstrong, 46 Cal. 85.

[b] When the government, by its agents, enters wrongfully on land, and erects a building thereon, which becomes a part of the realty, and then seeks to condemn the land for a public use, the owner has a right to have the value of the structure allowed him in the estimate of damages.—United States v. Land in Monterey County, 47 Cal. 515.

[c] Where proceedings are instituted to condemn land for the benefit of a railroad, in determining the compensation to be awarded for the lands taken, the value of ties, rails, etc., already laid, with consent of the owner of the land, are to be considered as part of such realty.—California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123, 128.

[d] A railroad company, having no positive knowledge as to the ownership of land, while guilty of a technical trespass, does not become a tort feasor by entering on the land, and constructing a bridge and track thereon, intending subsequently to condemn it to the public use; and the land owner, who himself was ignorant of his title at the time of the entry, is not entitled to have the value of such track and bridge allowed him as a part of his "just compensation" for the taking of his land.—Albion River R. Co. v. Heeser, 84 Cal. 435, 24 Pac. 288.

[e] Where private road is condemned as public highway, its value as a graded road must be considered in estimating damages.—Colusa County v. Hudson, 85 Cal. 638, 639, 24 Pac. 791.

[f] Compensation cannot include value of track built by company before proceedings begun.—San Francisco etc. Co. v. Taylor, 86 Cal. 248, 24 Pac. 1027.

FOR AUTHORITIES FROM OTHER STATES:
16 L. R. A. 805, note. See, also, 18 Cent. Dig., cols. 1257-1265, §§ 358-361½.

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§ 72. Taking Part of Tract or Property—Depreciation of Value of Whole Tract.

[a] In the assessment of damages to the owner of land occupied by a railroad, the true rule is a fair and just comparison of the value of the whole tract through which the road passes before and after the improvement is made.—San Francisco etc. R. Co. v. Caldwell, 31 Cal. 367.

[b] The measure of damages to abutting property caused by the construction of a railroad in a public street is the depreciation of the market value of the property.—Muller v. Southern Pac. etc. Ry. Co., 83 Cal. 240, 23 Pac. 265.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1294-1303, §§ 372-376.

§ 73. —— Injuries to Property not Taken.

[a] In a proceeding to condemn part of an unsubdivided city block, an instruction authorizing the jury to find the arrangement of the lots into which the property might be divided, and assess damages only to such lots, held erroneous, under Code of Civil Procedure, section 1248, subdivision 2.—Southern Pac. R. Co. v. Hart (Cal. App.), 84 Pac. 218.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 691; 18 Cent. Dig., cols. 1290-1304, §§ 371-377.

§ 74. Deduction or Setoff of Benefits.

[a] The commissioners, in determining the just compensation to be allowed for lands taken for railroad purposes, should take into consideration the benefits and advantages accruing by the building of the railroad.—San Francisco etc. R. Co. v. Caldwell, 31 Cal. 367.

[b] Railroad act of 1861, section 30 requiring commissioners, in assessing the value of lands sought to be taken by a company, to make allowance for any benefit that will accrue to the person whose lands are taken, is not repugnant to the constitution, providing that private property shall not be taken for public use without compensation; since it is within the power of the legislature to declare that, in ascertaining what is a just compensation to the owner of land taken for a railroad, the benefit which shall accure to remaining land shall be set off in satisfaction of the value of that taken.—San Francisco etc. R. Co. v. Caldwell, 31 Cal. 367.

[c] Under the constitution granting the owner of land taken for public purposes a just compensation, not only the benefit which may result to remaining land of a parcel taken, but also the injury which such remaining part sustains, must be considered.—San Francisco etc. R. Co. v. Caldwell, 31 Cal. 368.

[d] If a part of a tract of land is taken for a railroad, and that part of the tract not taken is enhanced in value by the construction of the railroad, but receives no special benefits over other lands in the vicinity, and this enhancement in value is common to the contiguous lands, it is a benefit which is to be deducted from the injury caused to that part of the tract not taken.—California P. R. R. Co. v. Armstrong, 46 Cal. 85.

[d] The court cannot set off the benefits which will accrue to the owner by opening the road against the value of the land taken. Ventura County v. Thompson, 51 Cal. 577.

[e] Under Constitution, article 1, section 14, providing that no right of way shall be appropriated to the use of any corporation not municipal, until compensation is made, irrespective of any benefits from the proposed improvements, the benefits supposed to result to the rest of a piece of land, by taking part of it for the right of way for a railroad, cannot be considered in determining the damages. Pacific Coast Ry. Co. v. Porter, 74 Cal. 261, 15 Pac. 774.

[f] Under Code of Civil Procedure, section 1248, defendant is entitled to the full value of the land taken, for the use of a private individual, and also to the damages sustained by the balance of the tract by the severance from the part taken, less the benefits accruing to such part; and it is immaterial that Constitution, article 1, section 14, makes different provisions in case of the taking of land for the use of a private corporation.—Moran v. Ross, 79 Cal. 549, 21 Pac. 958; Moran v. Farley, 21 Pac. 1135.

[g] Damages caused cannot be offset by benefits to remainder of property.—Muller v. Southern Pacific etc. Ry. Co., 83 Cal. 245, 23 Pac. 265.

[h] Under Constitution, article 1, section 14, which provides that no right of way shall be appropriated until compensation is made, irrespective of any benefits from the proposed improvements, the court properly refused to permit a railroad company to show that the construction of its road would prevent the depreciation of the land not taken, by reason of making the products more accessible to the markets.—San Bernardino etc. Ry. Co. v. Haven, 94 Cal. 489, 29 Pac. 875.

[i] The use to which a street might be put after a change of grade does not affect the damage caused to an abutting lot by the change of grade; and the fact that it might receive a benefit from the construction or operation of a railroad thereon is immaterial upon the question of damages.—Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

[j] In condemning land for a railroad the jury may consider benefits to the land not taken, though such benefits also accrued to other land in the vicinity.—Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040.

[k] Under Constitution, article 1, section 14, providing that no right of way shall be ap-

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propriated to the use of any corporation other than municipal until compensation be made "in money" or paid into court, irrespective of any benefit from any improvement proposed by such corporation, general benefits resulting from such an improvement cannot be set off against the damages.—Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083, 59 L. R. A. 581.

FOR AUTHORITIES FROM OTHER STATES:

How far benefits may be considered as offsets in proceedings under eminent domain: 45 Am. Dec. 532, note. See, also, 15 Cyc. 764-774; 18 Cent. Dig., cols. 1305-1342, §§ 378-393.

§ 75. Counsel Fees as Element of Compensation.

[a] Land owner cannot recover the value of his counsel fees as part of his compensation.—San Jose etc. R. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522.

§ 76. Amount Awarded.

[a] In an action by a railroad company to condemn land for a right of way, where the only evidence given at the trial as to the cost of building a lawful fence along the line of the proposed railroad was thirty cents per foot, and it appeared that the length of the right of way was one thousand and one feet, a finding that the fence would cost one hundred dollars is not sustained by the evidence. Los Angeles etc. Ry. Co. v. Rumpp, 94 Cal. 432, 29 Pac. 872.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1351-1357, §§ 401, 402.

D. PERSONS ENTITLED AND PAYMENT.

PERSONS ENTITLED, § 77.
DETERMINATION OF CONFLICTING CLAIMS, § 78.
REQUISITES AND SUFFICIENCY OF PAYMENT, § 79.
—— MEDIUM OF PAYMENT, IN GENERAL, § 80.
—— PAYMENT INTO COURT, § 81.

§ 77. Persons Entitled.

[a] Damages assessed for the value of land taken for a railroad should be paid to the true owner, if he recovers possession before the damages are paid by the company, although at the time of the damage a trespasser was in possession who had filed his claim to the damages.—Rooney v. Sacramento Valley R. R. Co., 6 Cal. 638.

[b] Parties in possession are entitled to compensation in condemnation proceedings, though third parties have given notice of ownership.—Sacramento Valley R. R. Co. v. Moffatt, 7 Cal. 577.

[c] When the compensation to be paid to the owner of the land has been ascertained, the amount thereof must be paid to the one who is the owner at the time or his authorized agent.—Curran v. Shattuck, 24 Cal. 427.

[d] Parties claiming compensation for value of land condemned for railroad purposes must be owners of the land taken, or have an interest therein.—San Francisco etc. R. R. Co. v. Mahoney, 29 Cal. 112.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 788-800; 18 Cent. Dig., cols. 1358-1394, §§ 403-426.

§ 78. Determination of Conflicting Claims.

[a] The determination of the board of commissioners, in the matter of widening a street, as to who is the owner of a building, and who is entitled to damages for property taken, is not conclusive. Where there are conflicting claims to damages assessed, the board of supervisors should pay the money into the county board where such claims can be settled as provided by the act.—Appeal of Lefevre, 32 Cal. 565.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1396-1399, §§ 428-432.

§ 79. Requisites and Sufficiency of Payment.

[a] Statute requiring immediate payment, or provision therefor, to party whose land is condemned, held sufficiently complied with.—Tehama County v. Bryan, 68 Cal. 66, 8 Pac. 673.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 783; 18 Cent. Dig., cols. 1400-1406, §§ 436-441.

§ 80. —— Medium of Payment in General.

[a] In a proceeding to condemn land for a public use, if the court finds the value of the land taken, generally, in dollars and cents, without saying that the estimated value is in gold coin, it cannot render a judgment in gold coin.—North Pac. R. Co. v. Reynolds, 50 Cal. 280.

§ 81. —— Payment into Court.

[a] When land which a railroad crosses is claimed to be a part of a confirmed Mexican grant of half a league within external boundaries embracing a larger quantity, and a survey thereof has been made from which an appeal is pending, the money awarded as the value of the land taken by the road should be paid into court until the title to the property is settled.—San Francisco etc. R. Co. v. Mahoney, 29 Cal. 112.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

NATURE AND FORM OF PROCEEDINGS, IN GENERAL, § 82.
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STATUTORY PROVISIONS, § 84.
—— CONSTRUCTION, § 85.
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§ 82. Nature and Form of Proceedings in General.

[a] A proceeding to acquire lands for depot purposes and a proceeding to ascertain compensation for crossing one railroad by another may be united.—California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123, 128.

[b] Under Code of Civil Procedure, section 1247, authorizing the court in condemnation proceedings to determine all adverse and conflicting claims to the property, a city may in the same action assert its claim to an interest in the property, and condemn the outstanding interest of others.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 805; 18 Cent. Dig., cols. 1411-1414, §§ 448-450; cols. 1424, 1425, § 456.

§ 83. —— Special Proceedings or "Special Case."

[a] Proceedings taken under the act of 1859 (Stats. 1859, p. 26), for the condemnation of land are those of a special inquisition, and though taken by the district court or judge, are to be construed not by the general rules applicable to courts of general jurisdiction, but as the acts of a court sitting under a limited, special, statutory authority.—Gilmer v. Lime Point, 19 Cal. 47.

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[b] Proceedings for condemnation of land for road purposes fall within the class denominated "special cases" in the constitution.—Curran v. Shattuck, 24 Cal. 427.

§ 84. Statutory Provisions.

[a] The legislature possesses the constitutional power to prescribe the proceedings by which the taking of land for public use shall be effected, and the time at which, in view of the mode adopted, the taking shall be deemed complete.—Fox v. Western Pacific R. R. Co., 31 Cal. 538.

[b] Section 18 of the act of 1889, as to the form of the complaint to an action to condemn land as respects the averment of necessity, is not unconstitutional.—City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 830, 831; 18 Cent. Dig., cols. 1414-1425, §§ 451-456.

§ 85. —— Construction.

[a] Statutes like this act of 1859 providing for the appropriation of private property for public use are in derogation of general right and of common-law modes of procedure, and must be strictly construed.—Gilmer v. Lime Point, 19 Cal. 47.

[b] Powers conferred by statute for incorporation of water companies (Stats. 1858, p. 218; Stats. 1853, p. 99), and all others to condemn private property to the use of another, without the consent of the owner, are in derogation of the common law and of general private rights, and must be strictly construed.—San Francisco etc. Water Co. v. Alameda Water Co., 36 Cal. 639.

[c] The rule that proceedings in invitum must be strictly construed and strictly pursued has no application to a proceeding by the property owners in making their protest in order to prevent the taking of their property for a public improvement, and the statute, so far as designed for their protection, should receive a liberal construction, with a view to effect its object and promote justice. City Street Imp. Co. v. Babcock, 139 Cal. 690, 73 Pac. 666.

§ 86. —— Strict Compliance with Statutory Requirements.

[a] Statutory provisions for the appropriation of private property for public use must be strictly complied with.—Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Gilmer v. Lime Point, 19 Cal. 47; Stanford v. Worn, 27 Cal. 171; Damrell v. San Joaquin County, 40 Cal. 154; Southern Pacific R. R. Co. v. Wilson, 49 Cal. 396; Ventura County v. Thompson, 51 Cal. 577.

[c] Statutory provisions as to mode of conducting condemnation proceedings must be strictly pursued.—Lux v. Haggin, 69 Cal. 301, 10 Pac. 674.

[d] The laying out of a public highway is a proceeding to condemn land, and the mode is in some sense the measure of the power, and it must appear that the statute has been substantially complied with to render the proceedings valid; yet the courts make very liberal indulgences in favor of the records of the board of supervisors in such proceedings, which, though of great importance, are usually imperfect.—Hill v. Board of Supervisors of Ventura County, 95 Cal. 239, 30 Pac. 585.

[e] In proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with, and when the form of the statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings.—Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599.

§ 87. Right to Institute Proceedings.

[a] Under Constitution, article 20, section 6, Code of Civil Procedure, section 1240, subdivision 2, sections 1244, 1245, and Political Code, section 472, condemnation proceedings instituted against the state, and in which the attorney general appeared for the state, held authorized prior to the passage of act of March 15, 1901 (Stats. 1901, p. 307, c. 144), adding subdivision 7, Code of Civil Procedure, section 1240.—California etc. Ry. v. State, 1 Cal. App. 142, 81 Pac. 971.

[b] The trial court should not refuse to grant an application for the appointment of commissioners to assess damages for land taken by a railroad company on the ground that there was another petition pending before him for the condemnation of the same lands at the suit of another corporation, and that he could not determine which of the two companies had the better right to condemn.—Lake Merced Water Co. v. Cowles, 31 Cal. 214.

[c] A municipal corporation may maintain an action to condemn land for a public street, under Code of Civil Procedure, part 3, title 7, relating to condemnation proceedings in general, before it has resorted to the steps and processes contemplated by statute of 1889, page 70, relative to the laying out of streets of municipalities.—City of Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34.

[d] Statute of 1889, page 70, section 18, provides that if any owner of land to be taken for a public street does not accept the warrant drawn in his favor for damages, or objects to the report of the necessity of taking his lands, proceedings for the condemnation thereof shall be taken, as provided by law, under the right of eminent domain. The complaint need not set forth the proceedings therein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of the necessity of taking the land. Held that, if the resolution and ordinance are passed as in the law provided, authority exists to bring an action condemning property for a public street under the right of eminent domain, without proof

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of the regularity of the proceedings for levying assessments thereon.—City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

[e] A natural person may not maintain proceedings to condemn lands for railroad purposes unless he is in charge of a public use, and intends to perform a public service, and may not maintain the proceedings merely in order that he may transfer the rights to be acquired to another.—Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083, 59 L. R. A. 581.

[f] Under act of April 9, 1862 (Stats. 1862, pp. 152, 153, 158), sections 4, 7, 17, and statute 1861, page 358, chapter 352, section 16, the board of levee commissioners of the city of Sacramento held to have no authority to condemn land for a levee outside the city.—McCarty v. Southern Pac. Co. (Cal. Sup.), 82 Pac. 615.

[g] In condemnation proceedings by a railroad to condemn a right of way along a highway, held, that the owner of the land could not object on the ground that another corporation had not conveyed to the railroad a franchise to build a railroad along the highway. Civil Code, sec. 494.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 87 Pac. 27.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 808-810; 18 Cent. Dig., cols. 1425-1430, §§ 457-460.

§ 88. —— Conditions Precedent in General.

[a] Under acts of 1868, page 283, section 6, requiring that, on ascertainment of the damages, upon condemnation of land for road purposes, the trustees' warrant be paid by the clerk, "provided there is sufficient funds in the treasury applicable thereto," the party seeking to condemn the land must show that there were such funds in the treasury.—Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634.

[b] Conceding that the streets of a city cannot be used by a railroad company until the right to use the same has been granted by the city as prescribed in code, section 470, it is not necessary that such grant shall first be obtained in order to maintain an action to condemn the rights of adjacent land owners in such streets.—California Southern R. R. Co. v. Kimball, 61 Cal. 90.

[c] Where a ditch company incorporated in T. county seeks to condemn defendant's land, in F. county, and pleads its ownership of ditches, canals, and water in F. county, which ownership defendant's pleadings deny, the issue involves the determination of the ownership of property claimed by plaintiff, and the action cannot be maintained until a copy of its articles of incorporation is filed in F. county, as required by Civil Code, section 299. Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 Pac. 1061.

[d] In an action to condemn a right of way for a public road, it is only necessary, in order to make out a prima facie case, for plaintiff to prove the presentation to the board of supervisors of a regular petition, with a sufficient bond; the record of the board showing the appointment of viewers, the report of the viewers and its approval, the assessment of damages and the setting apart out of the proper fund of the money awarded defendant, his refusal for ten days to accept the same, and the order to commence suit for condemnation.—Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468.

[e] Where a city adopted its engineer's report, recommending in general outline a plan of a water system, and also a resolution directing its attorney to commence condemnation proceedings as soon as the ordinance providing for the system should be signed, and, after suit brought, the ordinance was published, and orders and resolutions were adopted providing for carrying out the proposed plan, it could not be said that the suit was commenced without authority, pursuant to a plan not formally adopted.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

[f] An order by a board of supervisors for the payment out of "the proper fund" of money awarded for land to be taken for a highway, made in statutory proceedings, before the board of supervisors, for the establishment of such road, is sufficient to sustain an action for condemnation thereof, since the particular fund need not be designated.—Sutter County v. McGriff, 130 Cal. 124, 62 Pac. 412.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 812-829; 18 Cent. Dig., cols. 1430-1432, § 461.

§ 89. —— Inability to Agree with Land Owner in General.

[a] Act of 1859 does not give United States any unqualified right to cause the forced sale or to condemn the land, but only a right qualified by the existence of the particular fact recited in the act, to wit, the disagreement between the United States and the owners as to the price. If there be no disagreement as to the price, and if, as defendants contend, the government has contracted to purchase at a sum agreed upon, these proceedings to condemn the land must fail.—Gilmer v. Lime Point, 19 Cal. 47.

[b] The courts are not authorized to condemn lands for railroad purposes, unless it is shown by evidence that the petitioners have endeavored to contract for the purchase of the same, but have been unable to do so.—Contra Costa R. R. Co. v. Moss, 23 Cal. 323.

[c] Proceedings to take private property cannot be instituted unless there was a prior attempt to agree with the owner on a purchase of the premises.—(Cal. 1869) San Francisco etc. Water Co. v. Alameda Water Co., 36 Cal. 639.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 813-821; 18 Cent. Dig., cols. 1433-1441, §§ 462-467.

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§ 90. —— —— Sufficiency of Attempt to Agree.

[a] Under the act of 1861, a person whose lands have been taken for a public road has no right of action against the county for damages, until after a fair and honest attempt on his part to agree upon the amount with the board of supervisors; and proof that he filed a petition for just and reasonable damages with the board, as required by said act, does not tend to show that he has ever made such an attempt at an agreement.—Lincoln v. Colusa County, 28 Cal. 662.

[b] Under the act of March 27, 1876, authorizing the city and county of San Francisco to provide and maintain public waterworks for such city and county, and to condemn and purchase private property for that purpose, and which required the mayor, district attorney, and auditor to enter into negotiations with the owners of any land and water rights, for the purchase of the same, before taking any steps towards the condemnation thereof, where a majority of the commissioners never agreed among themselves upon a price to offer for the lands and water, and there was nothing to show that owners ever offered to sell at any price, or refused to name a price, there was no such negotiation as authorized proceedings to condemn.—Mahoney v. San Francisco Supervisors, 53 Cal. 383.

§ 91. Defenses and Objections.

[a] Where municipality proceeds to enforce its right to condemn land for a public street, the fact that a property owner's land is irregularly assessed does not affect the right of the municipality to condemn the land.—City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

[b] In condemnation proceedings by a railroad, the good faith of the corporators in forming the corporation cannot be called in question.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 87 Pac. 27.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 866, 867; 18 Cent. Dig., cols. 1441-1446, §§ 468, 469.

§ 92. Jurisdiction.

[a] Unwarranted determination of a proceeding to condemn land for highway purposes without hearing held an error only and not a jurisdictional defect.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

[b] An objection to the jurisdiction of a county court can be taken at any stage of the proceedings in that court.—In re Grove St. in City of Oakland, 61 Cal. 438.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 810-812; 18 Cent. Dig., cols. 1446-1451, §§ 470-472.

§ 93. —— Jurisdiction of Particular Courts.

[a] No authority is vested, by the act of April 22, 1858, for the incorporation of water companies, in the county court or judge to try and determine conflicting adverse claims of rival corporations, or whether the lands or waters were liable to condemnation to the use of the applicant as against another party claiming a prior appropriation for the same purpose.—San Francisco etc. Water Co. v. Alameda Water Co., 36 Cal. 639.

[b] Under Constitution, article 6, section 8, providing that county courts shall have jurisdiction of all special cases and proceedings not otherwise provided for, the act of April 22, 1858, conferring on the county judge of Napa county jurisdiction of proceedings for the condemnation of the waters of certain creeks in said county for the purpose of a public water supply, is unconstitutional; and hence the judge has no jurisdiction of such proceedings.—Spencer Water Co. v. Vallejo, 48 Cal. 70.

[c] Superior court has power to hear and determine rights of city to maintain condemnation proceedings under municipal government act.—Bishop v. Superior Court, 87 Cal. 231, 232, 25 Pac. 435.

§ 94. —— Conflict Between State Courts and United States Courts.

[a] The federal government, in taking private property in California for a fort site, under the act of the legislature of February 14, 1859, providing for relinquishing to the United States lands for sites of lighthouses and other purposes, etc., may properly proceed in the state courts.—Gilmer v. Lime Point, 18 Cal. 229.

§ 94½. Venue in General.

[a] In the absence of any law defining the residence of a corporation, it is not necessary where its principal place of business is, and an action against a corporation to condemn land should be brought in the county where the land lies.—California Southern R. Co. v. Southern Pac. R. Co., 65 Cal. 394, 409, 4 Pac. 344, 346, 388; Thomas v. Placerville Gold Quartz Min. Co., 65 Cal. 600, 4 Pac. 641.

[b] An action to condemn land for a ferry is properly brought in the county in which the land is situated.—Pool v. Simmons, 134 Cal. 621, 66 Pac. 872.

[c] Under section 1243 of the Code of Civil Procedure, a special proceeding for the condemnation of land must be brought and tried in the superior court of the county in which the property is situated, unless transferred by the court to another county, as required or authorized by section 394 of the Code of Civil Procedure. The place of trial cannot be changed to the place of residence of the defendants.—City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 Pac. 1123, 1136.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 834; 18 Cent. Dig., cols. 1451, 1452, §§ 473, 474.

§ 95. Parties.

[a] The state itself, in taking private property for "public use," may make the ap-

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plication itself, or may make it through the agency of others, whether domestic or foreign corporations, or, a fortiori, foreign governments, or a member of the domestic government, or even the federal government itself.—Gilmer v. Lime Point, 18 Cal. 229.

[b] Where the act authorizing proceedings for the condemnation of land for the use of the state directs them to be commenced in the name of the people of the state, and they are commenced in the name of the governor, the lieutenant governor, and secretary of state, the whole proceedings are null. Stanford v. Worn, 27 Cal. 171.

[c] It seems that mortgagee is not necessary party in proceedings for the condemnation of land for street improvement.—Schumacher v. Toberman, 56 Cal. 508.

[d] Misnomer of land owner in proceedings by supervisors under section 2690, Political Code, does not vitiate proceedings.—Monterey County v. Cushing, 83 Cal. 513, 23 Pac. 700.

[e] Proceedings in eminent domain to procure a right of way, which Political Code, section 2690, authorizes the supervisors of the county within which the road is to be located to institute, are properly brought in the name of the county, rather than in the name of the people.—Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700.

[f] Proceedings in eminent domain for a right of way over land of a decedent's estate are properly brought against the executrix, within Code of Civil Procedure, section 1582, providing that actions for the recovery of any property, or the possession thereof, may be maintained by or against executors where the same might have been maintained by or against their testators, as the word "recovery" does not here imply previous possession.—Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700.

[g] Under Political Code, section 2690, providing that in proceedings to acquire a right of way, the board of supervisors shall, by order, direct proceedings in eminent domain against all the land owners who shall not accept the award of damages, an order merely stating, in general terms, that suit be brought against the nonconsenting land owners, is sufficient; and the fact that the order directed suit against a decedent who, after his death, had been before the board, and had refused to accept the award of damages, will not render the suit against his executrix void.—Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700.

[h] It is only in a modified sense that the state is the principal and the plaintiff, in a proceeding to condemn lands, the agent of the state; and the plaintiff in such proceeding is not prevented by the law of agency from questioning the conditions upon which the state authorizes him to act.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[i] Condemnation proceedings to open a private way over land may, under Political Code, section 2692, be maintained in the name of the county.—Lake County v. Allman, 102 Cal. 432, 36 Pac. 767.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 1462-1477, §§ 477-487.

§ 96. —— Substitution on Sale or Transfer of Interest.

[a] The water corporation act does not empower a water company, after commencing proceedings for the taking of private property, to sell and transfer its right to another water company, nor to prosecute proceedings for the taking of private property in the name of another company.—Mahoney v. Spring Valley Waterworks, 52 Cal. 159.

[b] Where a railroad is consolidated with other road pending condemnation proceedings, consolidated company may be substituted as plaintiff.—California Central Ry. Co. v. Hooper, 76 Cal. 410, 411, 18 Pac. 599.

§ 97. —— Substitutions of Representatives on Death of Party.

[a] Proceedings in eminent domain may, on the death of the owner of the land, be continued against the executrix from the stage at which they then stood.—Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700.

§ 98. Process or Notice and Appearance—Necessity.

[a] The proceedings for the condemnation of land for road purposes fall within the class denominated "special cases" in the constitution, and in such proceedings the person whose land is to be taken against his will must have notice on the proceedings will be void.—Curran v. Shattuck, 24 Cal. 427.

[b] If the act authorizing proceedings for the condemnation of land directs a notice to claimants to be published for four weeks, and only twenty-four days elapse from the day of the first publication to the day the defendants are notified to appear, the court acquires no jurisdiction over parties who do not voluntarily appear in the action.—Stanford v. Worn, 27 Cal. 171.

[c] In a proceeding to open a road across private land, the person whose rights are to be affected thereby, against his will, is entitled to notice.—Silva v. Garcia, 65 Cal. 591, 4 Pac. 628.

[d] Condemnation proceedings are not commenced until summons is issued.—Pacific Coast Ry. Co. v. Porter, 74 Cal. 263, 15 Pac. 774.

[e] Where a complaint in a suit to acquire land for highway purposes contained all the averments required by Code of Civil Procedure, section 1244, nonassenting owners who appeared held not entitled to judgment on the pleadings for want of notice.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

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FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 841-844; 18 Cent. Dig., cols. 1479-1483, § 489.

§ 99. —— Notice of Lis Pendens.

[a] Section 409, Code of Civil Procedure, providing for filing of notice of lis pendens applies to condemnation proceedings.—Roach v. Riverside Water Co., 74 Cal. 265, 15 Pac. 776.

§ 100. —— Appearance.

[a] An appearance before the board of one of the persons whose land is about to be taken is a waiver of service of notice upon such person.—Kimball v. Alameda County Supervisors, 46 Cal. 19.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 1493-1495, § 499.

§ 101. Maps, Plans, Surveys, or Locations.

[a] In order to recover compensation for "outside lands" in San Francisco, the claim must be delineated on the "outside land map."—Clark v. City of San Francisco, 53 Cal. 306.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 817; 18 Cent. Dig., cols. 1495-1504, §§ 500-504.

§ 102. Possession and Use Pending Proceedings—Bond or Deposit as Security.

[a] The court allowed an amended bond to be filed after the expiration of thirty days from the rendition of the judgment. Held, that the court exceeded its power, and that the bond was ineffectual.—California S. R. R. Co. v. Southern Pacific R. R. Co., 65 Cal. 293, 4 Pac. 12.

[b] Where, in an action for condemnation of land, judgment is given defendant for the value of certain fences and cattle-guards with a provision that, unless plaintiff elects, in thirty days, to build such fences and cattle-guards, and gives a bond, with sureties, in double the assessed value of the same, defendant may have execution, a bond with but one surety in double the assessed value of such fences and cattle-guards, is insufficient.—California Southern R. Co. v. Southern Pac. R. Co., 65 Cal. 293, 4 Pac. 12.

[c] Approval by the supervisors of a bond accompanying a petition for the laying out of a road is equivalent to a declaration that the sum named in the bond is double the amount of probable cost as required by statute.—Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

[d] Under Political Code, sections 2692 and 2683, requiring the bond in support of a petition for condemnation of a private road to be conditioned to pay to the land owner his necessary costs and disbursements, etc., such a bond for a definite sum, double the probable cost of viewing and laying out the road as recited in the bond, was sufficient, though not containing an unlimited and unconditional promise to pay all disbursements, etc.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied, 72 Pac. 989.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 829; 18 Cent. Dig., cols. 1505-1508, § 506.

§ 103. —— —— Actions on Bonds.

[a] Demand on principal is not prerequisite to suit against sureties on bond given for purpose of taking possession under section 1254, Code of Civil Procedure.—Coburn v. Brooks, 78 Cal. 445, 21 Pac. 2.

§ 104. —— Proceedings to Obtain Possession.

[a] Where, in condemnation proceedings to appropriate lands for public use, an interlocutory order is entered authorizing the person seeking the condemnation to take possession of and use the lands during the pendency of proceedings and until their conclusion, the court has authority, when the circumstances seem to require it, to set such order aside and direct that all proceedings under it be stayed.—Templeton v. Twelfth District Court, 47 Cal. 70.

[b] Under Code of Civil Procedure, section 1294, a district judge at chambers has no power to make an order authorizing a person to take possession of and use property during the pendency of proceedings to condemn land for public use.—Loomis v. Andrews, 49 Cal. 239.

[c] Where, pending the proceedings, possession has been taken without an order authorizing it, possession may be restored on motion to the court in which the proceedings are pending.—Bryan, In re, 65 Cal. 375, 4 Pac. 304.

§ 104½. Pleading—Petition or Complaint.

[a] Under Code of Civil Procedure, section 1244, a complaint in a proceeding to condemn land for highway purposes held not demurrable for failure to specify the manner in which the road was to be constructed.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

[b] To give the court jurisdiction over a petition to condemn land for railroad purposes, under general railroad act of 1861, section 1, an averment that they were unable to contract for the purchase of the land is indispensable.—Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323.

[c] The right of a water company to resort to the judicial proceeding for the condemnation of lands and waters as prescribed in the act for incorporation of water companies (Stats. 1858, p. 218; Stats. 1853, p. 99) only arises after its due incorporation and an unavailing effort, made in good faith on its

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part, to acquire said property by purchase and consent of its proprietors; and a petition for such condemnation must show said facts also that the property sought to be condemned is necessary and proper for the lawful objects and purposes of such incorporation.—San Francisco etc. Water Co. v. Alameda Water Co., 36 Cal. 639.

[d] In proceedings to condemn portion of tract, damage resulting to remainder of tract is not special damage, and need not be specially pleaded.—North Pacific R. R. Co. v. Reynolds, 50 Cal. 90.

[e] Complaint not averring that land has been appropriated for a public use need not aver that it is required for a more necessary public use.—Lake etc. Co. v. Contra Costa etc. Co., 67 Cal. 659, 8 Pac. 501.

[f] In a proceeding to condemn land for the right of way of a railroad, a complaint which states "the general route," giving the termini as National City and "a connection with the Atlantic and Pacific Railroad Company, at or near the thirty-fifth parallel, north latitude, in the state of California," sufficiently complies with Code of Civil Procedure, section 1244.—California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123, 128.

[g] In condemnation proceedings, the value of the land sought to be taken need not be alleged or proved by plaintiff, as for such purposes the value is immaterial.—California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123, 128.

[h] Complaint in proceeding to condemn right of way held to insufficiently describe land sought to be taken.—California Central Ry. Co. v. Hooper, 76 Cal. 413, 414, 18 Pac. 599.

[i] A complaint in a proceeding to condemn land for sewer purposes by a municipal corporation of the fifth or sixth class need not aver to what class of municipal corporations the plaintiff belongs, nor that an effort has been made to agree upon a price, which effort has failed; and a complaint omitting such averments is not subject to general or special demurrer by reason of such omission.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[j] Under Code of Civil Procedure, section 1244, providing that the complaint in condemnation proceedings for a right of way must show the "location, general route, and termini, and must be accompanied with a map thereof," a complaint to condemn land for a sewer already partially built, which states the termini of the whole sewer, need not state the exact spot to which it has been already constructed; and the phrase "along and east of the center line" of a certain avenue sufficiently shows the location of the proposed sewer.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[k] A complaint in an action by a water company to condemn water rights and a strip of land, which alleges that it is necessary to condemn and take the water rights, in order to carry out the purpose of the water company to supply a "farming neighborhood," composed of land riparian to the creek, with water for domestic use and irrigation, but which does not otherwise show whether the "farming neighborhood" is inhabited, not only fails to show that the use for which condemnation is sought is a public use, but shows affirmatively that it is not.—Alisо Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537.

[l] The damage resulting to the plaintiff from the deprivation of the convenience of communication between his land and the center of the city is in the nature of special damage, which must be specially pleaded.—Smith v. Los Angeles etc. Ry. Co., 98 Cal. 210, 33 Pac. 53.

[m] Act of March 6, 1889, section 18, providing that "the complaint [in an action to condemn] may aver that it is necessary for the city to take or damage and condemn the said land, ... without setting forth the proceedings herein provided for," is constitutional.—City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Heffernan v. Superior Court of City and County of San Francisco, 33 Pac. 725.

[n] Condemnation proceedings are sufficient, where the statement in the complaint of the land sought to be taken, together with the name filed, constitute a sufficient description of such land.—Lake County v. Allman, 102 Cal. 432, 36 Pac. 767.

[o] The complaint, in proceedings by an irrigation district, alleged that, in order to properly irrigate the lands in the district, it was necessary to construct a pipe line across defendant's land, which adjoins the district. Held sufficient to show the use a public one, and the taking necessary.—Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484.

[p] A complaint in a proceeding for condemnation of a right of way for a railroad described the land as a strip one hundred feet wide, lying equally on each side of the center line of the road, "where the same is located through" defendant's land, beginning at a point where such center line intersects the northwest boundary of such land, "at or near engineer's station 2218+66, running thence in a general southeasterly direction" for five thousand and ninety feet, "more or less, to where said center line intersects the east boundary" of the defendant's land "at or near engineer's station 2269+56"; containing eleven and seven-tenths acres, more or less. A map of the road was attached, but in neither the map nor the complaint were the points of intersection given by courses and distances, nor were any courses or distances of the line itself shown; and the radii or lengths of the curves were not given. Held, that the description was insufficient, under Code of Civil Procedure, section 1244, subdivision 4, providing that the complaint must show the location, general route, and termini, and must be accompanied by a map, and must contain a description of each piece

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of land sought to be taken, and whether the same includes the whole or only a part of an entire tract.—San Francisco etc. Ry. Co. v. Gould, 122 Cal. 601, 55 Pac. 411.

[q] A complaint by a city showed that the object of the proceeding was to condemn all the estate and interest of defendants in certain land described; alleging the interest to be the fee, subject only to the city's ownership of the exclusive right to the use of all the waters of a river flowing through it. Held, on demurrer, that the complaint sufficiently described the property sought to be condemned.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585.

[r] The right of action by a city to condemn an easement or right of way for an alley is derived from statute, and is given in the interest of the general public. The complaint in such action need not show any previous right of the city to the easement, nor any previous user or servitude.—Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[s] In a condemnation of realty for an alley, a complaint which definitely describes the land, and asserts the purpose to be to acquire an easement or right of way for a public use by the extension of an alley through the land described, is not demurrable on the ground of ambiguity and uncertainty.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[t] In an action by a city to condemn a strip of land for a sewer, the defendant, under the general denial of the necessity to construct the sewer over the proposed line as alleged in the complaint, may give evidence to show that the sewer could as readily be located along a designated street of the city; but if such defense be specifically pleaded in the answer, it is not error to allow the answer to stand as against a demurrer.—Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. 883.

[u] Under Code of Civil Procedure, section 1244, subdivision 4, requiring a complaint in proceedings to condemn land for a railroad right of way to show the "location, general route, and termini" of the road, an allegation that "the location and general route of said road are from some point in the city and county of S. or some point on the Bay of S., or the waters discharging into it, in a general easterly direction to the city of A., and from thence in a general easterly and southerly direction to a point in the vicinity of the city of B," and that "the termini of the road are, respectively, the city and county of S. and the point in the vicinity of B," is a sufficiently definite statement of the location, general route, and termini.—San Francisco etc. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.

[v] Under Code of Civil Procedure, section 1244, prescribing requisites of a complaint for condemnation of land, no statement that the proposed location of a railroad is compatible with the greatest public good and the least private injury is required.—San Francisco etc. Val. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.

[w] The sufficiency of a petition for the laying out of a road was not impaired by its asking the abandonment of an old road as well as the laying out of the new one.—Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

[x] Where a natural person, acting as agent of one in charge of a public use, and who intends to perform a public service, institutes proceedings for condemnation of land, it is necessary that the agency should be alleged.—Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083, 59 L. R. A. 581.

[y] Where the description of the land condemned is aided by a map attached to and made part of the complaint, and which is referred to in the judgment, and a surveyor could, with the description and the map, have no difficulty in definitely locating the road, the description is sufficiently certain.—County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

[z] Complaint alleging that plaintiff required title to land sought to be condemned and to other lands for the purpose of excavating a tunnel, states no cause of action for condemnation of the land.—City of Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. 151.

[aa] Complaint contained the name of defendant as a corporation duly organized and acting under the laws of California, and alleged that plaintiff was constructing a railroad, and "seeks to acquire a right of way, one hundred feet in width, through the lands of the defendant, said right of way being more particularly described as follows: Being a strip of land, one hundred feet in width, located and included between lines on each side of, parallel to, and fifty feet distant from, the center line of location of plaintiff's railroad, as the same is located through the lands of the defendant." Held sufficient under Code of Civil Procedure, section 1244. California Southern R. Co. v. Colton Land etc. Co., 2 Pac. 38.

[bb] A complaint in a proceeding by a county to condemn land for a highway held sufficient within Political Code, sections 2688, 2689, and Code of Civil Procedure, section 1963, subdivisions 15-20.—Mendocino County v. Peters (Cal. App.), 82 Pac. 1122.

[cc] Under Code of Civil Procedure, section 1244, relating to eminent domain, complaint in proceedings to condemn a railroad crossing held sufficient.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

[dd] Under Civil Code, section 291, subdivision 2, a railroad corporation, by describing where one branch is to run, cannot exercise the right to condemn property for different branches.—Boca etc. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 850-859; 18 Cent. Dig., cols. 1510-1537, §§ 509-518.

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§ 105. —— Answer.

[a] An answer in proceedings by the city to condemn a right of way for the opening of a street, setting forth that the action is instituted upon the motion and at the request and for the benefit of a railroad company, goes to the public character of the use and the necessity for its establishment, and may properly be stricken out as insufficient. City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[b] In condemning land for an alley, a mere denial of the city's right to lay out the alley raises no issue of fact.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[c] In condemning realty for an alley, a contention that the city had no right to condemn the land, because one of its trustees signed the petition which was presented to the board, is untenable, where it is not alleged that such trustee's vote was essential to the hearing.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[d] In condemning realty for an alley, an answer alleging that the right of way was sought for the convenience of the adjoining land owners, and not for the public benefit, and that other land could be taken, presents no material issue, since a city in condemning land for an alley need only prove that the taking of the property sought to be condemned was necessary for alley purposes.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

For Authorities From Other States:

See 15 Cyc. 860, 861; 18 Cent. Dig., cols. 1537-1541, §§ 519-521.

§ 106. —— Amendments.

[a] The court has full power to grant leave to amend a petition to condemn land for railroad purposes whenever it shall be of opinion that justice may require it.—Contra Costa R. R. Co. v. Moss, 23 Cal. 323.

For Authorities From Other States:

See 15 Cyc. 859; 18 Cent. Dig., cols. 1541-1545, § 523.

§ 107. —— Issues, Proof and Variance.

[a] To obtain the condemnation of land for railroad purposes, the averment that the company have endeavored to contract for the land, but have been unable to do so, must be proved.—Contra Costa R. Co. v. Moss, 23 Cal. 323.

[b] Court exercises limited and statutory jurisdiction in proceedings for the condemnation of land for public use, and should confine the issues to matters which are material to and directly connected with the judgment sought.—California Pacific R. R. Co. v. Central Pacific R. R. Co., 47 Cal. 549.

[c] In a proceeding to condemn land for railroad purposes, damages resulting to the remainder of the tract not taken, on account of the shape in which it will be left, or of the effect of an embankment built along the railroad track, or from cutting off the front from a county road, so as to injure its sale for building sites, are not special damages, and may be proved without being set up in the answer.—North Pac. R. Co. v. Reynolds, 50 Cal. 90.

[cd] In an action by a city to condemn land as a street, where the plaintiff alleges title to be in defendant, evidence of a dedication by him is inadmissible.—City of San Jose v. Reed, 65 Cal. 241, 3 Pac. 806.

[d] In proceedings to condemn lands for railroad purposes, there being no allegation in the answer that fences and cattle-guards would be necessary to be constructed in case the railway should be built, it is not error to fail to find upon that question.—Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Moran v. Farley, 21 Pac. 549.

[e] It is duty of owner to allege and prove value of land.—San Diego etc. Co. v. Neale, 88 Cal. 55, 25 Pac. 977.

[f] In condemnation proceedings for sewerage of a city or town it is immaterial whether or not it is incorporated, and it is therefore unnecessary to prove its incorporation, although averred in the complaint.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[g] An averment in the complaint that the city tendered a specified sum to the defendant as compensation was unnecessary, and a denial thereof in the answer raised an immaterial issue.—Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[h] In proceedings for the condemnation of land for a public street, the owner must allege and prove damages for improvements, if such damages are claimed.—City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

For Authorities From Other States:

See 15 Cyc. 862, 863; 18 Cent. Dig., cols. 1545-1548, § 524.

§ 108. Hearing and Determination as to Right to Take.

[a] Title to land cannot be tried in proceeding of eminent domain.—Sacramento Val. R. R. Co. v. Moffatt, 7 Cal. 577.

[b] The first order in proceedings for the condemnation of land, under the act of 1859, determines nothing, but involves a right to contest the averments of the pleading which set up a right to condemn the land. The force or use of these averments is not limited to a mere statement of facts authorizing the judge below to give notice.—Gilmer v. Lime Point, 19 Cal. 47.

[c] In condemning land for an alley, an objection that the board of trustees failed to acquire jurisdiction because there was no hearing of the objections cannot be main-

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tained, where defendant had an opportunity and did state his reasons for objecting to the board, though he was afterward excluded from the room, so that the board might pass on the objections privately.—City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287.

[d] A water company furnishing water to inhabitants of a village owned land adjacent to a stream, with a right to a certain amount of its water. In a proceeding by a city to condemn the land for a water supply, the court found that the water company was not devoting the water to any public use when the action was commenced, but that the land was of special value to the company for the preservation of the stream; that the company had a right to a certain amount of water from the stream, but that, because of drought, and a tunnel previously dug through the land by plaintiff, the water had ceased to flow to the point where the company diverted it for its use. Held that the finding that the company was not devoting the water or the land to any public use was in conflict with the other findings, inasmuch as the temporary cessation of the flow of water caused by the construction of the tunnel by plaintiff and by the drought did not deprive the company of its right to use the water.—City of Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. 151.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 863-871; 18 Cent. Dig., cols. 1549-1566, §§ 525-539.

§ 109. —— Evidence as to Right to Take in General.

[a] Want of power to obstruct navigation by a bridge may be considered in condemnation proceedings, so far as affecting the right of condemnation and no further.—California P. R. R. Co. v. Central Pacific R. R. Co., 47 Cal. 553.

[b] A petition alleging that "the council duly passed an ordinance in writing" condemning certain property, and "that it is now necessary to condemn said land for public use," is a sufficient showing of the passage of the ordinance, and of the necessity of taking the land for public use.—City of Los Angeles v. Waldron, 65 Cal. 283, 1 Pac. 883.

[c] Evidence that a witness had surveyed a route fourteen hundred and thirty-two feet shorter than that proposed for a sewer, on a better grade, through lands not thickly settled, was admissible.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[d] An offer of the defendant to prove a shorter and more practicable route than the one sought to be condemned is properly rejected as inadmissible.—County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468.

[e] Under the statute requiring a certain form for the tender of money awarded the owner of property sought to be taken for a highway before a condemnation suit can be commenced, the presumption that the official duty has been regularly performed will not dispense with evidence showing a compliance with an order of the board of supervisors awarding damages.—Sutter County v. McGriff, 130 Cal. 124, 62 Pac. 412.

[f] Under Civil Code, section 465, subdivisions 1, 4, 7, giving railroad corporations power to select the most advantageous routes, to lay out their routes, and to purchase land, etc., as may be required, the necessity of a right of way through private property is conclusively established by the existence of the public use and the fact that the location has in fact been made through the property.—San Francisco etc. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.

[g] In an action by a county to condemn land for a road, the introduction of a petition to the supervisors for the laying out of the road, with a bond for the costs and expenses of viewing and surveying, accompanying the same; the record of the appointment of viewers; their report, and its approval by the board, and the assessment of damages; the order of the board that the damages assessed and awarded be set apart in the treasury out of the proper fund; and proof that the same was set apart more than ten days prior to the commencement of the action, but had not been accepted—made a prima facie case for plaintiff.—Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

[h] In condemnation proceedings by a railroad evidence considered, and held sufficient to show the use a public one.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 87 Pac. 27.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 868-871; 18 Cent. Dig., cols. 1555-1560, §§ 529-534.

§ 110. —— Burden of Proof.

[a] Since the state has the general power to take private property for "public use," in any particular case, it devolves upon one objecting to such taking to show that it is an exception to the general power.—Gilmer v. Lime Point, 18 Cal. 229.

[b] Before land can be taken for a public use it must appear that the taking is necessary for such use, and such necessity is a question of fact to be determined by the court or jury, in view of all the evidence in the case, the burden of proof being upon the corporation seeking the condemnation, to show that the land is reasonably required for the purpose of effecting the object or carrying on the business for which the corporation was organized.—Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

[c] Under Code of Civil Procedure, sections 1238, 1241, held, that in condemnation proceedings by a railroad the burden is on the corporation to show the use a public one.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 87 Pac. 27.

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§ 111. —— Priority Between Conflicting Proceedings.

[a] If two corporations each start proceedings against same person for the condemnation of the same land, and neither becomes a party to the action brought by the other, the land will belong to the one over whose proceedings the court first acquired jurisdiction.—Lake Merced Water Co. v. Cowles, 31 Cal. 215.

§ 111½. —— Questions for Jury.

[a] Whether workshops for repairing and safely keeping the cars and locomotives of a railroad are necessary appendages to a railroad, and whether land sought to be condemned as a site for such workshops is really needed for that purpose, are questions of fact on which issues may be joined, to be decided at the trial.—Southern Pac. R. R. Co. v. Raymond, 53 Cal. 223.

[b] Question as to whether crossing one railroad by another in a certain manner is compatible "with the greatest possible public benefit and least private injury" is one of fact, determinable by reference to the proven circumstances in each case.—California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123-128.

[c] In proceedings to condemn private property for a sewer, the proposed sewer ran parallel to and ninety-five feet from a street. This street was paved with asphalt, and the evidence showed that it would be more convenient and less expensive to the property owners to have the sewer constructed as proposed, rather than in the street, and that the street would be materially damaged in having the pavement torn up. Held, under Code of Civil Procedure, section 1242, providing that, where land is taken for public use, such use must be located where most beneficial to the public and least injurious to the citizens, error to direct a verdict for defendant on the question of the necessity for the construction, as being a question of fact for the jury.—City of Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. 883.

§ 112. —— Verdict.

[a] Where, in proceedings to condemn property for a public use, the question whether the taking of the same is necessary for such use is submitted to a jury, and the jury find on the issue, the court has no power to disregard the finding of the jury and make findings of its own.—Wilmington Canal etc. Co. v. Dominguez, 50 Cal. 505.

[b] In a proceeding to condemn land for a ditch or canal, in which the proposed public use is alleged by defendant to be a mere pretense, defendant is entitled to a special finding of the jury upon that issue, there being no general verdict.—Cummings v. Peters, 56 Cal. 593.

[c] After the court has submitted the question, "Were the lands described in plaintiff's complaint, and sought to be condemned for the right of way, ... necessary for such right of way?" it is not an abuse of discretion to refuse to recall the jury, and submit an interrogatory requested by defendants as to whether it was necessary for plaintiff to take any of their tract for its right of way. California Cent. Ry. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599.

§ 113. Evidence as to Compensation—Presumptions and Burden of Proof.

[a] If no evidence be introduced upon any issue finding must be against party having burden of proof.—Monterey County v. Cushing, 83 Cal. 510, 23 Pac. 700.

[b] Burden of proving value of property condemned is on defendant.—Monterey County v. Cushing, 83 Cal. 510, 23 Pac. 700.

[c] Burden is on defendant to prove value of land.—San Diego etc. Co. v. Neale, 88 Cal. 55, 25 Pac. 977.

[d] The acts of the state or its agents in charge of a public use in surveying and locating land under express statutory authority, in exercise of the right of eminent domain, are presumed correct and lawful, in the absence of evidence to the contrary; and where it is attempted to show that the location made is unnecessarily injurious to the owners of property affected thereby, the burden of proof is upon them, and the proof ought to be clear and convincing.—Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[e] Where defendant, through whose land a private road was surveyed, refused to accept the compensation awarded, and the case was tried by a jury, he cannot complain of the jury's action in assessing damages on the ground that the evidence is insufficient to justify the verdict, as the burden of proving damages rests on defendant.—Los Angeles County v. Reyes, 32 Pac. 233.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 898; 18 Cent. Dig., cols. 1566, 1567, § 540.

§ 114. —— Admissibility in General.

[a] In a proceeding by the government to condemn land, evidence of a contract between the owner and the government for the sale of the land, and evidence of the value of the land to the government as a fort, is properly refused.—Gilmer v. Lime Point, 19 Cal. 47.

[b] Evidence of dedication of a street sought to be condemned cannot be considered as affecting compensation.—City of San Jose v. Freyschlag, 56 Cal. 8.

[c] In proceedings by private individuals to condemn land for railway purposes, it is not error to refuse to permit defendant to prove that the general line of plaintiff's projected road was first located by a railroad corporation, and that some of it on a different portion of the line was actually built.—Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Moran v. Farley, 21 Pac. 549.

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[d] The general rule is that in actions to condemn land for public use no damages can be allowed for injury to business caused merely by the improvement, and not by the taking of the property, and where a general offer is made to show damage to business on the line of the proposed widening of a street, without specifying the nature of the alleged damages, or whether the business was done on the land taken or on the land damaged, for which compensation was awarded by the jury, it does not appear that the proffered testimony is competent, and no error appears in its exclusion.—City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720.

[e] The supervisors who acted upon the petition are competent as witnesses to testify as to the damages sustained by the defendant, and their testimony cannot be rejected upon the ground that their records are the best evidence of their determination as to damages.—County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468.

[f] Where there is no suggestion or claim that any of the signers to the petition were minors, proof of their age or ages before the board of supervisors is not required, and testimony as to whether the board took or heard any evidence as to their age or ages is properly excluded.—County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468.

[g] In proceedings by a county to condemn land for widening a highway, the admission in evidence of the auditor's warrant in favor of the owner of the land for the damages awarded was admissible, under Code of Civil Procedure, section 1870, subdivision 1.—Mendocino County v. Peters (Cal. App.), 82 Pac. 1122.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 899; 18 Cent. Dig., cols. 1567-1572, § 540½.

§ 115. —— Value of Property.

[a] Witnesses having knowledge of surroundings and of values may testify as to values though they are not experts.—San Diego L. & T. Co. v. Neale, 78 Cal. 76-79, 20 Pac. 372.

[b] Bona fide offers made for purchase of land are admissible to prove value of land on issue of damages.—Muller v. Southern Pacific etc. Ry. Co., 83 Cal. 243, 23 Pac. 265.

[c] In condemnation proceedings it is error, under Code of Civil Procedure, section 1249, making the value of the land at the date of the summons the measure of damages, to permit a witness to answer as to the present value.—San Jose etc. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522.

[d] Value of land cannot be proved by tax assessment list signed by defendant.—San Jose etc. R. R. v. Mayne, 83 Cal. 570, 23 Pac. 522.

[e] Witnesses should not be allowed to give their opinions as to the value of the property for a particular purpose, but should state its market value in view of any purpose to which it is adapted.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1572-1574, § 541.

§ 116. —— Expert Testimony.

[a] Value may be ascertained from expert evidence based on purposes for which land is suitable though never used for such purposes.—San Diego L. & T. Co. v. Neale, 78 Cal. 68, 69, 20 Pac. 372.

[b] Expert opinion of market value should be based on existing business wants of community or such as may be reasonably expected in immediate future.—San Diego etc. Co. v. Neale, 88 Cal. 62, 25 Pac. 977.

[c] Experts should support their estimates by description of property, giving location, surroundings and advantages for particular uses.—San Diego etc. Co. v. Neale, 88 Cal. 62, 25 Pac. 977.

[d] Widest latitude should be allowed on cross-examination of expert testifying as to value.—San Diego etc. Co. v. Neale, 88 Cal. 62, 25 Pac. 977.

§ 117. —— Damages.

[a] In an action by a city to condemn land for a street, and to determine the damages to the land owners, evidence that the assessment of other property for the expense of the improvement was irregular is inadmissible.—City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Heffernan v. Superior Court of City and County of San Francisco, 33 Pac. 725.

[b] Under Code of Civil Procedure, section 1248, subdivision 2, evidence of damages to defendants' land not taken by the construction of plaintiff's railroad across a street on which such land fronted held admissible. Southern Pac. R. Co. v. Hart (Cal. App.), 84 Pac. 218.

[c] In proceedings by a railroad to condemn a right of way along a highway over defendant's land, it was proper to exclude, on the question of defendant's damages, evidence as to the condition in which the highway was left by plaintiff grading at points other than that along defendant's line.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 87 Pac. 27.

[d] In condemnation proceedings by a railroad, held, that there was no prejudicial error in admitting the testimony of a witness in other condemnation proceedings.—Madera Ry. Co. v. Raymond Granite Co. (Cal. App.), 87 Pac. 27.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1574-1578, § 542.

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§ 118. —— Weight and Sufficiency of Evidence.

[a] In proceedings before railroad commissioners to settle land damages, possession is evidence of title.—Sacramento Val. R. Co. v. Moffatt, 7 Cal. 577.

FOR AUTHORITIES FROM OTHER STATES:
See Cent. Dig., cols. 1580-1582, § 544.

§ 119. Mode of Assessment of Compensation.

[a] For fixing the compensation for private property taken for public use, any fair and equitable mode may be provided whether it involves a trial by jury or not.—People v. Blake, 19 Cal. 579.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 872; 18 Cent. Dig., cols. 1582-1601, §§ 545-551.

§ 120. —— Scope of Inquiry and Questions to be Determined in Fixing Compensation.

[a] Where land is taken for a railroad, the commissioners, under the statute, are not required to pass on questions of title, or to apportion the amount of damages among several claimants of the property taken. Spring Valley Waterworks v. City of San Francisco, 22 Cal. 434.

[b] Commissioners appointed to appraise land to be taken for the use of a railroad company have no power to pass upon any question of title, or to make any apportionment of the money assessed for the value among the owners.—San Francisco etc. R. R. Co. v. Mahoney, 29 Cal. 112.

[c] Evidence, in proceedings to condemn land for a sewer, that the sewer farm to which the sewer was to extend would become a nuisance, was inadmissible, as involving a question not in this proceeding.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

§ 121. Assessment by Jury—Conduct of Proceedings, View, and Questions for Jury.

[a] An absent co-owner of land sought to be condemned for highway purposes represented in the proceedings by his co-owner held to have acquiesced in the court's action in refusing to accompany the jury during a view.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

[b] Section 1248, Code of Civil Procedure, does not apply to proceedings before supervisors; they are regulated by Political Code. Monterey County v. Cushing, 83 Cal. 514, 23 Pac. 700.

[c] Damages to be awarded are to be estimated by jury.—Colusa County v. Hudson, 85 Cal. 637, 24 Pac. 791.

[d] On proceedings to condemn a right of way for a public highway, where the owner of the land claims damages for the additional fencing required, it is question for the jury whether the land is worth fencing for any use to which it may be put.—Colusa County v. Hudsoen, 85 Cal. 633, 24 Pac. 791.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 872-882; 18 Cent. Dig., cols. 1601-1647, §§ 552-573.

§ 122. —— Instructions.

[a] It was proper for the court to instruct the jury that they were to estimate the value of the lease at the time when the track complained of was first completed and operated, and that the market value of the lease was not its value in use to the plaintiff for a particular purpose, but only its fair market value.—Kishlar v. Southern Pacific R. R. Co., 134 Cal. 636, 66 Pac. 848.

[b] An instruction that the jury, in estimating damages to land taken, "are permitted to exercise, in weighing the evidence, their individual judgment as to values on subjects within their knowledge which they have acquired through experience and observation." was not erroneous.—Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040.

[c] In proceedings to condemn land for a railroad right of way, evidence held to justify an instruction requiring the jury to determine the value of the property taken and the damage to property not taken.—Southern Pac. R. Co. v. Hart (Cal. App.), 84 Pac. 218.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 902, 903; 18 Cent. Dig., cols. 1621-1636, §§ 562-567.

§ 123. —— Verdict.

[a] Verdict of jury is conclusive of value of property taken.—California etc. Co. v. Southern Pacific R. R., 67 Cal. 59, 7 Pac. 123.

[b] Fact that amount of damages awarded by jury may sometimes be unjust will not affect conclusiveness of verdict.—Colusa County v. Hudson, 85 Cal. 637, 24 Pac. 791.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 881; 18 Cent. Dig., cols. 1636-1647, §§ 568-573.

§ 124. Assessment by Commissioners.

[a] The provision of the water company act of 1858, directing that the compensation to the owners of the land condemned shall be estimated by commissioners as in the Railroad Act of 1853, instead of a jury, is constitutional.—People v. Blake, 19 Cal. 579.

[b] The same rule prevails whether the question be as to the value of the property taken or as to the extent of the damages which the owner may sustain from the use made of his property. In either case the proceedings, so far as the constitution is con-

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cerned, may be with or without a jury, as the statute directs.—People v. Blake, 19 Cal. 579.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 883-894; 18 Cent. Dig., cols. 1656-1734, §§ 580-620.

§ 125. —— Qualifications.

[a] Where two of the three members of a board of trustees of a reclamation district are owners of different levees required for the purpose of the board, but have no interest in common therein, they are both disqualified to act in proceedings to acquire a levee belonging to either.—Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. 1038.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 885.

§ 126. ——Appointment.

[a] When the proceedings for the condemnation of land are regular it is the duty of the court to appoint commissioners to appraise the same, regardless of the question as to whether the purchaser will acquire a good title.—Lake Merced Water Co. v. Cowles, 31 Cal. 215.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 883, 18 Cent. Dig., cols. 1661-1668, § 582.

§ 127. —— Compelling Appointment by Mandamus.

[a] If county judge refuses to appoint commissioners to appraise land in proceedings to condemn the same a writ of mandate will be issued compelling him to do so.—Lake Merced Water Co. v. Cowles, 31 Cal. 215.

§ 128. —— Conduct of Proceedings, and View.

[a] When lands are taken for the use of a water company under the act of 1858, the commissioners make their view of the premises before hearing the evidence.—Spring Valley Waterworks v. City of San Francisco, 22 Cal. 434.

[b] The commissioners appointed by the court to assess lands condemned for railroad purposes are not bound by the testimony of witnesses, but are not only allowed, but required, to view the premises and found their awards upon their own judgment, as well as that of the witnesses.—Western Pac. R. Co. v. Reed, 35 Cal. 621.

[c] Commissioners appointed to assess the damage for taking land for public uses must hear the evidence offered by the parties, and in doing so must be governed by the same rules by which the admission and exclusion of evidence in other cases is regulated.—Central Pacific R. R. Co. v. Pearson, 35 Cal. 247.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 888; 18 Cent. Dig., cols. 1670-1680, §§ 585-589.

§ 129. —— Report and Findings or Award.

[a] A party, after procuring an order for the condemnation of property to public use, cannot lay by for four years without complying at all with those requirements of the proceeding which are of service to the owner, and then, without notice, give effect to the previous and initiatory acts through which he deraigns his title.—Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

[b] Commissioners appointed to assess damages for taking land for public uses exercise a special delegated power, and their report should show upon its face that they have acted in the appointed mode.—Central Pacific R. R. Co. v. Pearson, 35 Cal. 247.

[c] Where a statute requires commissioners appointed to assess lands taken for railroad purposes to "set forth their proceedings," it is error to confirm a report which fails to show that they met at the time and place ordered, and were duly sworn.—(Cal. 1868) Central Pac. R. R. Co. v. Pearson, 35 Cal. 247.

[d] If the report of commissioners in proceedings to assess damages for lands taken for railroad purposes does not show fully what their proceedings were, it should be set aside or sent back to them for amendment.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[e] A bill of exceptions to the report of the commissioners in proceedings to assess damages for lands taken for railroad purposes, though signed by the commissioners after the trial, should be considered by the court a part of the report, as an amendment thereto.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[f] The court should compel the commissioners in proceedings to assess damages for lands taken for railroad purposes to amend their report where it is not such as the statute and the nature of their power demand.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[g] Under act of January 31, 1870, authorizing the opening of streets in Oakland, it is the duty of the commissioners to report the damages suffered by the owner of each specific parcel of land affected by the work, including the value of the land taken for the street.—Jacobus v. Council of City of Oakland, 42 Cal. 21.

[h] Where commissioners are appointed to assess compensation for the taking of private property for public uses, and it is claimed that the commissioners have not assessed "compensation for each piece of land taken, and for each source of damage, separately," an objection to the action of the commissioners on that ground must be taken before the commissioners themselves, to afford them

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an opportunity to obviate the objection; and, if they refuse, an exception must be noted. If the party fails to make the objection before the commissioners, he cannot move to set aside the report on that ground in the court to which the report of the commissioners is made.—In re Clear Lake Water Co., 48 Cal. 586.

[i] Code of Civil Procedure, section 1248, provides that, in condemnation proceedings, the court, with or without a jury, must ascertain and assess (1) the value of the land, (2) the damage by reason of severance, and (3) the benefit. Held, that these elements of compensation must be separately assessed, and that until such assessment a judgment of condemnation is void.—Butte County v. Boydston, 64 Cal. 110, 29 Pac. 511.

[j] The value of land and property and of all improvements thereon pertaining to the realty is to be taken, but the improvements are not required to be assessed separately from the land, and a finding of total damages without finding the value of the land, is sufficient.—Tehama County v. Bryan, 68 Cal. 57, 8 Pac. 673.

[k] Under Political Code, section 2690, declaring that in an action to condemn land for a public road no informality in the proceedings of the board of supervisors shall vitiate the suit, but the order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof, failure of the viewers to report as to the cost of the road upon the route proposed in the petition, as required by Political Code, section 2686, and defects in the form of the bond presented with the petition, the form of the clerk's notice to land owners, the form of the viewers' report, or the manner in which they performed their duty, are not defenses to an action to condemn land for a public road; the decision of the supervisors as to the sufficiency and regularity of the preliminary proceedings being a final judgment, not subject to collateral attack.—Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 890-893; 18 Cent. Dig., cols. 1681-1709, §§ 592-604.

§ 130. —— Objections and Exceptions.

[a] Objection that commissioners have not assessed items of damage separately must be made to them and exception taken.—Matter of Clear Lake W. Co., 48 Cal. 586.

[b] Where, in an action by a county to condemn real property for a highway, the county shows the appointment of viewers, their report in proper form, and its approval, the burden of proof is on the defendant to show that the viewers did not take the required oath for the faithful discharge of their duties, and that for that reason the proceedings were invalid.—Sutter County v. McGriff, 130 Cal. 124, 62 Pac, 412.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1696-1700, § 601.

§ 131. —— Setting Aside Report or Award.

[a] The rule that a verdict will not be set aside as contrary to evidence, where there is substantial conflict in the evidence, applies to the reports of commissioners assessing damages and benefits resulting from the widening of a street.—Appeal of Piper, 32 Cal. 530.

[b] The provisions of the practice act in relation to new trials have no application to a motion to set aside the report of commissioners to assess damages for land condemned for railroad purposes, the statute under which such proceedings are taken neither in terms nor by necessary implication making such provisions applicable thereto.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[c] If "good cause" within the meaning of section 31 of the act of May 20, 1861 (1 Hitt. Laws, art. 855), providing for proceedings to assess damages for lands taken for public uses, exists for setting aside the report of the commissioners in such proceedings, which does not appear on its face, such as fraud or misconduct on the part of the commissioners or others, such cause may be shown by affidavits, or in any other legal mode which the court may prescribe.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[d] The award of commissioners in proceedings to condemn land for railroad purposes, under the act of May 20, 1861, will not be set aside when there is a substantial conflict in the evidence.—Western Pac. R. Co. v. Reed, 35 Cal. 621.

[e] The provisions of the practice act in relation to motions for new trials have no application to a motion to set aside the report of commissioners in proceedings, under act of May 20, 1861, to condemn lands for railroad purposes; and such motion may properly be founded upon the report itself, of which the testimony taken by the commissioners properly forms a part.—Western Pac. R. Co. v. Reed, 35 Cal. 621.

[f] Under Statutes of 1861, page 607, providing that the report of commissioners appointed to assess damages for property taken by railroad companies in condemnation proceedings may be set aside for good cause shown, the court has no jurisdiction to set aside a report as to the owner of an undivided interest in a tract, but the motion, if made, must be to set aside the report as to the whole tract.—Southern Pac. R. Co. v. Wilson, 49 Cal. 396, 397.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 905-917; 18 Cent. Dig., cols. 1709-1724, §§ 605-613.

§ 131½. —— Review of Report.

[a] The review by the court of the report of commissioners appointed to assess damages for taking land for public uses is intended to be had upon the report itself, so far as all matters which should be stated there are concerned, and not upon bills of

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exceptions or statements in the sense of the practice act in relation to new trials.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

§ 132. Dismissal and Nonsuit.

[a] Failure of a city, which seeks to condemn a right of way for a sewer, to prove that its location was most compatible with the greatest public good and least private injury, is not a ground for a nonsuit.—Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

§ 133. Assessment by Court.

[a] In condemnation proceedings, the action of the court in vacating former orders for condemnation of lands of a defaulting defendant, prematurely entered, and inoperative, and entering a final decree, such former orders not purporting to adjudge the rights of any of the other defendants or condemn any of the other lands, is not prejudicial as to such other defendants.—Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766.

§ 134. New Trial.

[a] Code of Civil Procedure, section 1254, provides that if, after the judgment in condemnation proceedings, plaintiff wishes to take possession, it must pay into court the full amount of the judgment; that defendant, upon filing an abandonment of all defenses except as to the amount of damages on a new trial, shall be entitled to receive the amount of the judgment; and that the receipt of such amount shall be held to be an abandonment by defendant of all defenses excepting his claim for greater compensation. Held, that where defendant has filed an abandonment, and received the amount of the judgment, the only issue on a new trial is whether he is entitled to greater compensation; and, if the award is for a smaller amount, plaintiff is not entitled to a judgment against him for the difference.—Los Angeles etc. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859.

[b] In condemnation proceedings by a railroad company, defendant will not be allowed on a second trial to show the comparative value of her property before and after the construction of the railroad, which took place after the first and before the second trial.—Los Angeles etc. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859.

§ 135. Judgment or Award.

[a] Under Code of Civil Procedure, sections 941, 1254, on payment into court of damages awarded for land taken in proceedings to establish a highway, an order letting plaintiff into possession held proper.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

[b] If commissioners, appointed to assess damages and benefits in an application to condemn land for a railroad, assess the cost of fencing separately from the estimate of damage to land not taken, there is no substantial error, although the directions of the statute are not technically complied with; and, in such case, the court may enter judgment for the value of the land taken and the cost of fencing, and the excess of damages over benefits to land not taken, if there are any.—California Pacific R. R. Co. v. Frisbie, 41 Cal. 356.

[c] Under Code of Civil Procedure, section 1254, which provides that at any time after judgment, or pending an appeal, when plaintiff shall have paid into court the amount of the judgment and costs, and such further sum as may be required by the court, the court may authorize plaintiff to take possession of the land, when possession is taken without such order, the court may order it to be restored to defendant.—Neale v. Superior Court of San Diego County, 77 Cal. 28, 18 Pac. 790.

[d] In condemnation proceedings, a finding specifically as to the ownership of all the lands sought to be condemned, and as to all lands about which there is any issue presented, necessarily excludes the idea of any ownership in a defendant not specifically mentioned, and is, in effect, a finding against him.—Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766.

[e] Under Code of Civil Procedure, section 1251, providing that the plaintiff in condemnation proceedings must within thirty days of the final judgment pay the sum of money assessed, the condemnation judgment is not void because payment is made before it is due.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied 72 Pac. 989.

§ 135½. —— Requisites and Entry of Judgment.

[a] In condemnation proceedings, where judgment of condemnation was entered March 11th and filed March 12th, and the final order, entered May 23d, stated that it was as of date March 11th, it will be presumed, if it was competent for the court to make such a nunc pro tunc order, that it did not take effect until after the entry of judgment. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied 72 Pac. 989.

[b] The final order took effect when entered, and not nunc pro tunc, the clause "as of date March 11th" merely identifying the order as supplementing the judgment of that date.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied 72 Pac. 989.

[c] In condemnation proceedings by a municipal corporation in which the damages were paid into court, the owner of the land condemned was not prejudiced by the fact that the judgment was in personam, and did not in form require the payment of damages before appropriation of the land.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied 72 Pac. 989.

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§ 136. —— Conclusiveness and Effect.

[a] Under Statutes of 1889, page 70, providing that streets may be laid out in municipalities, and property condemned therefor, a property owner, refusing to accept from the commissioners the amount awarded her, is bound by the judgment in subsequent condemnation proceedings, though the amount awarded therein is less than the amount of assessment on the land.—City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

[b] Damages to land caused by the seepage of water from a canal, due to faulty construction thereof, were not included in the damages awarded the land owner in proceedings to condemn land for the canal.—Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. 295.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 922-927; 18 Cent. Dig., cols. 1743-1757, §§ 627-629.

§ 137. —— Bond as Requisite.

[a] No bond is required as a condition to a final order for the condemnation of land for highway purposes except in the cases specified in Code of Civil Procedure, section 1248, subdivision 5.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

§ 138. —— Right to Compensation Awarded.

[a] Where, subsequent to a determination by the board of water commissioners of the city of San Francisco that the acquisition of certain waterworks by condemnation proceedings was necessary, and the appointment of appraisers to determine the value thereof, and subsequent to their appraisal, or before the property is taken, the act authorizing such condemnation is repealed, the owner of such property is not entitled to any compensation.—Lamb v. Schottler, 54 Cal. 319.

[b] Defendant is not entitled to compensation deposited with clerk until he abandons all defenses except as to sufficiency of award. Pool v. Butler, 141 Cal. 48, 74 Pac. 444.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 929; 18 Cent. Dig., cols. 1766-1770, § 637.

§ 139. —— Interest on Award or Judgment.

[a] Where a statute authorizing the condemnation of private property for a railway provides that the company shall pay or tender the amount of the award within thirty days after the final confirmation of the report, the owner of land which has been condemned for such purpose is entitled to interest on the amount of the award after the expiration of such thirty days.—Phillips v. Pease, 39 Cal. 582.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 929-933; 18 Cent. Dig., cols. 1770-1779, §§ 638-643.

§ 140. Abandonment or Dismissal of Proceedings.

[a] Where after proceedings have been taken to condemn land for the use of the state, the damages have been assessed, and a decree of condemnation entered, it shall appear that the state has acquired no title by the decree, the court should, on motion of the attorney general, quash all the proceedings, and order the money to be refunded to the state.—Stanford v. Worn, 27 Cal. 171.

[b] Plaintiff recovered a judgment condemning a right of way through defendant's land, but afterward determined to change its line, and filed a petition and made a motion to have the judgment rendered set aside and annulled. The court entered an order denying plaintiff's petition and motion. Held that, although the motion was based upon new matter occurring subsequently to the judgment, there was no statutory provision for such a motion, or for the proceedings which plaintiff sought to institute.—Eureka etc. R. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360.

[c] Plaintiff may abandon condemnation proceedings at any time before possession has been taken without incurring liability to pay awarded damages.—Pool v. Butler, 141 Cal. 50, 52, 54, 74 Pac. 444.

[d] Right to dismiss condemnation proceeding before trial is not precluded by stipulation for judgment containing conditions rendered impossible of performance.—Southern etc. Water Co. v. Cameron, 141 Cal. 286, 287, 74 Pac. 838.

§ 141. Liability to Pay Compensation Awarded.

[a] Government is under no obligation to take property if the terms, when ascertained, are not satisfactory.—Fox v. Western Pac. R. R. Co., 31 Cal. 538-555; Lamb v. Schottler, 54 Cal. 319.

[b] By bringing action to condemn land plaintiff does not bind himself to take the land and pay compensation fixed by court or jury.—Pool v. Butler, 141 Cal. 49, 74 Pac. 444.

§ 142. Appeal—Decisions Reviewable.

[a] The decision of the court in proceedings to condemn land for public use, which determines the merits of the case, is a final judgment rendered in a special proceeding, from which an appeal may be taken.—Sacramento etc. R. Co. v. Harlan, 24 Cal. 334.

[b] An order confirming the report of commissioners appointed to condemn realty for railroad purposes is a final judgment, within Practice Act, section 347, providing for an appeal from a final judgment rendered in a special proceeding in the district court. Phillips v. Pease, 39 Cal. 582.

[c] The award of commissioners appointed to appraise land to be condemned for the benefit of a state university is not a final

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judgment until approved and affirmed by the governor.—People v. Pfeiffer, 59 Cal. 89.

[d] A final order for the condemnation of land, made after an alleged payment of damages awarded therefor, is a special order after a final judgment, from which an appeal may be taken under Code of Civil Procedure, section 939, subdivision 3.—City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 948-950; 18 Cent. Dig., cols. 1807-1816, §§ 660-664.

§ 143. —— Right of Review.

[a] Where a party is permitted, on an ex parte order, to intervene, but is afterward dismissed from the suit on the setting aside of the order, he is not such a party to the action as to be entitled to appeal.—People v. Pfeiffer, 59 Cal. 89.

[b] In condemnation proceedings, defendant does not waive his right to appeal from an order overruling his demurrer by answering and going to trial.—San Francisco etc. Ry. Co. v. Gould, 122 Cal. 601, 55 Pac. 411.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 944-946; 18 Cent. Dig., cols. 1816-1820, § 665.

§ 144. —— Presentation and Reservation in Lower Court of Grounds of Review.

[a] An objection to the jurisdiction of the county court can be taken for the first time on appeal.—Grove St., In re, 61 Cal. 438.

FOR AUTHORITIES FROM OTHER STATES:

See 18 Cent. Dig., cols. 1820-1823, § 666.

§ 145. —— Taking and Perfecting Appeal.

[a] A county brought an action to condemn for a road lands owned by the respective defendants, one of whom appealed from the judgment. Held, that the other defendants were adverse parties, on whom, under Code of Civil Procedure, section 940, notice of appeal should have been served.—Butte County v. Boydstun, 68 Cal. 189, 8 Pac. 835.

[b] Where a defendant whose land, together with that of his codefendants, is condemned, appeals, the latter are "adverse parties," on whom notice of appeal must be served. United States v. Crooks, 116 Cal. 43, 47 Pac. 870.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 951-954; 18 Cent. Dig., cols. 1826-1838, §§ 668-671.

§ 146. —— Record.

[a] In an appeal in condemnation proceedings on the judgment-roll alone, wherein the final order recited the payment of the damage money, such recital was conclusive.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied, 72 Pac. 989.

[b] In an appeal in condemnation proceedings on the judgment-roll alone, a certificate signed by the trial judge, but bearing date subsequent to the notice of appeal and to the stipulation of counsel as to printing the transcript, is not a part of the judgment-roll, and cannot be considered in support of a claim that appellant was given no opportunity to be heard in opposition to the final order, or that the trial judge inadvertently signed the same.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied, 72 Pac. 898.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 954; 18 Cent. Dig., cols. 1839-1842, § 673.

§ 147. —— Review.

[a] Under Code of Civil Procedure, section 1244, subdivision 5, the separation of proceedings to condemn several parcels of land lying in the same county for highway purposes is within the jurisdiction of the court, the exercise of which will not be reviewed in the absence of abuse.—San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

[b] In a proceeding to condemn land for highway purposes, the entry of an order of condemnation without hearing held harmless. San Luis Obispo County v. Simas, 1 Cal. App. 175, 81 Pac. 972.

[c] Where the lowest estimate as to the value of the land was two thousand seven hundred dollars, a verdict for one dollar will be set aside.—City of San Jose v. Reed, 65 Cal. 241, 3 Pac. 806.

[d] Failure to find as to the benefit which would accrue to the portion of lands not taken, in a proceeding to condemn land for a public road, is not prejudicial error.—Tehama County v. Bryan, 68 Cal. 57, 8 Pac. 673.

[e] The admission of evidence as to the benefits to defendant by the location of a railroad on his land, and an instruction thereon, though error, is not prejudicial, where the jury finds that there are no benefits.—San Jose etc. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522.

[f] Where both parties proceed with trial upon assumption that certain facts are in issue they cannot complain on appeal of want of it.—San Diego etc. Co. v. Neale, 88 Cal. 55, 25 Pac. 977.

[g] Although the assessment of the cost of fencing in a proceeding by a railroad to condemn a right of way is made to enforce a duty imposed by law, and not as damages to the land owner for an injury to his land, still it is a duty in which the land owner has a special and substantial interest, and an error committed in the assessment of the cost of the fence is a prejudicial error, of which

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the land owner has the right to complain. Los Angeles etc. Ry. Co. v. Rumpp, 94 Cal. 432, 29 Pac. 872.

[h] Whether a particular region is a "farming neighborhood," and whether the supplying of water to that neighborhood is a "public use," within Code of Civil Procedure, section 1238, providing that eminent domain may be exercised in the following "public uses": canals, ditches, and pipes for supplying "farming neighborhoods with water," are questions of fact for the trial court, and its findings thereon are conclusive, where the evidence upon which they were based was not insufficient to support them.—Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802.

[i] Defendant's motion to strike out the testimony of one of plaintiff's witnesses that "the railroad would prevent any further wash, and it affords a good embankment to protect the balance of the property," was denied. Held, that an instruction that "the compensation to be awarded . . . . must be ascertained without respect to any benefits that would accrue to the remainder of the land from the building of the railroad," was sufficient to remove any prejudice to the defendant from the refusal to strike out.—Los Angeles etc. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859.

[j] Where the court improperly entered a premature judgment condemning the interest of one defendant not appearing, before other defendants had appeared and answered, and properly included the interest of that defendant in the final judgment of condemnation of the interests of all the defendants, it will be presumed, upon appeal of another defendant, that the court made an order vacating the premature judgment, and such judgment must be deemed harmless as to the appellant.—Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766.

[k] Upon appeal in condemnation proceedings awarding a judgment for the value of the land taken and damages as assessed by the jury, mere irregularities or errors of the board not affecting its jurisdiction do not affect the judgment appealed from, and cannot be considered.—Glen County v. Johnston, 129 Cal. 404, 62 Pac. 66.

[l] In a proceeding by a city to condemn private property for the construction of a sewer, an answer outlining a different route for the sewer through the streets of the city, and alleging that such route was better than the proposed one, though such facts could have been shown under a general denial of the necessity to construct the sewer, error in allowing the answer to stand was not prejudicial.—City of Santa Ana v. Gildmacher, 122 Cal. 395, 65 Pac. 883.

[m] In condemnation proceedings the land owner was not prejudiced by the deposit of the amount of damages before the judgment therefor was entered.—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, rehearing denied 72 Pac. 989.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 956-960; 18 Cent. Dig., cols. 1855-1881, §§ 681-686.

§ 148. —— Determination and Disposition of Cause.

[a] The power conferred by Code of Civil Procedure, section 957, is discretionary; and where, after an appeal by the land owner from a judgment of damages in condemnation proceedings, the court allows plaintiff to take possession of the land, and occupy it pending the litigation, as authorized by Code of Civil Procedure, section 1254, on the payment into court of a sum in addition to the judgment, the supreme court, on reversing the judgment and remanding the cause for a new trial as to the amount of damages only, will not put the land owner back into possession unless the circumstances render it just and necessary.—Spring Valley Waterworks v. Drinkhouse, 95 Cal. 220, 30 Pac. 218.

[b] As a final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him, an order for possession, being founded on the decree, must fall with the reversal thereof for inadequacy of the compensation made.—(1900) San Mateo v. Coburn, 130 Cal. 631, rehearing denied (1901) 130 Cal. 631, 63 Pac. 621.

[c] In condemnation proceedings by a city the money awarded to the property owners was actually deposited with the clerk of the court within the proper time, but the clerk, because of their refusal to take it, deposited it with the county treasurer, in accordance with the provisions of Code of Civil Procedure, section 2104. It appears that the money was in the county treasury, but that the property owners would not receive it. Held, that the final judgment of condemnation will not be reversed on the technical point that the money was not actually carried from the treasurer's room to the courtroom. City of Los Angeles v. Pomeroy, 133 Cal. 529, 65 Pac. 1049.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 961-965; 18 Cent. Dig., cols. 1881-1886, § 687.

§ 149. —— Effect of Appeal.

[a] The giving of a bond on an appeal, under Code of Civil Procedure, section 941, from a final order for the condemnation of land, made after an alleged payment of damages therefor, stops all proceedings thereunder till the appeal is determined.—City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477.

[b] Where the plaintiff in condemnation proceedings has recovered judgment, and paid into court the sum assessed as damages, the court has no power to order payment to defendants pending an appeal by them upon other grounds than the insufficiency of the

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damages awarded.—Pool v. Butler, 141 Cal. 46, 74 Pac. 444.

§ 150. —— Review on Certiorari—Nature and Grounds.

[a] Certiorari will not lie to review an action of the board of water commissioners of the city of San Francisco in determining that it was necessary for said city and county to acquire certain waterworks by condemnation proceedings, and appointing appraisers to determine the value thereof, since such determination was not judicial in its nature. Lamb v. Schottler, 54 Cal. 319.

[b] An order of a city council, to whom has been delegated power to appropriate land for public use, declaring that certain land is hereby "condemned, appropriated, acquired, set apart, and taken for public use," is subject to review on certiorari, as such order is the exercise of a function judicial in its nature.—Wulzen v. Board of Supervisors of the City and County of San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; Brickell v. Board of Supervisors of the City and County of San Francisco, 35 Pac. 357.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 969-973; 18 Cent. Dig., cols. 1886-1895, §§ 688, 689.

§ 151. Costs, Fees, and Expenses.

[a] Party seeking to condemn should pay costs.—San Diego etc. Co. v. Neal, 88 Cal. 67, 68, 25 Pac. 977.

[b] The discretionary power conferred upon the court in condemnation proceedings by section 1255 of the Code of Civil Procedure, is limited by section 14 of article I of the constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made." The court has only the power to determine what are proper and improper items of costs in such proceedings, but to disallow such as are improper, as in other cases.—City and County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56.

[c] Under Code of Civil Procedure, section 1251, requiring plaintiff in condemnation proceedings to pay the sum of money assessed within thirty days after final judgment, the costs of court need not be deposited.—City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

[d] Under Code of Civil Procedure, section 1251, requiring plaintiff in condemnation proceedings to pay the sum of money assessed within thirty days after final judgment, the costs of court need not be deposited.—City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127.

§ 152. —— Counsel Fees and Interest.

[a] Counsel fees cannot be allowed on a general judgment for defendant in condemnation proceedings.—Coburn v. Townsend, 103 Cal. 233, 37 Pac. 202; Coburn v. Brooks, 103 Cal. 233, 37 Pac. 202; Coburn v. Josselyn, 103 Cal. 233, 37 Pac. 202.

[b] Under Code of Civil Procedure, sections 1251, 1253, stating as conditions to judgment of condemnation the payment of "the sum of money assessed," interest cannot be allowed on the amount, nor payment of costs required.—San Francisco etc. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473.

IV. REMEDIES OF OWNERS OF PROPERTY.

NATURE AND GROUNDS, § 153.
RIGHT TO RETAKE PROPERTY, § 154.
RECOVERY OF COMPENSATION, § 155.
ACTION FOR DAMAGES, § 156.
RECOVERY OF POSSESSION OF PROPERTY, § 157.
INJUNCTION, § 158.
—— INJUNCTION AFTER AWARD OF COMPENSATION, § 159.
EQUITABLE ACTION TO ANNUL PROCEEDINGS, § 160.
LIMITATIONS AND LACHES, § 161.
PARTIES, § 162.
EVIDENCE, § 163.
TRIAL, § 164.
APPEAL AND ERROR, § 165.

§ 153. Nature and Grounds.

[a] Under Constitution, article 14, section 1, declaring the use of water appropriated for sale or distribution to be a public use, an irrigation company is the agent of the state in the administration of a public use, and owners of land who tacitly acquiesce in the construction of a canal by such a company through their land, while they may have a right to demand and receive compensation for any damage to their lands caused thereby, have no right to abate the canal by action, nor to injure or destroy it, thus jeopardizing the interests of the community dependent on the continuous operation of the canal. Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940.

FOR AUTHORITIES FROM OTHER STATES:

Remedies of owners of property for damages accruing after condemnation: 5 Am. St. Rep. 537, note. See, also, 15 Cyc. 979-995; 18 Cent. Dig., cols. 1910-1919, §§ 694-705.

§ 154. Right to Retake Property.

[a] Private property cannot be taken by a municipal corporation for public use without compensation or provision therefor; and, if none is made, the party may retake the property.—Colton v. Rossi, 9 Cal. 595.

§ 155. Recovery of Compensation.

[a] Where action of county authorities in taking land for a public use is void because compensation did not precede or accompany the taking, a suit against the county for the compensation does not lie.—Johnson v. Alameda County, 14 Cal. 106.

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[b] If compensation has not been had for property taken by statutory condemnation proceedings, it may be recovered in civil action.—Bigelow v. Los Angeles, 85 Cal. 618, 24 Pac. 778.

[c] Where amount of compensation fixed by court is deposited with clerk, court cannot order it paid to defendant who appeals from judgment, until appeal is determined.—Pool v. Butler, 141 Cal. 48, 51, 74 Pac. 444.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 984; 18 Cent. Dig., cols. 1919-1930, §§ 706-716; col. 1961, § 741.

§ 156. Action for Damages.

[a] The award of the road viewers for damages sustained by a person for laying out a road across his land is not conclusive. The applicant may, after the award and tender of the money awarded, commence suit against the county in the district court for his damages.—Grigsby v. Burtnett, 31 Cal. 406.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 985; 18 Cent. Dig., cols. 1944-1955, §§ 725-736; col. 1961, § 741.

§ 157. Recovery of Possession of Property.

[a] The entry of a railroad corporation on land for the purposes of a survey is not a trespass, nor is any disturbance of the soil for corporation purposes, until the time for compensation is past, or the corporation has concluded not to take the land, and then the owner is allowed to maintain an action for the recovery of the land, and for damages he may have sustained by the trespass. Fox v. Western Pac. R. Co., 31 Cal. 538.

[b] Where plaintiff takes possession without paying amount awarded to defendant, latter may have former removed by action but cannot do so on motion unless case comes within provisions of section 1252, Code of Civil Procedure.—San Diego L. & T. Co. v. Neale, 78 Cal. 82, 83, 20 Pac. 372.

[c] Where, when a railroad track was laid so as to encroach on the rights of a street railway company to the use of a street under its franchise, the president of the latter company desisted from a contemplated injunction at the request of the president of the former, and on promise of payment of all resulting damages, such street railway company or its assigns cannot thereafter maintain ejectment to remove such railroad from such street.—Fresno St. R. Co. v. Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773.

FOR AUTHORITIES FROM OTHER STATES:
See 15 Cyc. 986; 18 Cent. Dig., col. 1913, § 697; cols. 1954-1962, §§ 736-740, 742.

§ 158. Injunction.

[a] Where private property is appropriated to public use by the supervisors of a county, without making provisions for paying for the same, such act is illegal, and may be enjoined. McCann v. Sierra County, 7 Cal. 121.

[b] Where an owner of land through which a highway has been laid out commences an action against the county for damages, he is entitled to an injunction enjoining the removal of his fences, or the opening of the highway through his land, pending such action and until final judgment is entered. Grigsby v. Burtnett, 31 Cal. 406.

[c] If facts exist which give the defendant a cause of action in equity to restrain the petitioner from acts injurious to the defendant, they must be asserted in an independent action, and cannot be set up by way of cross-complaint in the proceeding for condemnation.—California P. R. R. Co. v. Central P. R. R. Co., 47 Cal. 549.

[d] When, on an application by one railroad company to condemn the land of another, the defendant, by way of cross-complaint, sets up facts which would be a legal defense to the petition, they do not constitute ground for an injunction to restrain the plaintiff from entering upon or taking possession of the property sought to be condemned. If such facts show that the petitioner had no power to condemn the lands of the defendant, or that the lands are not necessary and proper for the purposes named in the petition, they can be urged on the hearing for the appointment of commissioners, and there is no necessity for an injunction so far as they are concerned.—California Pac. R. Co. v. Central Pac. R. Co., 47 Cal. 549.

[e] The owner of land not part of a public street, but bordering on it, cannot have the laying of a railway track in the street enjoined unless his injury differs in character, and not in degree merely, from that suffered by the public generally.—Crowley v. Davis, 63 Cal. 460.

[f] Where injunction would be useless and unnecessary, it should be refused.—Cohen v. Gray, 70 Cal. 86, 11 Pac. 508.

[g] Court in which proceedings are pending has authority to prevent plaintiff from taking possession until order therefor is made.—Neale v. Superior Court, 77 Cal. 29, 18 Pac. 790.

[h] Taking will not be enjoined until compensation is made where there is no doubt as to defendant's ability to respond in damages.—Bigelow v. Los Angeles, 85 Cal. 618, 24 Pac. 778.

[i] An abutting owner upon a street of a city, whether he owns the fee in the street or has only an easement for its use, may enjoin the city from so changing a natural watercourse as to damage his property by preventing a free access to and use thereof, unless compensation for such damage is first made to, or paid into, court for him.—Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570.

[j] Injunction will lie to restrain the construction of a track of a steam railroad in a street to the damage of an abutter to whom

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no compensation has been offered.—O'Connor v. Southern Pac. R. Co., 122 Cal. 681, 55 Pac. 688.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 987-992; 18 Cent. Dig., cols. 1962-1998, §§ 743-774.

§ 159. —— Injunction After Award of Compensation.

[a] When land has been duly condemned as a public highway, and the amount the owner shall receive as compensation has been duly ascertained, and a warrant for the sum tendered him, which he has refused, a court of equity will not enjoin the road overseer from tearing down the fences and opening the highway.—Creanor v. Nelson, 23 Cal. 464.

§ 160. Equitable Action to Annul Proceeding.

[a] Corporation acquiring right by purchase may sue in equity to annul proceeding of a rival corporation.—San Francisco etc. Co. v. Alameda etc. Co., 36 Cal. 639.

[b] Equity will annul a decree of condemnation unlawfully obtained.—San Francisco etc. Co. v. Alameda etc. Co., 36 Cal. 639.

§ 161. Limitations and Laches.

[a] An action to recover damages for a wrongful entry by a railroad company upon the land of plaintiff, and the construction of its railroad thereupon, without proceedings for condemnation, and without plaintiff's consent, if commenced more than three years after the road was built and operated, is barred by subdivision 2 of section 338 of the Code of Civil Procedure.—Robinson v. Southern California Ry. Co., 129 Cal. 8, 61 Pac. 947.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 997-999; 18 Cent. Dig., cols. 2016-2025, §§ 783-788.

§ 162. Parties.

[a] Owners of separate tracts of land must sue separately to recover damages to their respective tracts caused by the same public improvement.—Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570.

[b] Owners of separate tracts of land which will be permanently injured by a contemplated public improvement may unite in an action to enjoin the improvement.—Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 1001-1003; 18 Cent. Dig., cols. 2025-2031, §§ 789-796.

§ 163. Evidence.

[a] A railroad company was authorized by law to lay a double track with proper and necessary switches and turnouts in the streets of a city. Held, in a suit by the owner of a lot upon the street who had no title to the soil of the street, that the presumption of law was that a switch, turnout and side track laid down by the company were necessary and proper, and that the burden was on the plaintiff to establish an averment to the contrary.—Carson v. Central R. Co., 35 Cal. 325.

[b] On issue as to whether one was estopped from asserting the invalidity of condemnation proceedings for a levee, and that the actual width was not as great as claimed, facts held insufficient to show an estoppel. McCarty v. Southern Pac. Co. (Cal. Sup.), 82 Pac. 615.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 1006-1010; 18 Cent. Dig., cols. 2043-2058, §§ 803-814.

§ 164. Trial.

[a] In ejectment for land occupied by defendant's railroad and depot, the defendant in effect pleaded that it had entered by permission of plaintiffs, and had paid plaintiffs for the right of way over the land, and for the privilege of maintaining a depot, and that thereupon plaintiffs had granted to defendant said right and privilege. The court did not find on this issue, but in effect found that plaintiffs had consented to the erection of the depots, and had recognized the land as defendant's, and had waived error in the location of the premises. Held, that this finding was beyond the issue, and defective in not finding upon the issue presented.—Robinson v. Pittsburg R. Co., 57 Cal. 417.

[b] A statement of facts showing the construction of a steam railroad so that an abutting owner has the use of only thirty-one feet of street between his property and the track, in the absence of which he would have the use of seventy-two feet, sustains a finding that such owner was damaged.—O'Connor v. Southern Pac. R. Co., 122 Cal. 681, 55 Pac. 688.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 1010, 1011; 18 Cent. Dig., cols. 2064-2075, §§ 820-824.

§ 165. Appeal and Error.

[a] Where defendant railroad corporation has been perpetually enjoined from entering upon and constructing its road over private lands, such injunction must be modified so far as it prohibits the exercise of rights subsequently acquired by defendant under right of eminent domain pending its appeal from the decree.—Southern Cal. Ry. Co. v. Southern Pac. R. Co., 43 Pac. 1123.

FOR AUTHORITIES FROM OTHER STATES:

See 15 Cyc. 1015, 1016; 19 Cent. Dig., cols. 2080-2085, §§ 829-833.

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V. TITLE OR RIGHTS ACQUIRED.

NATURE OF ESTATE OR INTEREST ACQUIRED, § 166.
—— OILS AND MINERALS BENEATH SURFACE, § 167.
TIME OF PASSING OF TITLE OR RIGHT, § 168.

§ 166. Nature of Estate or Interest Acquired.

[a] Where lands are in terms condemned or taken for the purposes of a corporation, the prevailing doctrine is that the title does not vest absolutely in the corporation, but only to the extent necessary for its purposes.—People v. Blake, 19 Cal. 579.

[b] The condemnation of lands is but a purchase of them in invitum, and the title acquired is but a quitclaim.—Lake Merced Water Co. v. Cowles, 31 Cal. 215.

[c] The condemnation of land in a street for the use of a railroad company, to enable it to lay and operate its track, gives it no title to the land condemned, nor any interest in it, except a mere easement in common with the general public.—Southern Pacific R. R. Co. v. Reed, 41 Cal. 256.

[d] Where property is taken for public use and an easement is sufficient for the use, the fee will not be deemed to be appropriated unless expressly stated, or by necessary implication.—McCarty v. Southern Pac. Co. (Cal. Sup.), 82 Pac. 615.

[e] Under act of May 13, 1861 (Stats. 1861, p. 358, c. 352) section 16, act of April 9, 1862 (Stats. 1862, pp. 152, 153, c. 158) sections 6, 8, and the proceedings in which land was condemned for levee purposes by the city of Sacramento, held that the city did not acquire the fee to the lands so condemned.—McCarty v. Southern Pac. Co. (Cal. Sup.) 82 Pac. 615.

FOR AUTHORITIES FROM OTHER STATES:
53 C. C. A. 604, note. See, also, 15 Cyc. 1018-1021; 18 Cent. Dig., cols. 2086-2095, §§ 834-840.

§ 167. —— Oils and Minerals Beneath Surface.

[a] A railroad acquires by condemnation proceedings no right to minerals or oils lying beneath the surface.—Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961.

§ 168. Time of Passing of Title or Right.

[a] The "taking" of land by a railroad corporation consists of a series of acts, commencing with the entry for the purpose of location and terminating in the act of payment; and the land is not considered "taken," so as to devest the owner of the title, until this last act is performed.—Fox v. Western Pac. R. Co., 31 Cal. 538.

[b] When the act for condemning land for a public highway requires the money allowed to a land owner for damages to be set apart in the treasury by the supervisors for the owner, the land is not taken for public use until it is so set apart. An order of the supervisors awarding the damages allowed, payable from the current expense fund of the county, is not a taking of the land for public use; and a tender to the land owner of the damages allowed, made after such order, is of no avail.—Murphy v. De Groot, 44 Cal. 51.

[c] Title does not pass to plaintiff until payment of compensation awarded.—Callahan v. Dunn, 78 Cal. 369, 20 Pac. 737.

[d] Title to condemned land does not vest in plaintiffs until final order of condemnation is made and a copy filed with county recorder.—Pool v. Butler, 141 Cal. 50, 74 Pac. 444.

FOR AUTHORITIES FROM OTHER STATES:
See 18 Cent. Dig., cols. 2107-2112, §§ 851, 852.

EMOTIONAL INSANITY.

As affecting responsibility for crime. See Criminal Law, § 12.

EMPLOYER AND EMPLOYEE.

See Master and Servant.

EMPLOYMENT.

Of attorney. See Attorney and Client, § 53.
Of brokers. See Brokers, II.

EMPLOYMENT TAXES.

See Licenses, I.

ENCOURAGING LITIGATION.

See Champerty and Maintenance.

Encouraging illegal litigation as ground for disbarment. See Attorney and Client, § 26.

ENCROACHING WALLS.

See Adjoining Land Owners, §§ 4-7.

ENCROACHMENT ON EXECUTIVE.

By legislature. See Constitutional Law, §§ 69-71.
By courts. See Constitutional Law, §§ 90, 91.

ENCROACHMENT ON JUDICIARY.

By legislative department of state. See Constitutional Law, §§ 53-68.
By executive department of government. See Constitutional Law, § 95.

ENCROACHMENT ON LEGISLATURE.

By courts. See Constitutional Law, §§ 86-89.
By executive department of government. See Constitutional Law, § 94.

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ENCROACHMENTS.

See Obstructions.

As public nuisance. See Nuisance, § 23.
On private roads. See Private Roads, § 6.

ENCUMBRANCES.

See Chattel Mortgages; Liens; Mechanics' Liens; Mortgages; Pledges.

Covenants against. See Covenants, §§ 12, 19, 28.

ENDORSEMENT.

See Indorsement.

ENEMIES.

See War.

ENFORCEMENT.

Actions to enforce rights. See Action and cross-references thereunder.
Of escheats. See Escheat, § 4.
Of exemption right. See Exemption, §§ 21-27.
Of forfeiture. Se Forfeiture, § 3.
Of homestead liability. See Homestead, § 75.
Of lien. See Liens, § 6.
Of pledge. See Pledges, §§ 31-40.
Of vendor's lien. See Vendor and Purchaser, §§ 115-121.

ENGINEER.

Performance of contract subject to approval of engineer. See Contracts, § 219.
Report of engineer of drainage district. See Drains, § 24.

ENGINES.

As fixtures. See Fixtures, §§ 9, 17.

ENGLISH LANGUAGE.

Knowledge of, as necessary qualification of juror. See Jury, § 45.

ENLARGEMENT.

Of drainage or reclamation districts. See Drains,

ENLISTMENT BOUNTY.

Bounty for enlistment in army. See Bounties, § 1.

ENTICING SPOUSE.

Actions for. See Husband and Wife, §§ 190-195.

ENTIRE AND SEVERABLE CONTRACTS.

See Contracts, § 118.

Of sale of personalty. See Sales, § 16.

ENTIRE CONSTRUCTION.

Construction of instructions as a whole. See Criminal Law, § 450.

ENTIRETY OF JURISDICTION.

See Courts, § 25.

ENTITLING AFFIDAVITS.

See Affidavits, § 9.

ENTITLING PLEADINGS.

See Pleading, § 4.

ENTRAPMENT.

Competency of evidence procured by plot to entrap. See Criminal Law, § 137.
In ejectment. See Ejectment, § 86.

ENTRAPMENT OF BURGLAR.

Effect of consent of owner to entrapment of burglar by detectives. See Burglary, § 9.

ENTRIES IN FAMILY BIBLE.

As evidence. See Evidence, § 267.

ENTRY.

Of appearance construed. See Appearance, § 17.
Of submission to arbitration. See Arbitration and Award, § 16.
Of constitutional amendment. See Constitutional Law, § 8.
Of sheriff's sale. See Execution, § 105.
Of consent decree. See Judgment, § 40.
Of judgment in general. See Judgment, VII.
Of default and default judgment. See Judgment, §§ 68-71.
Of waiver of right to trial by jury. See Jury, § 35.
Of challenge to jurors. See Jury, § 106.
Of justice judgment. See Justices of the Peace, § 89.
Foreclosure of mortgage by. See Mortgages, § 158.
Rights acquired by entry on government lands. See Public Lands, § 22.
In government land office. See Public Lands, §§ 105, 106.
Of judgment on report of referee. See Reference, § 23.
Of stipulations relative to proceedings in actions. See Stipulations, § 7.

ENTRY NUNC PRO TUNC.

See cross-references under Nunc Pro Tunc.

EQUAL DIVISION OF COURT.

Affirmance or dismissal of appeal by. See Appeal and Error, §§ 1364, 1365.

EQUAL EQUITIES.

Maxims applied. See Equity, §§ 34-38.

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EQUAL FAULT.

In maritime collision. See Collision, § 3.
Equitable maxims relating to parties in equal fault. See Equity, §§ 47-49.

EQUALITY.

Of punishment for crime. See Criminal Law, § 821.
Of taxation. See Taxation, § 13.

EQUALITY IS EQUITY.

Maxim applied. See Equity, § 33.

EQUALIZATION OF TAXES.

See Taxation, § 96 et seq.

EQUAL KNOWLEDGE OF FACTS.

As affecting misrepresentation. See Fraud, § 22.

EQUAL MEANS OF KNOWLEDGE.

As affecting misrepresentation in procuring deed. See Deeds, § 56.

EQUAL PROTECTION OF LAWS.

Constitutional guaranty of. See Constitutional Law, X.

EQUAL WRONG.

Refusal of relief to parties to illegal contract in pari delicto. See Contracts, § 98.

EQUITABLE ASSIGNMENT.

See Assignments, §§ 32-35.

EQUITABLE CONSTRUCTION.

Of statutes. See Statutes, § 67.

EQUITABLE CONVERSION.

See Conversion.

EQUITABLE DEMANDS.

Right to garnish. See Garnishment, § 6.

EQUITABLE ESTATES.

See Estates, § 1.

Jurisdiction of courts of equity over. See Equity, § 12.
Liability to mechanic's lien. See Mechanics' Liens, § 6.
As subject to partition. See Partition, § 9.

EQUITABLE ESTOPPEL.

See Estoppel, III.

EQUITABLE LIENS.

See Liens, § 2.

Of vendor of land. See Vendor and Purchaser, § 107.

EQUITABLE MORTGAGES.

Nature and essentials. See Mortgages, §§ 12, 13.

EQUITABLE TITLE.

Descent of. See Descent and Distribution, § 9.
As sufficient title to support ejectment suit. See Ejectment, § 51.
Protection of, by injunction. See Injunction, § 38.

EQUITIES AND DEFENSES.

Between parties to assignments. See Assignments, § 58.

EQUITY.

Include administration of equity as a distinct system of jurisprudence, either by separate courts of chancery or by other courts exercising chancery powers; nature, grounds, limits, and subjects of jurisdiction in equity in general; principles and maxims of equity jurisprudence; and procedure peculiar to suits in equity.

I. JURISDICTION, PRINCIPLES AND MAXIMS OF EQUITY, §§ 1-49.
   A. Nature, Grounds, Subjects and Extent of Jurisdiction in General, §§ 1-22.
   B. Remedy at Law and Multiplicity of Suits, §§ 23-29.
   C. Principles and Maxims of Equity, §§ 30-49.

II. LACHES AND STALE DEMANDS, §§ 50-67.

III. PARTIES, §§ 68-75.

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I. JURISDICTION, PRINCIPLES AND MAXIMS OF EQUITY.

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A. NATURE, GROUNDS, SUBJECTS AND EXTENT OF JURISDICTION IN GENERAL.

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§ 1. Constitutional and Statutory Provisions.

[a] Civil Code, section 3423, subdivision 1, which provides that an injunction cannot be granted to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings, is not in violation of the constitutional provision that the superior courts shall have original jurisdiction in all cases in equity. The statute affects the rights of persons, and not the jurisdiction or procedure of courts.—Spreckels v. Hawaiian Commercial etc. Co., 117 Cal. 377, 49 Pac. 353.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 28, 29; 19 Cent. Dig., cols. 17-21, § 2.

§ 2. Nature and Source of Jurisdiction.

[a] Equity jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in the court of chancery of England.—People v. Davidson, 30 Cal. 379.

[b] Courts of equity in this state, while keeping within the rules and principles on which their remedial jurisdiction is founded, will apply their jurisdiction to those new questions which are continually arising.—Dougherty v. Creary, 30 Cal. 290, 86 Am. Dec. 116.

[c] There are no fixed rules limiting the power of equity in dealing with subject matters coming generally within its jurisdiction; and equity has power to deal with novel conditions.—Southern Pacific Co. v. Robinson, 132 Cal. 408, 64 Pac. 572.

FOR AUTHORITIES FROM OTHER STATES:
See, also, 16 Cyc. 23-30; 18 Cent. Dig., col. 17, § 1; col. 25, § 1.

§ 3. —— Abolition of Distinctions Between Law and Equity.

Abolition of distinction between legal and equitable actions. See Action, § 39.

[a] Although the distinction between actions at law and suits in equity has been abolished by the Code so far as regarding form of procedure, still the principles by which the rights of parties are to be determined remain unchanged.—(Cal. 1852) De Witt v. Hays, 2 Cal. 163, 91 Am. Dec. 352; (1853) Smith v. Rowe, 4 Cal. 6.

[c] The distinction between actions at law and suits in equity is abolished by the codes and practice acts.—Cordier v. Schloss, 12 Cal. 143.

[d] Recovery may be had on a complaint which states facts constituting a cause of ac-

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tion either at law or in equity.—Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

[e] Section 307, Code of Civil Procedure, does not abolish distinction between law and equity but makes subsequent provisions applicable to both.—Lux v. Haggin, 69 Cal. 267, 10 Pac. 674.

§ 4. Extent of Equitable Jurisdiction.

[a] A court of equity has jurisdiction in cases of fraud or mistake, provided it has jurisdiction of the subject matter in connection with which the fraud or mistake occurred, but it has no jurisdiction of the subject matter of fraud or mistake connected with legislative or political action, which is beyond judicial control.—County of Riverside v. County of San Bernardino, 134 Cal. 517, 66 Pac. 788.

§ 5. Mistake of Fact.

[a] A court of equity will relieve against mistake, as well as fraud, in a deed or contract in writing.—Wagenblast v. Washburn, 12 Cal. 208.

[b] Equity will not aid the nonexecution of a power; but when a party undertakes to execute a power, and by mistake does it imperfectly, equity will, in favor of creditors and others peculiarly within its protective favor, aid the defective execution.—Beatty v. Clark, 20 Cal. 11.

[c] Equity will correct a mistake in the notation of record of a mortgage as against a subsequent mortgagee with knowledge sufficient to put on inquiry.—Donald v. Beals, 57 Cal. 399.

[d] Equity will decree reconveyance of excess included in deed by mistake.—Sepulveda v. Sepulveda, 77 Cal. 609, 20 Pac. 145.

[e] Equity will not assist one to profit by mistake of another.—Weyant v. Murphy, 78 Cal. 282, 12 Am. St. Rep. 50, 20 Pac. 568.

[ef] When the legal rights of parties have been changed by mistake, equity restores them to their former condition when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.—Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196.

[f] Where equally innocent parties have dealt with one another under a mistake, the burden of loss resulting from the common error will ordinarily be left where the parties themselves have placed it; and a recovery can only be had where in equity and good conscience the defendant should be called upon to refund.—Crocker-Woolworth National Bank of San Francisco v. Nevada Bank of San Francisco, 139 Cal. 564, 96 Am. St. Rep. 169, 73 Pac. 456.

FOR AUTHORITIES FROM OTHER STATES:

Mistake of fact, relief against contracts on account of: 45 Am. Dec. 631, note.

Ignorance of one's own rights as a ground of relief: 55 Am. St. Rep. 494, note. See, also, 16 Cyc. 68-72; 19 Cent. Dig., cols. 42-45, §§ 17-20.

§ 6. —— Diligence of Complainant.

[a] A mistake will not be corrected in partnership accounts when both parties had equal opportunities of knowledge and no fraud appears.—Belt v. Mehen, 2 Cal. 159, 56 Am. Dec. 329.

[b] General rule being that equity will not relieve from consequences of mistake, unless the party seeking relief used due diligence to ascertain the facts, and it being immaterial whether the mistake be the result of ignorance, surprise, imposition, or misplaced confidence, whether an action to cancel warrant on the ground of fraud could be maintained between the original parties, query?—El Dorado County v. Elstner, 18 Cal. 144.

§ 7. —— Placing Parties in Statu Quo.

[a] Where, on redeeming from the sheriff's sale, counterfeit money is paid, and such money is paid and received under a mutual mistake as to its character, it is not a valid redemption, and the party from whose purchase the redemption was thus made is entitled to be placed in statu quo, on returning the money which he received. A court of equity will relieve the defendant from the consequences of his mistake, when it is innocent, and allow him to perfect the redemption on payment of good money and interest. Pownall v. Hall, 45 Cal. 189.

§ 8. Mistakes of Law.

[a] Equity will not relieve a party against mistakes of law.—Smith v. McDougal, 2 Cal. 586.

[b] Plaintiff is not entitled to relief on the ground of mistake, which was of law, and not of fact.—Gross v. Parrott, 16 Cal. 143.

[c] Mistake of law, unless accompanied by special circumstances, is no ground for relief in equity.—Guy v. Du Uprey, 16 Cal. 196, 76 Am. Dec. 518.

[d] Mistake of law, unless accompanied by special circumstances, constitutes no ground for independent relief in equity.—Goodenow v. Ewer, 16 Cal. 461.

[e] One of two tenants in common mortgaged his estate, and subsequently the two conveyed one-third of the whole estate to a third party. The mortgagee foreclosed without making such vendee a party, and became the purchaser at the foreclosure sale for the amount of his debt and costs, under a mistake, supposing that he thereby acquired the vendee's interest in the property. The vendee afterward acquired the remaining interest of the two tenants in common

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The mortgagee applied for a sale of the whole property, on the ground that it was incapable of partition, and asked to be reimbursed out of the proceeds to the extent of one-third of the amount paid, on the ground of his mistake in bidding on the supposition that he acquired a title to one-half instead of only one-third, of the property. Held that, his mistake being one of law, he was not entitled to relief under the particular circumstances.—Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540.

[f] Equity will not, in an independent action, relieve from mistakes of law, unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence.—Boggs v. Fowler, 16 Cal. 559.

[g] A court of equity will not relieve a party from a contract entered into by mistake where the mistake is one purely of law, unattended with misrepresentation, undue influence, misplaced confidence, or other special circumstances of similar character.—Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137.

[h] A contract entered into by parties under a mutual supposition that the law affecting the subject of the contract was in accordance with a previous decision of the supreme court upon a similar state of facts will not be set aside because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the subject.—Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137.

[i] In the absence of fraud or mistake a party cannot escape the consequences of an arrangement voluntarily made by him, because of a misunderstanding of its legal effect.—Parsons v. Fairbanks, 22 Cal. 343.

[j] Fact that person is unlearned and ignorant of legal proceedings affords no ground of relief in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and such person misrepresented the state of facts.—Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146.

[k] Parties will be relieved from a mistake of law in defective execution of a mortgage. Love v. Sierra etc. Co., 32 Cal. 639, 91 Am. Dec. 602.

[l] Parties may be relieved from a mistake of law as well as of fact.—Remington v. Higgins, 54 Cal. 620.

[m] A mere mistake of law on the part of the grantor of a deed of trust as to the nature and effect of the instrument, supposing it to be a mere testamentary disposition of his property remaining within his control, is not ground for relief in equity, especially where it appears that he intended to put the property beyond the reach of an unfavorable judgment.—Kopp v. Gunther, 95 Cal. 63, 30 Pac. 301.

[n] A plain and acknowledged mistake of law is not beyond the reach of equity; and where all parties understood the law alike, all making the same mistake, and where the mistake operates to deprive one of the parties of a valuable right, such as that of redemption, and to give to the other party a material advantage not contemplated by either, a court of equity will adjust their rights as though the law relating thereto was in fact as the parties supposed it to be, if necessary to do justice between them.—Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991.

FOR AUTHORITIES FROM OTHER STATES:

Ignorance of the laws as a ground for relief: 10 Am. Dec. 323, note.

Ignorance of one's own rights, as a ground for relief: 55 Am. St. Rep. 494, note. See, also, 16 Cyc. 73-75; 19 Cent. Dig., cols. 35-42, §§ 15, 16.

§ 9. Fraud.

[a] Fraud in use of instrument is as much ground for interposition of equity as fraud in its creation.—Pierce v. Robinson, 13 Cal. 116.

[b] Whether a party can go into equity to set aside a contract for fraudulent representation as to title, when he has been let into and enjoyed peaceably the possession, and when the vendor has executed a warranty deed and there is no charge of insolvency, query?—Fratt v. Fisk, 17 Cal. 380.

[c] If the title to property, has been acquired through fraud equity will grant relief by undoing what has been done and placing the title where it was before.—Gorham v. Gilson, 28 Cal. 479.

[d] It is the peculiar province of equity to strip off the disguises of fraud.—Perkins v. Center, 35 Cal. 721.

[e] No person can complain in equity of fraudulent practices of another, unless he has been injured by such practices.—Patterson v. Donner, 48 Cal. 369.

[f] Equity will relieve one who has been induced to alter his position to his injury by means of fraud.—Newman v. Smith, 77 Cal. 26, 18 Pac. 791.

[g] Equity will relieve one who was induced to marry another on fraudulent representation that he would convey certain land to her. Peek v. Peek, 77 Cal. 110, 11 Am. St. Rep. 244, 19 Pac. 227.

[h] Two persons may concur in an illegal act without being deemed to be in pari delicto; and, where but one of them is guilty of fraud, he cannot take advantage of his own wrong or avail himself of his own fraud as a defense against the other person.—Victoreno v. Corea, 92 Cal. 69, 28 Pac. 95.

[i] The relations between a husband and wife are confidential, and all transactions be-

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tween them respecting property are subject to the same rules that control a trustee and cestui que trust. If one of the spouses uses the influence which is given by the marriage relation to obtain any advantage over the other spouse it is a fraud against such other, for which equity will grant appropriate relief.—Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957.

[j] That a complaint in equity contains an allegation of fraud does not give the court jurisdiction where it has no jurisdiction of the subject matter.—Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788.

[k] The jurisdiction of equity extends to all cases of fraud save those in which a judgment for damages affords adequate relief.—Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 81-88; 19 Cent. Dig., cols. 46-58, §§ 21-26.

§ 10. Bills Quia Timet.

[a] Nature of bills quia timet stated.—Archbishop v. Shipman, 69 Cal. 589, 11 Pac. 343.

[b] Bills quia timet are applied to prevent wrongs or anticipated mischief, not to redress wrongs done.—Archbishop v. Shipman, 69 Cal. 589, 11 Pac. 343.

[c] Where adequate and complete remedies exist at law or equity for any injuries which may happen in future, quia timet will not lie. Archbishop v. Shipman, 69 Cal. 593, 11 Pac. 343.

FOR AUTHORITIES FROM OTHER STATES:

Bills of peace, nature of and when sustainable: 50 Am. Dec. 449, note.

§ 11. Administration of Estates and Wills.

[a] In England, it is well settled by a long series of decisions that the comprehensive jurisdiction exercised by courts of chancery in setting aside instruments obtained by fraud does not extend to wills, and that those courts have no power to determine the validity of a will of either personal or real property.—State v. McGlynn, 20 Cal. 233, 81 Am Dec. 118.

[b] Courts of chancery in England, in their efforts to defeat fraudulent practices, have, in some cases, deprived parties of the benefit of the fraudulent will by decreeing that such parties should hold the property under their will in trust for the parties who would have been entitled to it if such will had not been probated, but in all such cases they have disclaimed any power to set aside the will or the probate.—State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118.

[c] Equity has no jurisdiction to confirm probate sales.—Hill v. Den, 54 Cal. 21.

[d] A proceeding to set aside administration cannot be said to be a suit in equity, where no summons was served on the administrator, or pleading filed by him.—Costa v. Superior Court of Santa Clara County, 137 Cal. 79, 69 Pac. 840.

FOR AUTHORITIES FROM OTHER STATES:

Estates of decedents, jurisdiction of over: 48 Am. Dec. 744, note. See, also, 16 Cyc. 91-101; 19 Cent. Dig., cols. 89-94, §§ 51-62.

§ 12. Equitable Estates and Interests in General.

[a] A purchaser of realty borrowed the purchase money from B, to whom a deed in form absolute was made by the seller, on agreement that when payment was made of the money loaned B was to convey the property to the purchaser. To discharge the indebtedness the purchaser obtained money from a loan company, on agreement that he would pay B, and receive from him the conveyance, and at the same time executed a mortgage to the loan company to secure the last loan. The loan company assigned an unpaid balance of its demand, with the mortgage, to the plaintiff, who sought a foreclosure, making C a party, to whom the purchaser, being indebted at the time of the purchase, had on account thereof promised to buy a lot for him and erect a building thereon, which was to become C's property. While such realty was in B's name, the purchaser pointed out to C one of the lots as the one on which he intended to erect such building, and C took possession, but there was no accounting between such purchaser and C, nor any price agreed on such lot. Held, that the transaction created no equitable title in C. enforceable in a court of equity, as against such purchaser.—Doe v. Culverwell, 35 Cal. 291.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 88, 89; 19 Cent. Dig., cols. 75-78, §§ 46, 47.

§ 13. —— Enforcing Equitable Rights.

[a] In a proceeding in equity an equitable title is as good as a legal title, either for defense or recovery.—Ortman v. Dixon, 13 Cal. 33.

[b] Equitable title will control the legal title in an equitable proceeding.—Hill v. Den, 54 Cal. 19.

[c] An action to foreclose a lien is always within the jurisdiction of a court of equity.—Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546.

§ 14. Penalties and Forfeitures.

[a] Forfeitures and denouncements are not to be favored by basing them upon language which does not plainly and unmistakably provide for them.—Belcher Con. G. M. Co. v. Deferrari, 62 Cal. 160.

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[b] Forfeitures are not favored in equity.—Silva v. Campbell, 84 Cal. 422, 24 Pac. 316.

For Authorities from Other States:

Relief in equity against forfeitures: 68 Am. Dec. 85, note.

Relief from forfeiture in equity: 86 Am. St. Rep. 48, note. See, also, 16 Cyc. 75-80; 19 Cent. Dig., cols. 101-114, §§ 69-76.

§ 15. —— Relief in General.

[a] Where a note provides that it shall become due at the option of the holder on default in the payment of interest, equity will not relieve from the enforcement of the provision.—Whitcher v. Webb, 44 Cal. 127.

[b] In an action to compel a reconveyance of land on which plaintiff had entered for breach of a condition subsequent, that defendant (plaintiff's grantee) should maintain a lumber yard on the premises conveyed, for five years, the trial court found that the conveyance was made at a time of great excitement in the real estate market, and both plaintiff and defendant believed that large quantities of lumber would be required for building, as represented by plaintiff, but that there was little, if any, demand for lumber when defendant discontinued the lumber yard, and has not been any since. Held, that equity would not relieve defendant from the forfeiture, as the damage to plaintiff by the breach of the condition could not be ascertained, and it was immaterial whether or not the price paid by defendant for the land was its full value at the time of the conveyance.—Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702.

§ 16. —— Enforcement in General.

[a] Equity will never enforce a penalty or forfeiture.—Keller v. Lewis, 53 Cal. 113; McCormick v. Rossi, 70 Cal. 474, 15 Pac. 35.

§ 17. Illegal Contracts, Combinations, and Transactions.

[a] Equity will not relieve against an executed illegal contract.—Miners' Ditch Co. v. Zellerbach, 37 Cal. 544.

[b] A court of equity cannot enforce the performance of an act which is prohibited by law.—Martin v. Zellerbach, 38 Cal. 300, 49 Am. Dec. 365.

[c] Under Civil Code, section 1918, providing that parties may contract in writing for the payment of any rate of interest, equity will not relieve one who has contracted to pay interest largely in excess of the current rates, in the absence of accident, mistake, actual fraud, or undue influence.—Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473.

[d] Defendant sold to plaintiff, his partner, his interest and good will in a manufacturing business for seventeen thousand five hundred dollars. Previous to such sale, plaintiff, unknown to defendant, had entered into an agreement with others in the same business, to effect, and afterwards did effect, a combination in said business, thereby enhancing the value of defendant's interest to twenty-five thousand dollars. Held that, as the combination was illegal, equity would not aid in distributing the profits thereof.—Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662.

For Authorities from Other States:

Relief of particeps criminis in equity: 7 Am. St. Rep. 587, note. See, also, 19 Cent. Dig., cols. 114-129, §§ 77-85.

§ 18. Trivial Matters.

[a] Where a city lot is assessed only two dollars and fifty cents for a street improvement, and sold for nonpayment, and the owner could redeem from the sale by paying three dollars and ninety cents, the maxim, "De minimis non curat lex," applies, and a court of equity will not restrain the execution of a deed pursuant to such sale, if invalid.—Mietzsch v. Berkhout, 35 Pac. 321.

For Authorities from Other States:

See 16 Cyc. 124; 19 Cent. Dig., cols. 142, 143, § 98.

§ 19. Necessity that Wrong be Committed or Threatened.

[a] There is no principle of equity which would make person responsible for a wrong that he has neither done nor threatened to do.—Keyes v. Little York etc. Co., 53 Cal. 724.

§ 20. Retention of Jurisdiction Acquired.

[a] A court of chancery, having jurisdiction for one purpose, will retain it for all purposes and do complete justice as between the parties.—(Cal. 1855) Ord v. McKee, 5 Cal. 515.

[b] A suit for the foreclosure of a mortgage is a subject of equity jurisdiction; and, when the district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises.—Belloc v. Rogers, 9 Cal. 123.

[c] If A, for his own benefit and without the knowledge of B, who paid no consideration, has a conveyance of land made to B by a third person, a court of equity in dealing with the transaction at the instance of creditors of A, or those claiming under him, will treat the land as the property of A, and regard him as the real party in interest.—Quivey v. Baker, 37 Cal. 465.

[d] If all the parties in interest with sufficient pleadings are before a court of equity, equity can and will take hold of the entire case and give effect to their contracts legally made.—Cross v. Zellerbach, 63 Cal. 623, 643.

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[e] In an action to have certain land adjudged to be the property of the estate of a decedent, brought against the widow and others as holders of the legal title, it is not an abuse of discretion for the court, after having determined the issue submitted to it, to refuse to take the entire administration away from the usual probate jurisdiction, and to proceed to settle the estate and close the administration.—Burton v. Burton, 79 Cal. 490, 21 Pac. 847.

[f] It is the duty of a court of equity to settle all matters of account which would affect parties in interest, though items accruing after commencement of suit are involved. Wise v. Walker, 81 Cal. 13, 20 Pac. 81, 22 Pac. 293.

[g] When equity court takes jurisdiction it will afford complete relief.—Havemeyer v. Superior Court, 84 Cal. 395, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

[h] When court of equity has once obtained jurisdiction it will do complete justice by deciding whole case.—Watson v. Sutro, 86 Cal. 528, 24 Pac. 172, 25 Pac. 64.

[i] The rule that when a court of equity has jurisdiction, it will determine in one action all questions that may arise, and will not remit the party to another tribunal, applies only when the party seeking the relief has a standing in the court of equity upon a sufficient bill.—Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 106-117; 19 Cent. Dig., cols. 145-176, §§ 103-118.

§ 21. —— Exercise of Jurisdiction Outside of Territorial Limits.

[a] Court of equity may compel reconveyance of property outside of state when it has jurisdiction of person.—McGee v. Sweeney, 84 Cal. 100, 23 Pac. 1117.

§ 22. —— Denial of Equitable Relief Demanded.

[a] Where a bill was filed by one against his partner and others to take an account of partnership accounts then running, and to establish his rights in certain lands, as to all of which rights he had an effectual remedy at law, except those arising out of the partnership, the allegations as to that standing admitted by defendant's default, the bill should be dismissed as to all but the defendant partner, and as to him proceeded on for an accounting.—Brush v. Maydwell, 14 Cal. 208.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 111; 19 Cent. Dig., cols. 169-176, §§ 116-118.

B. REMEDY AT LAW, AND MULTIPLICITY OF SUITS.

EXISTENCE OF LEGAL REMEDY AS A BAR TO EQUITABLE RELIEF, § 23.
—— NECESSITY THAT LEGAL REMEDY BE ADEQUATE, § 24.
—— EFFECT, IN GENERAL, § 25.
LOSS OF LEGAL REMEDY, § 26.
EXCLUSIVE OR CONCURRENT JURISDICTION, § 27.
MULTIPLICITY OF SUITS, § 28.
WAIVER OF OBJECTIONS, § 29.

§ 23. Existence of Legal Remedy as a Bar to Equitable Relief.

[a] To entitle plaintiff to equitable interposition of court he must show a proper case, and one in which he has no adequate remedy at law.—De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

[b] Legal remedy must be exhausted before equity will grant relief.—Kelley v. Kriess, 68 Cal. 216, 9 Pac. 129.

[c] Rule under which a court of equity declines to interfere until after application for relief has been made to court in which the judgment was rendered has no application when relief has been sought and denied in that court; and the denial of that court to grant that relief gives to a court of equity the same authority to interfere as if other court was powerless to render aid.—Merriman v. Walton, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108.

[d] An action for services by plaintiff as a member of the county board of education, where the amount claimed is not within the jurisdiction of the superior court, presents no equitable issues bringing it within the general jurisdiction of the court "in all cases in equity."—Wright v. Del Norte County, 115 Cal. 464, 47 Pac. 258.

[d] Denial of motion to recall execution in action of claim and delivery gives court of equity same authority to interfere as if court in that action was powerless to render aid.—Eppinger v. Scott, 130 Cal. 275, 62 Pac. 460.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 30, 58, 59; 19 Cent. Dig., cols. 182-243, §§ 121-140; cols. 290-293, §§ 164-166.

§ 24. —— Necessity that Legal Remedy be Adequate.

[a] Before case can be considered beyond reach of equity it must be made to appear that the legal remedy would be adequate and complete.—Hager v. Schindler, 29 Cal. 47; Hills v. Sherwood, 48 Cal. 386.

[b] Equity has jurisdiction of action brought to set aside deed alleged to have been fraudulently executed many years before the commencement of the action, and to charge the grantees therein as trustees of the land conveyed, notwithstanding the complaint alleges that the deed was executed without consideration. In such a case the remedy by ejectment is not adequate.—Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

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FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 41-59; 19 Cent. Dig., cols. 259-290, §§ 151-163.

§ 25. —— Effect in General.

[a] To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim he must show that he is without a remedy at law.—Lupton v. Lupton, 3 Cal. 120.

[b] A bill in chancery, in the nature of a "bill of peace," and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession, claiming title to the land. Ritchie v. Dorland, 6 Cal. 33.

[c] A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a court of chancery. Merrill v. Gorham, 6 Cal. 41.

[d] Where a clerk of the district court improperly refuses to issue execution on a judgment rendered in that court, on the ground that it has been attached at the suit of another party, a bill cannot be sustained to release the attachment and compel him to issue the execution, as the injured party has a remedy at law by an action on the clerk's official bond.—Miller v. Sanderson, 10 Cal. 489.

[e] Equity will not exercise jurisdiction to compel surrender and cancellation of promissory note where the party has a clear remedy at law.—Lewis v. Tobias, 10 Cal. 574.

[f] Equity will not entertain jurisdiction of a suit merely on the ground that the demand may be unconscientious and that injustice may have been done, provided it was competent for the party to have placed the matter before the court in the original action, either upon issue joined or upon motion to set aside the verdict or judgment.—Borland v. Thornton, 12 Cal. 440.

[g] Where adequate damages can be had and are susceptible of an exact admeasurement, as in an action on a bond of indemnity to a sheriff, equity will not interfere.—White v. Fratt, 13 Cal. 521.

[h] Equity will not entertain jurisdiction where there is an adequate remedy at law. Chipman v. Bowman, 14 Cal. 157; Ketchum v. Crippen, 37 Cal. 223.

[i] Upon a bill to set aside a mechanic's lien sale on the ground of fraud, it is not open to the plaintiff to object that the deed insufficiently describes the premises. The remedy on this point is by ejectment.—Gamble v. Voll, 15 Cal. 507.

[j] Equity will not settle disputed boundary, if remedy at law is adequate.—Wetherbee v. Dunne, 36 Cal. 249.

[k] Where party to equitable action has plain and speedy remedy by motion in the action he cannot maintain a separate suit in equity to obtain the desired relief.—Ketchum v. Crippen, 37 Cal. 223.

[l] Where two persons agreed to form a partnership for doing certain work before any contract for doing the work was obtained, and the partnership was never launched, and one of the parties carries on the work alone, the only remedy of the one excluded is an action at law for breach of contract.—(1872) Powell v. Maguire, 43 Cal. 11; (1892) Thomason v. De Greayer, 31 Pac. 567.

[m] Where the complaint in action to compel the defendant to make a conveyance of real estate alleges facts which show that the plaintiff has the legal title already, upon which he may recover in ejectment, the bill contains no equity.—Dalton v. Hamilton, 50 Cal. 422.

[n] The action of an assignee in insolvency in excluding a claim from the statement of claims was approved by the insolvency court. The owner of the claim thus excluded sought by a proceeding in equity the interposition of the superior court. Held, that no ground for such interposition was shown, and that relief should have been sought by appeal.—Julien v. Riley, 61 Cal. 242.

[o] Equity may compel assignee in insolvency to perform his trust and account, notwithstanding remedy under insolvent law. Sanderson v. McIntosh, 65 Cal. 36, 2 Pac. 728.

[p] When defendant has no equity, action will not be dismissed because plaintiff's legal remedy is adequate.—People v. Center, 66 Cal. 552, 5 Pac. 263, 6 Pac. 481.

[q] Party having adequate and speedy remedy at law is not entitled to assistance of equity.—Moulton v. Knapp, 85 Cal. 389, 24 Pac. 803.

[r] Equity will not interfere where there is a plain, speedy and adequate legal remedy. Heller v. Dyerville Mfg. Co., 116 Cal. 135, 47 Pac. 1016.

[s] One who alleges that he has a perfect title to land under a Mexican grant, not barred by the statute of limitations, may maintain a legal action for the possession, and there is no necessity for the interference of a court of equity to enable him to assert his rights.—Ohm v. City and County of San Francisco, 25 Pac. 155.

§ 26. Loss of Legal Remedy.

[a] If the party moving for a new trial in an action at law loses the same through his own blunders and laches, without any fraud, mistake, surprise, or excusable neglect existing, equity will not relieve him.—Boston v. Haynes, 33 Cal. 31.

§ 27. Exclusive or Concurrent Jurisdiction.

[a] Equity has concurrent jurisdiction with courts of law in cases of fraud, accident or

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confidence.—People v. Houghtaling, 7 Cal. 348.

[b] Where an administrator took possession of moneys held by his intestate as an officer in trust for the state, and refused to give them up, a bill in equity lies as in case of a suit against a trustee de son tort, though an action at law would also lie for money had and received.—People v. Houghtaling, 7 Cal. 348.

[c] Jurisdiction of probate court over testamentary and probate matters is not exclusive. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains its jurisdiction. Deck v. Gerke, 12 Cal. 433, 73 Am. Dec. 555.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 33; 19 Cent. Dig., cols. 244-252, §§ 141-145.

§ 28. Multiplicity of Suits.

[a] A court of equity will not permit litigation by piecemeal. The whole subject matter and all the parties should be before it, and their respective claims determined once and forever.—Wilson v. Lassen, 5 Cal. 114.

[b] Where question of boundary affects large number of persons, and by proceeding in equity to determine the controversy a multiplicity of actions at law will be prevented, the additional circumstance that "the boundaries have become confused by lapse of time, accident, or mistake," is all that is required to give a court of equity jurisdiction of the case.—Beatty v. Dixon, 56 Cal. 619.

[c] Where Civil Code, section 322, gives a joint and several action at law against stockholders for their proportionate share of the corporate debt, but provides that the judgment must be several, a suit to enforce contribution by stockholders on a company's note cannot be maintained in equity under the guise of avoiding a multiplicity of suits. Myers v. Sierra Val. Stock etc. Assn., 122 Cal. 669, 55 Pac. 689.

[d] Equity abhors a multiplicity of suits, and will not permit litigation by piecemeal. A court of equity will administer complete relief and adjust the case in all of its branches, and determine the whole controversy, and will give effect to contracts legally made between the parties in interest, who with sufficient pleadings are before it. Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

FOR AUTHORITIES FROM OTHER STATES:

See 6 Cyc. 288; 16 Cyc. 60-64; 19 Cent. Dig., cols. 293-304, §§ 167-171.

§ 29. Waiver of Objections.

[a] Where a bill in equity shows on its face that plaintiff is not entitled to relief, the defect may be taken advantage of in the appellate court, even though no demurrer be filed.—White v. Fratt, 13 Cal. 521.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 127, 128; 19 Cent. Dig., cols. 305-315, §§ 173-176.

C. PRINCIPLES AND MAXIMS OF EQUITY.

EQUITY PERMITS NO RIGHT TO BE WITHOUT A REMEDY, § 30.
EQUITY REGARDS SUBSTANCE RATHER THAN FORM, § 31.
EQUITY REGARDS THAT AS DONE WHICH OUGHT TO HAVE BEEN DONE, § 32.
EQUALITY IS EQUITY, § 33.
WHERE EQUITIES ARE EQUAL, THE FIRST IN TIME MUST PREVAIL, § 34.
WHEN EQUITIES ARE EQUAL THE LAW WILL PREVAIL, § 35.
WHERE EQUITY IS EQUAL THE POSITION OF DEFENDANT IS BETTER, § 36.
WHERE EQUITIES ARE EQUAL THE POSITION OF THE PERSON IN POSSESSION IS THE BETTER, § 37.
WHAT CONSTITUTES EQUAL EQUITIES, § 38.
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EQUITY ACTS IN PERSONAM NOT IN REM, § 41.
EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLEEP ON THEIR RIGHTS, § 42.
HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS, § 43.
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GOLDEN RULE AS PRINCIPLE OF EQUITY, § 45.
DOCTRINE OF RELATION, § 46.
INNOCENT PARTY MOST AT FAULT MUST SUFFER, § 47.
REFUSAL TO AID WRONGDOER, § 48.
—— PARTIES IN PARI DELICTO, § 49.

§ 30. Equity Permits no Right to be Without a Remedy.

[a] A court of equity cannot because of individual hardship reject from its consideration principles and rules upon which the right to relief has always been based, and the enforcement of moral obligations merely is not within the domain of equity or law.—Gard v. Gard, 108 Cal. 19, 40 Pac. 1059.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 133; 19 Cent. Dig., col. 316, § 177.

§ 31. Equity Regards Substance Rather than Form.

[a] Equity looks through the form to the substance.—Chater v. San Francisco Sugar Refining Co., 19 Cal. 237; Miners' Ditch Co. v. Zellerbach, 37 Cal. 608; Johnston v. San Francisco Savings Union, 75 Cal. 142, 16 Pac. 753; Tolman v. Smith, 85 Cal. 288, 24 Pac. 743.

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[e] Law looks at substance of transaction and does not require vain things. Instance.—Herman v. Hecht, 116 Cal. 558, 48 Pac. 611.

[f] Equity looks to intent and purpose rather than form. Instance.—Hall v. Cayot, 141 Cal. 19, 74 Pac. 299.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 134; 19 Cent. Dig., cols. 316, 317, § 178.

§ 32. Equity Regards that as Done Which Ought to have been Done.

[a] Equity looks upon that as done which ought to have been done.—Daggett v. Rankin, 31 Cal. 321.

[b] Equity will treat as done that which the parties agreed to have done, and which ought to have been done.—Remington v. Higgins, 54 Cal. 620.

[c] Equity gives that which ought to have been done force and effect as if done.—Ward v. Waterman, 85 Cal. 506, 24 Pac. 930; Watson v. Sutro, 86 Cal. 527, 24 Pac. 172, 25 Pac. 64; Flickinger v. Shaw, 87 Cal. 133, 22 Am. St. Rep. 234, 25 Pac. 268; Peers v. McLaughlin, 88 Cal. 298, 22 Am. St. Rep. 306, 26 Pac. 119.

[d] Equity looks upon things agreed to be done as actually performed in favor of him to whom and against him from whom the performance is due, and will treat the subject matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. Beverly v. Blackwood, 102 Cal. 83, 36 Pac. 378.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 135; 19 Cent. Dig., cols. 317, 318, § 179.

§ 33. Equality is Equity.

[a] "Equality is equity."—Crowell v. Gilmore, 18 Cal. 370; Chipman v. Morrill, 31 Cal. 135.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 137; 19 Cent. Dig., col. 318, § 180.

§ 34. Where Equities are Equal the First in Time Must Prevail.

[a] The maxim, "Qui prior est tempore, potior est jure," only applies where the equities are equal; otherwise, preference is given to the superior equity.—Salter v. Baker, 54 Cal. 140.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 139; 19 Cent. Dig., cols. 318-320, § 181.

§ 35. When Equities are Equal the Law will Prevail.

[a] When equities are equal the law will prevail.—Maina v. Elliott, 51 Cal. 11; Newhall v. C. P. R. R. Co., 51 Cal. 350.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 138; 19 Cent. Dig., cols. 320-322, § 182.

§ 36. Where Equity is Equal the Position of Defendant is Better.

[a] "Where equity is equal, the position of defendant is better."—State v. Wells, Fargo & Co., 15 Cal. 336.

§ 37. Where Equities are Equal the Position of the Person in Possession is the Better.

[a] In aequali jure melior est conditio possidentis.—Maina v. Elliott, 51 Cal. 11.

§ 38. What Constitutes Equal Equities.

[a] When two persons have been equally innocent, and equally diligent, the equity is equal.—Maina v. Elliott, 51 Cal. 11.

§ 39. Superior Equity must Prevail.

[a] Superior equity prevails.—Salter v. Baker, 54 Cal. 143.

§ 40. Equity Follows the Law.

[a] Equity follows the law.—Billings v. Hall, 7 Cal. 8.

[b] It is well settled that in an action at law for the conversion or nondelivery of personal property agreed to be delivered, interest may be awarded by way of damages for a breach of the contract; and there are even more cogent reasons why equity should adopt the same rule in the settlement of a long-standing account.—Pujol v. McKinlay, 42 Cal. 559.

[c] Equity follows law and rules as the law rules.—Hannan v. McNickle, 82 Cal. 127, 23 Pac. 271.

[d] Equity will not allow that to be done indirectly which law or its policy forbids to be done directly.—Jackson v. Torrence, 83 Cal. 537, 23 Pac. 695.

[e] Equity is bound by the rules of law, and cannot controvert the law, nor set aside the provisions of a trust deed contrary to the will of the trustee, or contrary to his intentions as evidenced by his instructions.—Floyd v. Davis, 98 Cal. 591, 33 Pac. 746.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 137; 19 Cent. Dig., cols. 322, 323, § 183.

§ 41. Equity Acts in Personam not in Rem.

[a] Equity acts on and charges a person by reason of obligation resting on his conscience

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and in regard to duty he owes to others. Watson v. Sutro, 86 Cal. 518, 24 Pac. 172; 25 Pac. 64.

[b] Equity generally operates by its decree in personam; and if the court has jurisdiction of the person of the defendant, the decree may run against him, though it may collaterally act in rem, and affect property out of the jurisdiction of the court.—Peninsular T. & F. Co. v. Pacific Steam W. Co., 123 Cal. 689, 56 Pac. 604.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 134; 19 Cent. Dig., cols. 323, 324, § 148.

§ 42. Equity Aids the Vigilant, not Those Who Sleep on Their Rights.

[a] Equity aids only the vigilant.—Norris v. Denton, 2 Cal. 378.

[b] Equity will not favorably regard one indifferent to ordinary means of information. Peabody v. Phelps, 9 Cal. 229.

[c] Equity aids vigilant applied.—Jones v. Police Commissioners, 141 Cal. 97, 74 Pac. 696.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 140.

§ 43. He Who Comes into Equity must Come with Clean Hands.

[a] He who seeks equity must show that he is not in fault.—Fowler v. Pierce, 2 Cal. 173.

[b] Plaintiffs must come into court of chancery with clean hands; otherwise they are not entitled to relief.—Gunter v. Laffan, 7 Cal. 588.

FOR AUTHORITIES FROM OTHER STATES:

Relief of particeps criminis in equity: 7 Am. St. Rep. 587, note. See, also, 16 Cyc. 144-148; 19 Cent. Dig., cols. 324-329, §§ 185-187.

§ 44. He Who Seeks Equity must do Equity.

[a] "He who seeks equity must do equity." Weber v. City of San Francisco, 1 Cal. 455.

[b] Those who seek equity should offer to do equity.—Bell v. Walsh, 7 Cal. 84; Burham v. San Francisco Fuse Mfg. Co., 76 Cal. 28, 17 Pac. 939.

[d] A plaintiff cannot come into a court of equity, and ask for a decree debarring the defendant from asserting a claim under an instrument executed by the former, without restoring the consideration received by him. Chandler v. Chandler, 55 Cal. 267.

[e] One coming into equity asking for the interference of equity must not only show an equitable right to relief, but he must offer to do equity.—Aurrecoechea v. Sinclair, 60 Cal. 532, 545.

[f] In imposing a condition to do equity court must consider all circumstances in order to arrive at the justice of the case.—Johnston v. San Francisco Savings Union, 75 Cal. 146, 16 Pac. 753.

[g] Who seeks equity must do equity, applied.—Johnston v. San Francisco Savings Union, 75 Cal. 143, 16 Pac. 753; Benson v. Shotwell, 87 Cal. 60, 25 Pac. 249.

[i] The maxim of equity jurisprudence, that he who seeks equity must do equity, only applies when the relief sought by the plaintiff and the right demanded by the defendant grow out of the same transaction, and does not apply where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the action.—Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020.

[j] A plaintiff seeking equity must do equity, and a complaint in equity which does not offer to do equity is demurrable.—Buena Vista Fruit etc. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Peshine v. Ord, 119 Cal. 314, 51 Pac. 536, 63 Pac. 131.

[l] An action to quiet title to land under Code of Civil Procedure, section 738, authorizing an action against any person claiming an interest in land adverse to plaintiff to determine such adverse claim, is not the same as the equity suit to remove a cloud on title, and hence plaintiff was not required in such action, in which a city appeared and alleged a void tax levy as a lien on the land, to pay such taxes as a condition to relief on the principle that he who seeks equity must do equity.—Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944.

[m] Sale under trust deed will not be enjoined when it appears by complainant's own showing that no sale would be made if he should pay what he admits to be due and what he avers his ability and willingness to pay. Meetz v. Mohr, 141 Cal. 673, 75 Pac. 298.

[n] Who seeks equity must do equity. Instance.—Meetz v. Mohr, 141 Cal. 673, 75 Pac. 298.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 140-143; 19 Cent. Dig., cols. 329-336, §§ 188-190.

§ 45. Golden Rule as Principle of Equity.

[a] Golden rule is a principle of equity to be enforced as fully as possible.—Webster v. King, 33 Cal. 352.

§ 46. Doctrine of Relation.

[a] Doctrine of relation is a fiction of the law adopted for purpose of justice and will not be given effect when it would work injustice.—Hawkins v. Harlan, 68 Cal. 238, 9 Pac. 108.

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§ 47. Innocent Party Most at Fault Must Suffer.

[a] When one of two innocent parties must suffer it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed.—Ruiz v. Norton, 4 Cal. 355.

[b] When one of two innocent parties must suffer loss by fraudulent act of third, he who enables such third party to occasion the loss must bear it.—Poorman v. Mills, 39 Cal. 345, 2 Am. Rep. 451.

[c] When one by carelessness and undue confidence has enabled another to obtain money of innocent third person, he must answer for loss.—Bedell v. Herring, 77 Cal. 573 11 Am. St. Rep. 307-n, 20 Pac. 129.

[d] Party affording agent opportunity to defraud principal and aiding him in doing so is party most at fault.—Taft v. Presidio etc. R. R. Co., 84 Cal. 140, 18 Am. St. Rep. 166, 24 Pac. 436.

[e] Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.—Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019.

[f] Innocent party most at fault must suffer, has no application where loss is result of criminal act of third person. It does not then fall on one making act possible.—Walsh v. Hunt, 120 Cal. 52, 53, 52 Pac. 115.

[g] The maxim that where one of two innocent parties must suffer loss, it is to be borne by the one whose fault or neglect occasioned the loss, cannot apply where no loss was occasioned to the other party by such fault or neglect.—Macdonald v. Cool, 134 Cal. 502, 66 Pac. 727.

[h] When one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.—Ballard v. Nye, 69 Pac. 481.

§ 48. Refusal to Aid Wrongdoer.

[a] No man can take advantage of his own wrong.—Turner v. Billagram, 2 Cal. 520.

[b] It may be stated, as a general proposition, that an act which the law prohibits to be done is in so far infirm that a court of equity will not lend its aid to enforce its performance. To grant any relief, the court must first decide that the transaction on which it is claimed was lawful and valid.—Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

[c] Equity will leave parties to fraudulent transactions where it finds them.—Mitchell v. Cline, 84 Cal. 415, 24 Pac. 164.

[d] Equity will not stoop to investigate and enforce agreements relating to division of land among conspirators who have obtained it from government by fraud.—Mitchell v. Cline, 84 Cal. 415, 24 Pac. 164.

§ 49. —— Parties in Pari Delicto.

[a] The members of an association, who have continued for years to pay to their chosen agents money to be expended in a specified way, cannot, after the failure of the scheme, sue their chosen agents in an action for money had and received to recover back the sums so paid. They are in pari delicto, and must share the loss.—Meyer v. Bishop, 129 Cal. 204, 61 Pac. 919.

II. LACHES AND STALE DEMANDS.

NATURE AND ELEMENTS, IN GENERAL, § 50.
DELAY, § 51.
—— WHAT CONSTITUTES UNREASONABLE DELAY, § 52.
—— TIME EXCEPTED FROM COMPUTATION, § 53.
—— EFFECT OF DELAY ALONE, § 54.
—— PREJUDICE TO DEFENDANT OR THIRD PERSONS, § 55.
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—— RECOGNITION OF RIGHT BY ADVERSE PARTY, § 60.
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LACHES OF PLAINTIFF AS CONCLUDING DEFENDANT, § 65.
TO WHAT CLAIMS A BAR, § 66.
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Laches distinguished from abandonment. See Abandonment, § 3.
Lapse of time as defense to disbarment proceeding. See Attorney and Client, § 40.
Laches as bar to foreclosure suit. See Mortgages, § 206.

§ 50. Nature and Elements, in General.

[a] The principal factors in determining the question of laches are acquiescence and lapse of time, but other circumstances are also material, such as that a change in the value or character of the property has taken place. Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

[b] Refusal to grant relief to plaintiff guilty of laches is not based upon presumption of payment, nor upon analogy to the statute of limitations, but upon considerations of public policy, and the difficulty of doing entire justice between the parties in consequence of the unreasonable delay.—Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

FOR AUTHORITIES FROM OTHER STATES:

Laches, when equity will refuse relief because of: 54 Am. Dec. 130, note.
Laches as a bar to relief in equity: 23 Am. St. Rep. 148, note.

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Laches or stale claims, denial of relief because of: 2 Am. St. Rep. 795, note. See, also, 16 Cyc. 150-181; 19 Cent. Dig., cols. 337-470, §§ 191-245.

§ 51. Delay.

[a] Long delay and acquiescence bars right to equitable relief.—Sayre v. Gas Light Co., 69 Cal. 213, 7 Pac. 437, 10 Pac. 408.

[b] The defense of laches differs from that of limitation, in that, in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must have been such lapse of time that it may reasonably be supposed that such prejudice will result if the remedy is allowed.—Cahill v. Superior Court of City and County of San Francisco, 145 Cal. 42, 78 Pac. 467.

[c] Equity will refuse to entertain suit brought after unreasonable delay, regardless of the question whether there has been a plea of the statute of limitations.—Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

[d] Plaintiff who has slept upon his rights so long that notes which were surrendered to him upon settlement and discharge of an express trust have become barred by the statute of limitations, and who intimated no dissatisfaction with the settlement for nearly eight years, and took no steps for rescission of it during that period, has no equity, but his claim is stale, and the court will not enforce it.—Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

§ 52. —— What Constitutes Unreasonable Delay.

[a] A stale and uncertain demand, as to set aside an alleged fraudulent conveyance, nineteen years old, ought not to be allowed in equity.—Dominguez v. Dominguez, 7 Cal. 424.

[b] A delay of less than six months after discovering the fraud held not to be such laches as to deprive one of the right to rescind the contract therefor.—Marston v. Simpson, 54 Cal. 189.

[c] One whose consent to execute a contract has been obtained through fraud or undue influence may rescind the contract, but he must do it promptly on discovering the facts which entitle him to rescind. In this case, where a trust deed by a married woman was executed on May 23, 1884, and the plaintiff, having full knowledge of the facts, did not commence the action to set aside the deed on the ground of undue influence or fraud until October 10, 1885, and the complaint then failed to allege any reason for such delay, held, that the delay was unreasonable, and fatal to the action.—Burke v. Levy, 70 Cal. 250, 11 Pac. 643.

[d] Where, in a suit for an accounting brought by the administrator of a deceased partner, appointed twenty-five years after his decease, against the executors of the surviving partner, also deceased, the complaint shows that the surviving partner continued in the individual possession of all the real and personal property of the partnership, and managed and disposed of the same as he saw fit, for twenty-five years after his partner's decease, and fails to allege that the heirs of plaintiff's decedent had not knowledge of the proceedings of defendant's decedent, or that there was any impediment to their action, a demurrer to the complaint will be sustained on the ground of staleness.—Bell v. Hudson, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791.

[e] Delay of eighteen months held fatal to action to set aside sale at auction.—Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837.

[f] In an action brought in March, 1889, for an accounting, it appeared that in October, 1875, plaintiff, being indebted to a bank, executed a deed of lands by a conveyance absolute in form, but as security for the indebtedness; that in August, 1876, this indebtedness and the conveyances were assigned to defendant; that in September, 1876, plaintiff, being largely indebted to defendant, executed several notes to the amount of his indebtedness, payable to one F, who was also indebted to defendant, and which were by F indorsed to defendant; that at the same time F executed several notes to the amount of his indebtedness, which notes were payable to the plaintiff, and were by him indorsed to defendant; that in November, 1876, the defendant executed to plaintiff and F an instrument designed as a "deed of trust" in which defendant declared that it held all the land assigned it by the bank as security for these notes; that in September, 1879, plaintiff conveyed the lands in fee simple in payment of his indebtedness to defendant, who canceled the debt, and surrendered to him his promissory notes as well as those of F. Held, that plaintiff's right of action, if any, was barred by his laches.—Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

[g] Where plaintiff purchased and caused to be conveyed to the infant son of the defendant a certain lot of land upon a parol agreement, that if the child should die unmarried and without issue before he arrived at age, the defendant, after distribution of the property to him as heir, would, on demand of plaintiff, immediately convey the same to plaintiff, and the child died when a little over five years of age, but no demand was made by plaintiff for a conveyance for about twenty-four years after the death of the child, an action brought one year after such demand, to enforce the trust, is barred by the laches of the plaintiff.—Seculovich v. Morton, 101 Cal. 673, 40 Am. St. Rep. 106, 36 Pac. 387.

[h] Notwithstanding the defendant's absence from the state the plaintiff had a rem-

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edy to invoke the authority of the court, and, upon service of process in the manner prescribed by the statute, could have procured the appointment of the commissioner to convey the property to him.—Seculovich v. Morton, 101 Cal. 673, 40 Am. St. Rep. 106, 36 Pac. 387.

[i] Where a firm, without excuse, delays for more than seven years to take any steps to set aside an order suspending it from membership privileges in a produce exchange, a finding that its rights to equitable relief have been barred by its laches will not be disturbed.—Meherin v. San Francisco Produce Exchange, 117 Cal. 215, 48 Pac. 1074.

[j] An unexplained delay of forty days after the filing of amended articles of incorporation of a water company, before a suit by stockholders to enjoin the issue of additional stock in accordance therewith, is not laches per se.—McDermont v. Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779.

[k] Mere lapse of time short of that prescribed by the statute of limitations held insufficient to convict a plaintiff of laches in the absence of hardship or injustice to the other party.—Cook v. Ceas, 147 Cal. 614, 82 Pac. 370.

[l] Equity will not entertain a cause of action seeking relief from an alleged fraud, where complainants could have informed themselves of the facts by the exercise of reasonable diligence, but delayed bringing suit for over 10 years, and until after the death of all the participants in the transactions.—Burling v. Newlands, 39 Pac. 49.

§ 53. —— Time Excepted from Computation.

[a] The fact that the heirs of a decedent omit for many years to assert their claim to the rents, issues, and profits of property, of which the administrator of the estate had control, will not render them guilty of laches so as to estop them from contesting the final account of the administrator, for which he seeks judicial sanction, or preclude them from seeking to charge him with the rents and profits in such account.—Estate of Misamore, 90 Cal. 169, 27 Pac. 68.

§ 54. —— Effect of Delay Alone.

[a] Where statute of limitations applies to equity suit delay for less period is no bar.—Lux v. Haggin, 69 Cal. 267, 10 Pac. 674.

[b] Mere lapse of time less than statutory period of limitation will not bar action for equitable relief, unless the delay, under the circumstances, has been such as to justify the presumption that the defendant may have been prejudiced thereby. The bar of an equitable remedy in such cases is not imposed upon the plaintiff as a penalty for his negligence, but is intended merely to protect the defendant from such consequences of the delay as may be prejudicial to his rights.—Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

§ 55. —— Prejudice to Defendant or Third Persons.

[a] A stockholder who suffers his stock to be sold for nonpayment of an assessment thereon, and who afterward refuses to redeem because he does not think it is worth the expense, will not be allowed afterward, when the stock has reached a considerable value through the exertions of others, to maintain an equitable proceeding to set aside the assessment sale, and redeem his stock.—(1885) Sayre v. Citizens' Gaslight etc. Co., 69 Cal. 207, 7 Pac. 437, 10 Pac. 408.

[b] A decree of foreclosure was rendered against a corporation April 5th, the stockholders first obtained notice of fraud June 5th, and an action to set aside the decree was begun in December. Held, that, as defendants were in control of the corporation till the last of September, and the delay in beginning the action had not prejudiced defendants, plaintiff's right of action was not barred.—Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610, 32 Pac. 600.

[c] Delay for a time less than the period of limitation does not amount to laches, unless it occasions, or may be presumed to occasion, prejudice to the other party.—Cohen v. Cohen (Cal. Sup.), 88 Pac. 267.

§ 56. Knowledge of Facts.

[a] An application to have a sale in mass of distinct parcels of real estate, at a price greatly below the actual value, set aside, held to come too late, made in the first instance three years after the sale, and by a cross-complaint in ejectment brought by the successor of the purchaser. The judgment debtor's knowledge of the judgment, execution, and advertisement was equivalent to a knowledge of the sale.—Vigoureux v. Murphy, 54 Cal. 346.

[b] In a decree for partition there was nothing to show that the referees had made a mistake as to the description of the land, and defendants therein relied upon the representations made to them by the referees, and the attorney for plaintiffs, and by surveyors familiar with the land that the survey adopted by the referees was correct. Within a year after entry of the decree, defendants suspected that a mistake had been made, and employed counsel to ascertain the correctness of the survey adopted, and to prosecute an action to set aside the decree in partition. Held, that defendants were not guilty of laches.—Sullivan v. Lumsden, 118 Cal. 664, 50 Pac. 777.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 169-172; 19 Cent. Dig., cols. 347-355, §§ 200-203.

§ 57. Acquiescence.

[a] Laches not constituting evidence of acquiescence is no bar.—Lux v. Haggin, 69 Cal. 273, 274, 10 Pac. 674.

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§ 58. Definition of Delay, Laches and Acquiescence.

[a] Delay, laches and acquiescence defined and distinguished.—Lux v. Haggin, 69 Cal. 269, 270, 10 Pac. 674.

§ 59. Excuses in General.

[a] Where a beneficiary did not commence suit to enforce a trust for two years after her trustee's death, eight years after marriage, sixteen years after attaining her majority, and nineteen years after the execution of a deed conveying the land in dispute to the trustee, the delay will not be considered laches, when it appears that she lived with her trustee most of the time, and that the defendants have expended nothing upon the lands.—Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 167; 19 Cent. Dig., cols. 425-433, §§ 227, 228, 230; cols. 438, 439, §§ 233, 234; cols. 447, 545, §§ 239, 240.

§ 60. —— Recognition of Right by Adverse Party.

[a] Where a trustee holding certain shares of corporate stock has acknowledged his trust from time to time, though failing to account for dividends on the stock, it was not laches for the beneficiary to refrain from taking an action to enforce an accounting under the trust till over two years after the death of the trustee.—Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 174; 19 Cent. Dig., cols. 433-435, § 231.

§ 61. —— Possession or Control of Property.

[a] A cestui que trust, owning the entire beneficial interest in land, is not guilty of laches in not asserting his rights against the holder of the legal title out of possession.—Barroilhet v. Anspacher, 68 Cal. 116, 8 Pac. 804.

[b] Plaintiff had owned the beneficial interest in property, and had been in possession thereof since 1879, and was in possession in 1883, when she brought action to have defendants, who held the naked legal title, declared trustees for her. Held, that the plaintiff was not guilty of laches in asserting her rights.—Mallagh v. Mallagh, 16 Pac. 535.

§ 62. —— Fraud, Concealment, or Other Act of Adverse Party.

[a] Plaintiff, in an action for divorce, alleged in her complaint that there was no common property, and the decree made no reference to any. For sixteen months prior thereto she had not lived with her husband. Three years and a half later, and after his death, she brought this action against his estate to recover her share of the community property, alleging that she was ignorant of the law, and had always relied upon her husband's statements, and that he had "systematically and persistently, during all the time of their residence in California, continuously represented, declared, and asserted to plaintiff that the property he owned, and had acquired since said marriage, was his sole and separate property." Held, that her right to relief, if any, was barred by her negligence and laches.—Champion v. Woods, 79 Cal. 17, 21 Pac. 534.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 169, 170; 19 Cent. Dig., cols. 442-446, § 237.

§ 63. Ignorance of Facts.

[a] A boarding-house keeper falsely represented to a prospective lessee from her of the premises, and purchaser of the furniture, that she had been and was still doing a fine business in the house, and that the furniture, all of which he did not examine, had cost her much more than the price she asked for it. The purchaser closed the contract, and it was six months after entering into possession before he found out that the representations were false. He then rescinded the contract of purchase, and offered to put her in statu quo, and upon her refusal brought suit. Held, that he was not guilty of laches.—Hart v. Kimball, 72 Cal. 283, 13 Pac. 852.

[b] A complaint for relief on the ground of fraud stated that plaintiff's ancestor had executed a power of attorney to defendants' ancestor, empowering him to sell for him certain realty; that soon thereafter he left the state, and never returned, and during the next ten years defendants' ancestor secretly, without consideration, and without notice to plaintiff's ancestor, conveyed to defendants (who were conversant with the fraud) the property in question; and that shortly after the death of plaintiff's ancestor, who devised all his property to plaintiff, she was first informed of the fraudulent conveyances. Held, that the complaint showed a good cause of action for concealed fraud, not barred by laches or lapse of time.—Duff v. Duff, 87 Cal. 104, 23 Pac. 874.

[c] Laches is not imputable to a beneficiary when he has no notice or knowledge of facts putting him upon notice of a repudiation of the trust; nor when there is no word or act or omission on his part which has given the trustee the right to suppose that the beneficiary had surrendered his ownership, or led him to change his position, or imposed upon him any injustice; nor can it be invoked to aid a faithless trustee in consummating a wrong, nor as a check upon the right of a person to impose confidence and trust in another.—Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077.

[d] Equity will not relieve against culpable negligence or inexcusable laches resulting

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in ignorance of fraud.—Tynan v. Kerns, 119 Cal. 451, 51 Pac. 693.

§ 64. —— Pleading.

[a] The right of a plaintiff to invoke a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the statute, which must be affirmatively pleaded, and the plaintiff must bring himself within the terms of the exception, and state the facts showing that he is within those terms.—Lady Washington Con. Co. v. Wood, 113 Cal. 482, 45 Pac. 809.

§ 65. Laches of Plaintiff as Concluding Defendant.

[a] When plaintiff is guilty of laches, he cannot conclude the defendant therewith.—Flint v. Lyon, 4 Cal. 21.

§ 66. To What Claims a Bar.

[a] Plaintiff brought suit for possession of realty and to quiet title, alleging the invalidity of certain judgments annulling a certificate of purchase from the state. Held that, if the issue was one of law, the question of laches could not arise, as defendant must rely upon the statute of limitations.—Hyde v. Redding, 74 Cal. 493, 16 Pac. 380.

§ 67. Following Statute of Limitations.

[a] Courts of equity generally follow the analogy of the law in cases where statutes of limitation are invoked, one of the defenses peculiar to equity being the lapse of time or staleness of the demand. (Per Murray, C. J.) Dominguez v. Dominguez, 7 Cal. 424.

[b] Statute of limitations prescribed in section 343, Code of Civil Procedure, applies to suits in equity.—Lux v. Haggin, 69 Cal. 267, 10 Pac. 674.

[c] Equity's power to entertain or refuse to entertain cause is exercised independent of statute of limitations.—Lux v. Haggin, 69 Cal. 268, 10 Pac. 674.

[d] Equity will sometimes refuse relief before statute of limitations has run.—Lux v. Haggin, 69 Cal. 270, 10 Pac. 674.

[e] In action to recover possession of land, where the plaintiff asserts no equitable rights, the statute of limitations, and not the doctrine of laches, generally furnishes the rule by which to determine whether the delay to assert the right is fatal to the action.—Anzar v. Miller, 90 Cal. 342, 27 Pac. 299.

[f] Entirely independent of statutory limitation periods, equity will not enforce stale demands.—Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516.

FOR AUTHORITIES FROM OTHER STATES:

When equity follows rule of law respecting limitation of actions: 12 Am. Dec. 368, note. See, also, 16 Cyc. 177-181; 19 Cent. Dig., cols. 458-467, §§ 242-244.

III. PARTIES.

NECESSARY PARTIES, § 68.
—— NATURE AND EXTENT OF INTEREST, § 69.
—— PARTIES INDISPENSABLE TO FINAL DETERMINATION, § 70.
—— NUMEROUS PARTIES, § 71.
PROPER PARTIES, § 72.
PERSONS WHO MAY JOIN AS PLAINTIFFS, § 73.
PERSONS WHO MAY BE JOINED AS DEFENDANTS, § 74.
BRINGING IN NEW PARTIES, § 75.

§ 68. Necessary Parties.

[a] All interested in the result should be made parties to a suit in equity.—(Cal. 1866) Wilson v. Castro, 31 Cal. 421.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 183-189; 19 Cent. Dig., cols. 471-511, §§ 246-259.

§ 69. —— Nature and Extent of Interest.

[a] If a debtor assigns his property to trustees to be by them sold, and the proceeds divided pro rata among creditors, one creditor cannot, after the property has been converted into money, maintain a bill against the trustees for an accounting and for his pro rata share, without making the other creditors parties and making the assignor defendant.—McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129.

§ 70. —— Parties Indispensable to Final Determination.

[a] Equity requires all to be made parties whose presence is necessary for a final end of litigation.—Wilson & Wilson v. Lassen, 5 Cal. 114.

[b] Necessary parties are those without whom no decree can be made determining principal issues.—Tregear v. Etiwanda Water Co., 76 Cal. 541, 9 Am. St. Rep. 245, 18 Pac. 658.

[c] In the absence of any finding as to the order in which several persons should in turn use their water right, no decree can be entered in favor of one of said persons until all the claimants of the water right have been made parties.—Lytle Creek Water Co. v. Perdew, 2 Pac. 732.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 183, 184; 19 Cent. Dig., cols. 496-502, § 252.

§ 71. —— Numerous Parties.

[a] The stock of a joint stock mining company was divided into money shares and labor shares, and certain holders of the labor shares brought a bill in chancery against certain holders of the money shares, praying in effect for a dissolution of the company

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and distribution of its effects; the whole of neither class of stockholders being made parties. Held, that the stockholders being numerous, and it being difficult, if not impracticable, to bring them all into court, enough of them had been made parties to authorize the court to adjudicate the rights of all, and make a decree according to the prayer of the bill.—Von Schmidt v. Huntington, 1 Cal. 55.

[b] Where parties interested are numerous and suit is for object common to all of them, some may maintain bill on behalf of themselves and others.—Meyer v. San Diego, 121 Cal. 110, 66 Am. St. Rep. 22, 53 Pac. 434.

§ 72. Proper Parties.

[a] Proper parties are those without whom substantial decree can be made, but not one completely settling all questions involved and concluding rights of all interested persons.—Tregear v. Etiwanda Water Co., 76 Cal. 541, 9 Am. St. Rep. 245, 18 Pac. 658.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 193; 19 Cent. Dig., cols. 511-519, §§ 260-265.

§ 73. Persons Who may Join as Plaintiffs.

[a] In equity assignee of legal title may join party retaining equitable title.—Cerf v. Ashley, 68 Cal. 420, 9 Pac. 658.

[b] All persons having common interest in subject matter of bill and right to same remedy against defendant may join as plaintiffs.—Churchill v. Lauer, 84 Cal. 238, 24 Pac. 107.

FOR AUTHORITIES FROM OTHER STATES:
Joinder of parties in equity: 71 Am. Dec. 311, note. See, also, 16 Cyc. 196-199; 19 Cent. Dig., cols. 519-527, §§ 266-270.

§ 74. Persons Who may be Joined as Defendants.

[a] In this state the jurisdiction of courts of equity over questions of title to real estate, acquiesced in to avoid the consequences of the fictitious actions of ejectment at common law, has no existence; as those actions must be prosecuted in the name of the real party in interest, and the plaintiff may join any number of parties defendant, without regard to the extent or character of their possession, subject only to their right to answer separately and have separate verdicts. Ritchie v. Dorland, 6 Cal. 33.

[b] Where several persons have been jointly concerned in a series of fraudulent acts, they may be united as defendants in a suit to annul the fraudulent acts, although the gains they realize by such acts are several.—Andrews v. Pratt, 44 Cal. 309.

FOR AUTHORITIES FROM OTHER STATES:
Joinder of defendants in equity: 15 Am. Dec. 427, note. See, also, 16 Cyc. 199; 19 Cent. Dig., cols. 527-531, §§ 271-274.

§ 75. Bringing in New Parties.

[a] If, in a case in equity to dissolve partnership, it appears on the trial that a complete determination of the controversy cannot be had without the presence of other parties, the court may, on its own motion, under section 17 of the Practice Act, order them to be brought in before a final disposition of the case.—Settembre v. Putnam, 30 Cal. 490.

FOR AUTHORITIES FROM OTHER STATES:
19 Cent. Dig., cols. 530, 531, § 274.

IV. PLEADING.

ORIGINAL BILL, § 75½.
—— AVERMENTS OF JURISDICTION, § 76.
—— FACTS NECESSARY TO BE ALLEGED, § 77.
—— MULTIFARIOUSNESS, § 78.
—— MISJOINDER OF CAUSES, § 79.
—— MISJOINDER OF PARTIES, § 80.
—— RELEVANCY OF ALLEGATIONS, § 81.
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—— EVIDENCE ADMISSIBLE UNDER PLEADINGS, § 98.
—— WHAT CONSTITUTES VARIANCE, § 99.
CURE OF DEFECTS BY SUBSEQUENT PLEADING, § 99a.
WAIVER OF OBJECTIONS TO PLEADING, § 99b.

§ 75½. Original Bill.

[a] The distinction between law and equity continues as marked as ever, though there is no difference in the form of a bill in chancery and a common-law declaration, under our system.—De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

§ 76. —— Averments of Jurisdiction.

[a] Complainants must show on the face of their bill their right to proceed in the district court of one county to restrain proceedings in the district court of another county, where such courts have co-ordinate jurisdiction.—Uhlfelder v. Levy, 9 Cal. 607.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 222; 19 Cent. Dig., cols. 596-600, § 316.

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§ 77. —— Facts Necessary to be Alleged.

[a] In order to set aside a judgment or conveyance on the ground of fraud, it is not sufficient to aver in general terms that such judgment on conveyance was fraudulent, but the facts and circumstances constituting the alleged fraud must be set forth.—Castle v. Bader, 23 Cal. 75.

[b] Complainant must aver in his bill all that is necessary to show his right and title to the relief he seeks.—Mercier v. Lewis, 39 Cal. 532.

[c] A complaint in equity, claiming relief because of mistake of complainant in attempting to effect a redemption after the sheriff's sale on the foreclosure of a mortgage, must not only aver the fact of the mistake, but must also set forth the circumstances under which it occurred, in so far as such circumstances may be necessary to present a case within the rule of equity on which relief is granted.—Wright v. Shafter, 48 Cal. 275.

[d] A demurrer is properly sustained to a petition against the personal representative of a surviving partner for a partnership accounting, brought more than twenty years after the right accrued, which alleges concealment by the surviving partner of the existence of the partnership, and that its existence was first discovered after his death, without alleging the nature of the concealment, what or of whom any inquiries were made, or why they were not made sooner, and that diligence would not have led to discovery before his death.—Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

[e] A pleading which asks for the interposition of equitable relief must state the specific facts upon which the relief is sought; and inferences, generalities, presumptions and conclusions have no place in such a pleading. Davitt v. American Bakers' Union, 124 Cal. 99, 56 Pac. 775.

[f] In an action to have his name inserted as one of the parties to a contract between defendant D. and defendant corporation, plaintiff alleged that his name was omitted through the fraud practiced by D. on the corporation and on plaintiff. Held, that the allegations were insufficient to sustain the action, since no facts constituting the fraud were set up. Thomason v. De Greayer, 31 Pac. 567.

§ 78. —— Multifariousness.

[a] A bill in equity is multifarious when several matters are united against one defendant which are perfectly distinct and unconnected, or when relief is demanded against several defendants of several matters of a distinct and independent nature.—Wilson v. Castro, 31 Cal. 420.

[b] No fixed rule can be laid down by which to determine whether a bill in equity is or is not multifarious; but it is said to be multifarious when distinct and independent matters are joined therein. It is not multifarious when the matters set forth are properly connected, and no new parties are necessary, though all the parties do not have an interest in all of the matters in the suit, and though the plaintiffs are not entitled to a decree in their favor jointly or in solido, or equally against all of the defendants.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 239-255; 19 Cent. Dig., cols. 648-724, §§ 340-379.

§ 79. —— Misjoinder of Causes.

[a] Plaintiff held notes and mortgages. B, for a certain purpose connected with a proposed purchase of the same, got possession of the papers, by means of which he obtained fraudulently a deed of the premises from the mortgagors, and then, concealing this fact, declined to purchase. Plaintiff in his bill claimed that B acted as his agent, and that the deed should have run to him. The mortgagor and wife, B, and other parties claiming interests subsequent to plaintiff, were made defendants, and plaintiff sought an injunction against B to restrain him from selling the property, that the trust be declared, that B execute a deed of the property to plaintiff, that the mortgagor's wife make such conveyances and releases to plaintiff as were proper under the mortgages, and that all the defendants be barred, foreclosed, etc., or that B's deed be declared void, and B foreclosed, and then that plaintiff have judgment against the mortgagor and wife on the notes, and that all the defendants be barred and foreclosed, and the premises sold to pay, etc. Held, that a demurrer for the union of inconsistent causes of action would not lie.—De Leon v. Higuera, 15 Cal. 483.

[b] The objection of multifariousness to a bill in equity will be overruled, if the parties are all interested in the main issue, and the issues tendered are simple, and foreshadow no embarrassment to a convenient and orderly trial, and a multiplicity of suits is avoided.—People v. Morrill, 26 Cal. 336.

[c] A bill in equity is not multifarious when the point in issue is a matter of common interest among all the parties to the suit, though the interests of the several defendants are otherwise unconnected.—Wilson v. Castro, 31 Cal. 420.

[d] There is no misjoinder to an action to reform a defective certificate of acknowledgment to a mortgage with one to foreclose the mortgage.—Hutchinson v. Ainsworth, 63 Cal. 286.

[e] A bill for a rescission of a sale of one partner's interest to another, and for a dissolution of the firm, is multifarious.—Behlow v. Fisher, 102 Cal. 208, 36 Pac. 509.

[f] A complaint to set aside the election of the directors of a corporation as illegal,

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and to annul the illegal action of the directors, and an illegal contract made by them without authority, and also complaining of the violation of a contract made by the defendant controlling the election, with the stockholders of the corporation, to give to one of the plaintiffs, as trustee, for the benefit and protection of the corporation, a transfer of stock, with irrevocable proxy to vote it for the period of five years, is not multifarious.—Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376.

[g] In a suit on behalf of a municipal corporation for the improper construction of waterworks, it is not stating different causes of action or misjoinder of defendants to include prayers for annulment of the contract, for such construction, and the return of bonds issued therefor, and to include as defendants those interested in only a part of the relief sought.—Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 241-248; 19 Cent. Dig., cols. 650-700, §§ 341-367.

§ 80. —— —— Misjoinder of Parties.

[a] A bill in equity is not multifarious if there is a common liability in the defendants and a common interest in the plaintiffs, or if the interests of the plaintiffs are the same and the defendants have not a coextensive common interest, but their interests are acquired under different instruments from the same source of title.—Wilson v. Castro, 31 Cal. 420.

[b] When a person received a grant of a tract of land from the Mexican government, and died intestate, leaving a brother and sister, his heirs at law, and a wife, and the wife afterward divided the tract into two parcels and granted one away, and she and her grantee afterward received a patent, by way of confirmation from the United States, for their respective shares, and the parties claiming under the heirs at law brought a bill to enforce the trust under which, as they claimed, the wife and her original grantee held the land for the heirs, and made the wife and her grantee, with several others claiming title to several distinct parcels under them, codefendants to the bill, it was held that the bill was not multifarious.—Wilson v. Castro, 31 Cal. 420.

[c] An administrator was made, in the same action, a defendant in his representative capacity, and in his personal capacity with others, plaintiffs being creditors of the estate whose claims had been rejected, and the purpose of the action being to compel a transfer to the estate of property which it was charged that his codefendants and himself held on a constructive trust for the estate. Held, that there was a misjoinder of parties defendant.—Mesmer v. Jenkins, 61 Cal. 151.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 248-250; 19 Cent. Dig., cols. 700-707, §§ 368-370.

§ 81. —— Relevancy of Allegations.

[a] In an action to set aside as fraudulent a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated therein is not irrelevant or redundant matter.—Perkins v. Center, 35 Cal. 713.

§ 82. —— Prayer for Relief.

[a] When grounds of legal and equitable relief are the same, equity jurisdiction will be determined by the prayer.—People v. Mier, 24 Cal. 61.

[b] A court of equity will not grant a relief which complainant does not ask for.—Morrison v. Bowman, 29 Cal. 337.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 224; 19 Cent. Dig., cols. 603-608, §§ 319-321.

§ 83. Plea or Answer.

[a] General denial, though the answer is sworn to, is insufficient in equity where the complaint is verified.—Dewey v. Bowman, 8 Cal. 145.

[b] In equity, general denials, made by traversing literally and conjunctively the statements of a sworn bill, are not legitimate for the purpose of putting in issue specific allegations; for, in this way, a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge or even the substantial fact.—Blankman v. Vallejo, 15 Cal. 638.

[c] As a defense in equity a plea is insufficient if it fails to show by direct and proper averment that the consideration supporting alleged agreement to convey was adequate in amount and not disproportionate to value of land.—Bruck v. Tucker, 42 Cal. 346.

[d] In setting up an equitable defense in an action at law, the defense interposed becomes a pleading in equity, the sufficiency of which—in matters of substance—is to be determined by the application of the rules of pleading observed in courts of equity, when relief is sought there in cases of like character.—Bruck v. Tucker, 42 Cal. 346.

[e] Where an express statute of limitations applies to a suit in equity, and defendant relies on mere delay of complainant in bringing the suit and his own adverse use, the statutory period having expired, he must plead the statute.—Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 286-297; 19 Cent. Dig., cols. 738-763, §§ 393-412.

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§ 84. Effect of Failure to Answer.

[a] Facts stated in an unanswered petition are admitted.—Kirby v. Superior Court, 68 Cal. 606, 10 Pac. 119.

§ 85. Disclaimer.

[a] A plea of disclaimer by part of several defendants, sued by bill to quiet title and for the recovery of property which they have obtained by a conspiracy, is not ground for dismissing the complaint against them, as they are still liable for costs.—Dupuy v. Leavenworth, 17 Cal. 262.

For Authorities From Other States:

See 16 Cyc. 260; 19 Cent. Dig., cols. 818, 819, §§ 436-438.

§ 86. Cross-bill.

[a] In an action to quiet title, where the answer consists of denials of plaintiff's allegations, and contains none of the elements of a cross-complaint, and contains no prayer for affirmative relief, it is error to award such relief.—Hungarian Hill Gravel Min. Co. v. Moses, 58 Cal. 168.

[b] Although the matters in the two cross-complaints should have been stated in one, yet, since they are not unintelligible or ambiguous, it is not a ground of demurrer.—Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. 308.

[c] Plaintiff, as riparian owner, sought to enjoin defendants, riparian owners above him, from diverting the waters of a stream, except a certain part to which they were entitled by prior appropriation. Defendants, by cross-complaint, alleged that plaintiff had drawn off the water so as to prevent it from irrigating their lands as it would do in its natural flow, and by a second cross-complaint alleged that he threatened to do so as to the part to which they were entitled, and asked an injunction. Held, that these matters were proper subjects of cross-complaint under Code of Civil Procedure, section 442, which provides that, when defendant seeks affirmative relief affecting the property to which the action relates, he may file a cross-complaint. Van Bibber v. Hilton. 84 Cal. 585, 24 Pac. 308.

[d] New parties may be brought in by defendant on a cross-bill, if the cause of action to which they are made parties defendant is the proper subject of a cross-complaint.—Stockton Savings etc. Soc. v. Harrold, 127 Cal. 612, 60 Pac. 165.

[e] A separate defense, in an action to quiet title, in which it was alleged that plaintiff's deed was acquired by fraud, did not constitute a cross-complaint, and hence plaintiff's failure to answer it was not an admission of its truthfulness.—Cohn v. Kelly, 132 Cal. 468, 64 Pac. 709.

For Authorities From Other States:

Cross-bills, nature and objects of: 63 Am. Dec. 251, note. See, also, 16 Cyc. 324-327; 19 Cent. Dig., cols. 828-838, §§ 446-449.

§ 87. Demurrer.

[a] If the bill to subject the assets of an absent debtor to a claim discloses a remedy at law it will be dismissed upon demurrer.—Lupton v. Lupton, 3 Cal. 120.

[b] When a bill in equity shows on its face that plaintiff, by reason of lapse of time, and of his own laches, is not entitled to relief, the objection may be taken by demurrer.—(Cal. 1858) Sublette v. Tinney, 9 Cal. 423.

[c] Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and, even in the absence of such clause, where an answer is filed.—Rollins v. Forbes, 10 Cal. 299.

[d] Failure to make proper parties defendants is not ground for demurrer.—Tregear v. Etiwanda Water Co., 76 Cal. 541, 9 Am. St. Rep. 245, 18 Pac. 658.

For Authorities From Other States:

See 16 Cyc. 315; 19 Cent. Dig., cols. 884-888, § 487.

§ 88. —— Form and Sufficiency of Demurrer.

[a] Under the laws, by which all distinctions between law and equity, in matters of procedure and form, have been abolished, where a complaint presents a case of equitable relief, but all the proper persons are not made parties, a demurrer to the complaint for want of facts, and not for want of parties, is bad.—Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

§ 89. —— Admissions by Demurrer.

[a] A demurrer to a prayer for an injunction admits the fact alleged—that plaintiff has a right and defendant a fictitious claim.—Tuolumne Water Co. v. Chapman, 8 Cal. 392.

For Authorities From Other States:

See 16 Cyc. 276, 277; 19 Cent. Dig., cols. 895-899, § 494.

§ 90. Striking Out Pleading.

[a] Equity court has no power to strike out answer and deny defendant right to answer over.—Foley v. Foley, 120 Cal. 41, 42, 65 Am. St. Rep. 147, 52 Pac. 122.

For Authorities From Other States:

See 16 Cyc. 315; 19 Cent. Dig., cols. 955, 956, § 535.

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§ 91. Amendment.

[a] Discovery of fraud after suit brought would entitle plaintiff so to shape his action as to include it.—Truebody v. Jacobson, 2 Cal. 269.

[ab] Facts which occur subsequent to filing of original complaint, and which change the liabilities of the defendants, and in consequence the character of the judgment which is sought, cannot be incorporated into the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. Van Maren v. Johnson, 15 Cal. 308.

[b] Allowance of amendments to equity pleading at any stage of proceedings is discretionary.—Graham v. Stewart, 68 Cal. 376, 9 Pac. 555.

[c] In an action by an administratrix to quiet title to land, it was not error for the court to permit plaintiff to amend her complaint after the cause was tried and submitted, but before findings had been filed or judgment given; the submission being set aside, and defendant allowed to answer the amended complaint and to introduce further evidence.—Andrus v. Smith, 133 Cal. 78, 65 Pac. 320.

[d] The inclusion by an amendment of specific tracts omitted in the original complaint in partition was within the discretion of the court, whether or not the original complaint stated a cause of action.—Adams v. Hopkins, 69 Pac. 228.

[e] Where an amendment included specific tracts omitted in the original complaint in partition, the cause of action as to the rest of the land remained the same, and defendants in adverse possession thereof were not affected by the change, in so far as they relied on the statute of limitations.—Adams v. Hopkins, 69 Pac. 228.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 959-961, §§ 541-543.

§ 92. —— Amendment of Demurrer.

[a] In an action by a vendee to recover the installments paid on the purchase price of land, where a cross-complaint by the vendor for specific performance fails to show that he has tendered a deed conveying the title he has agreed to convey, or that he is in a condition to convey such a title, and also fails to allege how or when conveyance of title is to be made, or how deferred payments are to be secured, it is not prejudicial error to allow the withdrawal of a demurrer for want of facts, and for ambiguity and uncertainty, and the filing of a second demurrer on the same grounds, but adding further specifications of ambiguity and uncertainty.—Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Good v. Taylor, 23 Pac. 220; Carscaddon v. Taylor, 23 Pac. 220.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., col. 1035, § 580.

§ 93. —— Conforming Allegations to Proofs.

[a] Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity if his pleadings had been properly framed, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits; and to refuse amendment is error.—Connalley v. Peck, 3 Cal. 75.

[b] In equity a party may generally amend his pleadings to meet the proof.—Tryon v. Sutton, 13 Cal. 490.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 346; 19 Cent. Dig., cols. 967-973, § 547.

§ 94. Supplemental Bills.

[a] A fact occurring subsequently to the filing of the original bill must be averred by way of supplemental bill, and cannot be brought to the knowledge of the court by amendment.—(Cal. 1860) Van Maren v. Johnson, 15 Cal. 308.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 357-362; 19 Cent. Dig., cols. 1035-1056, §§ 581-593; col. 1061, § 599.

§ 95. Verification.

[a] That the wife did not swear to her answer in a foreclosure suit is no ground for vacating the decree on her petition, especially where it appears that she has no defense.—Pfeiffer v. Riehn, 13 Cal. 643.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 366; 19 Cent. Dig., cols. 1072-1076, §§ 614-620.

§ 96. —— Authority of Officer Administering Oath.

[a] A jurat to an answer is, in form and substance, an affidavit, and may be taken before a county recorder.—Pfeiffer v. Riehn, 13 Cal. 643.

§ 97. Issues, Proof and Variance.

[a] It is a cardinal rule in equity, as in all other pleadings, that the allegata and probata must agree, and that averments material to the case omitted from the pleading cannot be supplied by the evidence.—Green v. Covillaud, 10 Cal. 317; Murdock v. Clarke, 59 Cal. 683.

[b] Allegations and proof must agree.—Noonan v. Nunan, 76 Cal. 49, 18 Pac. 98.

[c] Where a bill alleges that plaintiff agreed to buy, and defendant to sell, and the answer alleges that, at "the time of entering into the agreement aforesaid," the contract was deposited with one G, to hold for 30 days, until plaintiff made a payment, in de-

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fault of which "the trade should be considered off," and "that said agreement never was delivered to plaintiff," but that he obtained "possession thereof forcibly," the question of nondelivery is raised by the answer.—Haskell v. Doty, 78 Cal. 424, 21 Pac. 10.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 370; 19 Cent. Dig., cols. 1087-1092, §§ 635-640.

§ 98. —— Evidence Admissible Under Pleadings.

[a] Material facts as of full performance on the part of complainant, omitted in the pleadings, cannot be supplied by proof.—Green v. Covillaud, 10 Cal. 317.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 372-375; 19 Cent. Dig., cols. 1100-1106, §§ 648-650.

§ 99. —— What Constitutes Variance.

[a] Where the complaint avers that the note and mortgage sued on were made to "E.," a married woman, and by her assigned to plaintiff, he cannot recover, because the right to assign was in the husband; and this, too, where the proof was that both husband and wife assigned the note and mortgage. In chancery cases the party must recover according to the pleadings, and not the proof where there is a variance.—Tyron v. Sutton, 13 Cal. 490.

[b] When the pleadings set up that the parties applying for a decree of specific performance of a contract to convey are joint assignees of the right under the contract to a conveyance, the objection that documentary evidence should be excluded which showed that one part of the lot affected by the equitable title has been assigned to one of the parties, and another and distinct part to the other of the parties, is not valid.—Owen v. Frink, 24 Cal. 171.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 403-406; 19 Cent. Dig., cols. 1106-1119, §§ 651, 652.

§ 99a. Cure of Defects by Subsequent Pleading.

[a] Plaintiff cannot rely on a cross-bill as stating a cause of action in his behalf.—Mercier v. Lewis, 39 Cal. 532.

§ 99b. Waiver of Objections to Pleading.

[a] Though the complaint in an action by several persons to quiet title to their lots, owned in severalty, alleges that plaintiffs deraign title through a common source, Code of Civil Procedure, section 381, providing that several persons claiming an interest in lands under a common source may unite in an action to determine an adverse claim, yet it being found that they each own their respective lots, a finding that they deraign title through a common source is immaterial, and objection that there is no evidence to sustain it cannot be raised; the question of misjoinder not having been raised by answer or demurrer, and section 434 providing that objections to the complaint, except the questions of jurisdiction and that it does not state a cause of action, not taken by demurrer or answer, are waived.—Dewey v. Parcells, 137 Cal. 305, 70 Pac. 174.

V. EVIDENCE.

ANSWER AS EVIDENCE, § 99c.
—— OATH AS AFFECTING ANSWER AS EVIDENCE, § 99d.
—— CONCLUSIVENESS WHERE ACTION IS HEARD ON PLEADINGS, § 99e.

§ 99c. Answer as Evidence.

[a] In verified answer evasion of controlling fact in issue is strong circumstance against the defendant.—Baker v. Baker, 13 Cal. 87.

[b] Equity rule requiring two witnesses to controvert answer under oath does not prevail in this state. The answer is only a pleading, and is not evidence for defendant.—Bostic v. Love, 16 Cal. 69.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 383-401; 19 Cent. Dig., cols. 1151-1220, §§ 685-724.

§ 99d. —— Oath as Affecting Answer as Evidence.

[a] Verified answer of defendant in an equity case is not evidence for defendant, under Practice Act.—Goodwin v. Hammond, 13 Cal. 168, 73 Am. Dec. 574.

§ 99e. —— Conclusiveness Where Action is Heard on Pleadings.

[a] Where a chancery suit is heard on bill and answer, all the allegations in the answer, whether upon knowledge or upon information and belief, are to be taken as true. If the complainant wishes to dispute any of the allegations in the answer, he must file a replication, and thus enable the defendant to establish them by proof, if he can.—Von Schmidt v. Huntington, 1 Cal. 55.

[b] Where cause is heard on bill and answer the allegations of the latter are to be taken as true.—Belt v. Davis, 1 Cal. 134.

VI. HEARING, SUBMISSION OF ISSUES TO JURY, AND DETERMINATION.

DISCRETION OF TRIAL COURT, § 100.
SUBMISSION OF ISSUES TO JURY, § 101.
—— ISSUES PROPER FOR JURY, § 102.
—— PRELIMINARY PROCEEDINGS, § 103.
PROCEEDINGS AT AND AFTER TRIAL, § 104.
—— EFFECT OF VERDICT, § 105.

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—— DISREGARD OR MODIFICATION OF VERDICT OR FINDINGS, § 106.
—— SETTING ASIDE VERDICT, § 107.
NECESSITY FOR FINDINGS AND CONCLUSIONS, § 108.
NEW TRIAL, § 109.
ERRORS AND IRREGULARITIES AT TRIAL, § 110.
DETERMINATION, § 111.

Hearing in mandamus proceeding. See Mandamus, § 75.
Rehearing in mandamus proceeding. See Mandamus, § 77.
Rehearing in partition suit. See Partition, § 33.

§ 100. Discretion of Trial Court.

[a] The matter of laches is left to the sound discretion of the chancellor in each case.—Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

[b] Laches is question very largely within province of trial court, left to its discretion. Meherin v. San Francisco Produce Exch., 117 Cal. 217, 48 Pac. 1074.

§ 101. Submission of Issues to Jury.

[a] Where there was no need of a jury, it does not vitiate the decree that the chancellor informed his conscience by a verdict. Pfeiffer v. Riehn, 13 Cal. 643.

[b] It is entirely within discretion of court to grant or refuse a demand for a jury trial in an equity case.—Société Francaise v. Selheimer, 57 Cal. 623.

[c] Granting jury trial in equity is in discretion of trial court.—Curnow v. Happy Valley M. Co., 9 Pac. 149.

[d] Allowance of jury trial in equity cases is within discretion of court.—Graham v. Stewart, 68 Cal. 376, 9 Pac. 555.

[de] In an equity suit for the abatement of a nuisance the judge charged the jury that damages could be recovered against defendant after the commencement of the action. The plaintiff, however, disclaimed all damages after the filing of the complaint. Held no error, since the verdict was merely advisory. Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655.

[e] Action to cancel shares of stock and to compel their transfer from the corporation to executors, however regarded, is an equitable action, in which it is not error to refuse a demand of trial by jury.—Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 413-428; 19 Cent. Dig., cols. 1298-1351, §§ 788-820.

§ 102. —— Issues Proper for Jury.

[a] Special issues framed by the court according to the established rules of chancery practice may be tried by a jury in equity cases.—Brewster v. Bours, 8 Cal. 501.

[b] The court sitting in equity may direct, when proper, an issue to be framed upon the pleadings and submitted to a jury if questions of a purely legal character in relation to thetitle arise.—Curtis v. Sutter, 15 Cal. 259.

[c] Where defendant's answer raises issues of fact on which he is entitled to a jury, but the principal features of his defense are equitable, a demand for a jury must relate to the specific issues on which he is entitled to the same.—Bates v. Escot, 127 Cal. xviii, 59 Pac. 943.

[d] Under Code of Civil Procedure, section 592, where plaintiff alleged ownership and defendant asserted title in himself, plaintiff was entitled to a jury to try the issue of ownership.—Reiner v. Schroder, 146 Cal. 411, 80 Pac. 517.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 418; 19 Cent. Dig., cols. 1309-1319, §§ 794-799.

§ 103. —— Preliminary Proceedings.

[a] In chancery case, court may direct that special issues of material facts be framed or settled, and stated in writing, before proceeding to trial.—Smith v. Rowe, 4 Cal. 6.

[b] Special issues must be framed, according to chancery practice, to have a special verdict.—Brewster v. Bours, 8 Cal. 501.

§ 104. Proceedings at and After Trial.

[a] In a suit in equity, for relief on the ground that defendants' ancestor, who was, by power of attorney, authorized to sell for plaintiff's ancestor certain realty, had fraudulently exercised this power by a conveyance to defendants, a special finding of the jury that property referred to in a letter, being a power of attorney, is held in trust for plaintiff, as stated in it, should find that the property referred to in the letter is held in trust "in the manner and proportions mentioned" in the letter.—(1886) Duff v. Duff, 71 Cal. 513, 12 Pac. 570; (1890) Duff v. Duff, 87 Cal. 104, 23 Pac. 874, 25 Pac. 265.

[b] The verdict of the jury on an issue out of chancery is a part of the judgment-roll in the suit under Code of Civil Procedure, section 670.—Goldman v. Rogers, 85 Cal. 574, 24 Pac. 782.

[c] In equity, where a jury is impaneled merely as a body advisory to the court, to assist it in determining disputed facts, the court may direct a verdict, though the evidence is conflicting.—Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172.

[d] In a suit to quiet title to mining claims, held, that facts sufficient to warrant an injunction need not appear in findings separate

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from the decree.—Reiner v. Schroder, 146 Cal. 411, 80 Pac. 517.

[e] A general verdict in an equity case is insufficient.—Evans v. Ross, 8 Pac. 88.

§ 105. —— Effect of Verdict.

[a] Verdict in chancery cases is merely advisory to the court, and may be adopted or disregarded.—Gray v. Eaton, 5 Cal. 448; Still v. Saunders, 8 Cal. 281; Stockman v. Riverside L. & I. Co., 64 Cal. 57; Sweetser v. Dobbins, 65 Cal. 529; Schneider v. Brown, 85 Cal. 205, 4 Pac. 540.

[b] Conceding that a special verdict of a jury in an equity case is only advisory, and may be disregarded by the court, yet, if it is adopted by the court, it has the conclusive effect of a final adjudication.—Clink v. Thurston, 47 Cal. 21.

[c] The findings of a jury on special issues submitted in an equity case are merely advisory to the court, and, if adopted by it, are the findings of the court.—Bates v. Gage, 49 Cal. 126.

[d] A suit to foreclose a mortgage of chattels is equitable, and the special verdicts of a jury thereunder are advisory only.—Johnson v. Powers, 65 Cal. 179, 3 Pac. 625.

[e] Where, in ejectment, defendant files a counterclaim for specific performance of a parol contract for a lease of the land, the issues thus raised are equitable, on which the verdict of a jury is advisory only.—Haggin v. Raymond, 67 Cal. 302, 7 Pac. 721.

[f] In equity cases findings of jury are merely advisory.—Bell v. Marsh, 80 Cal. 414, 22 Pac. 170; Schneider v. Brown, 85 Cal. 206, 24 Pac. 715.

[h] Verdict of jury in equity case does not bind court.—Moore v. Copp, 119 Cal. 434, 51 Pac. 630.

§ 106. —— Disregard or Modification of Verdict or Findings.

[a] Even though it be unnecessary that there be findings in an equity case, still when there are findings, they are not to be disregarded.—Lyons v. Lyons, 18 Cal. 447.

[b] In a suit in equity the general verdict of a jury is to be disregarded, and the court must find the facts.—Brandt v. Wheaton, 52 Cal. 430.

[c] Where the court submits a special issue to a jury, but finds on the same issue differently from the jury, the court's finding determines the fact.—Freeman v. Stephenson, 63 Cal. 499.

[d] Verdict is merely advisory until adopted by court and it may disregard and set it aside of its own motion.—Clavey v. Lord, 87 Cal. 418, 25 Pac. 493.

[e] Where the evidence as to whether there was a parol gift is conflicting, the court does not abuse its discretion in disregarding the advisory verdict of a jury, and finding that there was not.—Shirley v. Shirley, 92 Cal. 44, 27 Pac. 1097.

§ 107. —— Setting Aside Verdict.

[a] Verdict in equity case may be set aside without motion for new trial.—Wingate v. Ferris, 50 Cal. 105.

[b] The findings of a jury in an equity case may be set aside by the court of its own motion.—Wakefield v. Bouton, 55 Cal. 109.

[c] Where an action was brought to cancel a contract for the sale of land to one defendant, and to enjoin another from removing wood from the land, and the defendant to the injunction claimed a lien on the wood for cutting it, and asked for foreclosure thereof, the plaintiff's action being equitable, as were also the predominant features of the defense, it was not error for the court to set aside the jury's answers to interrogatories, and substitute findings of his own, though they were contrary to the findings of the jury.—Diamond Coal Co. v. Cook, 129 Cal. xviii, 61 Pac. 578.

§ 108. Necessity for Findings and Conclusions.

[a] Under the Practice Act the rule requiring the court to find its conclusions of law and fact does not apply to equity cases, and does not conflict with our decision here. (Walker v. Sedgwick, 5 Cal. 192.) But we doubt that case, and leave the question of overruling it open.—Duff v. Fisher, 15 Cal. 375.

[b] In equity facts should be found by court, or specially by jury under an order of the court.—Wingate v. Ferris, 50 Cal. 105.

§ 109. New Trial.

[a] New trial will not be granted in equity, unless plaintiff fully negatives laches.—Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

[b] In an equity case, when the special issues are submitted to a jury, and they find thereon, and the court afterward renders a judgment, the party against whom the judgment is rendered, if he wishes to have the findings of fact reviewed on a motion for a new trial, must wait until the judgment is rendered by the court before giving notice and moving for a new trial.—Bates v. Gage, 49 Cal. 126.

[c] In an equity case, where special issues are submitted to a jury, the trial is not terminated when they render a verdict, but when the court renders a judgment; and hence a motion for a new trial should not be made until rendition of judgment.—Bates v. Gage, 49 Cal. 126.

[d] New trial should not be granted in an equity case when a general verdict is found.—Wingate v. Ferris, 50 Cal. 105.

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[e] The verdict of the jury in equity is merely advisory, and until findings have been made by the court there is no decision upon which to base a motion for a new trial. Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381.

§ 110. Errors and Irregularities at Trial.

[a] Instructions are not required in a chancery case when jury is to try special issues, and it is not error to refuse them.—Dominguez v. Dominguez, 7 Cal. 424.

[b] Error in instructions in equity case is immaterial.—Schneider v. Brown, 85 Cal. 206, 24 Pac. 715.

[c] An action to enjoin a nuisance is a case in equity, and the verdict of the jury in such a case is merely advisory to the court; and if instructions given to the jury are erroneous, such error is not ground for reversing the judgment, the correctness of the decision of the court and not the propositions of law it laid down for the guidance of the jury, being the only question for determination upon appeal.—Richardson v. Eureka, 110 Cal. 441, 42 Pac. 965.

[d] Instructions given to a jury in a suit in equity are not a subject of an exception, the verdict being merely advisory to the court. Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

§ 111. Determination.

[a] Equity is not bound to strict legal rights of parties, but will consider all circumstances to arrive at justice of case.—Walkerly v. Bacon, 85 Cal. 141, 24 Pac. 638.

VII. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

APPOINTMENT OF COMMISSIONER, § 112.
POWER TO REFER, § 113.
REPORT, § 114.
DISPOSITION OF REPORT, § 115.

§ 112. Appointment of Commissioner.

[a] Equity court has power to appoint a "commissioner" to execute a conveyance in behalf of heirs of grantor to enforce its decree.—Scadden etc. Co. v. Scadden, 121 Cal. 41, 53 Pac. 440.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 430, 431; 19 Cent. Dig., cols. 1394-1397, § 852.

§ 113. Power to Refer.

[a] A court of equity may order a reference without the consent of the parties.—Smith v. Rowe, 4 Cal. 6.

[b] Though, in an action to dissolve a partnership and obtain settlement of the partnership accounts, the court has power to order a reference for the trial of all issues of fact relating to the condition of the partnership accounts, it cannot invest the referee with power to report a judgment.—Williams v. Benton, 24 Cal. 424.

[c] The court in an equity suit has no power under the Practice Act, without the consent of parties, to order a reference for the trial of any issue of fact, except one which requires the examination of an account.—Williams v. Benton, 24 Cal. 424.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 434; 19 Cent. Dig., cols. 1410-1413, §§ 864-866.

§ 114. Report.

[a] Where the referee excludes proper testimony, or admits improper evidence, or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report; but error in a referee's final conclusions of fact or law, where the evidence is certified to the court by the referee, should be taken advantage of by a motion to set aside the report and for a new trial.—Branger v. Chevalier, 9 Cal. 353.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 444-447; 19 Cent. Dig., cols. 1439-1491, §§ 893-931.

§ 115. Disposition of Report.

[a] In a suit in chancery it is perfectly competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause.—McHenry v. Moore, 5 Cal. 90.

VIII. DECREE AND ENFORCEMENT THEREOF.

NATURE, FORM, AND VALIDITY, IN GENERAL —DECREE ON VERDICT OF JURY, § 116.
NATURE AND EXTENT OF RELIEF, § 117.
—— INTERLOCUTORY, § 118.
—— FINAL ADJUSTMENT OF ALL ISSUES, § 119.
—— PARTIES, § 120.
CONFORMITY TO PLEADING AND PROOFS, § 121.
RELIEF UNDER GENERAL PRAYER, § 122.
AMENDMENT—DURING TERM OF ENTRY, § 123.
—— INTERLOCUTORY DECREES, § 124.
OPENING OR VACATING—NOTICE, § 125.
CONSTRUCTION, § 126.
PERFORMANCE, § 127.
—— PROCEEDINGS FOR ENFORCEMENT, § 128.
SETTING ASIDE DECREE, § 129.
OPERATION AND EFFECT OF DECREE, § 130.

§ 116. Nature, Form and Validity in General—Decree on Verdict of Jury.

[a] In an equity case, where issues are submitted to a jury, their verdict is merely ad-

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visory to the court. The adoption of a verdict is equivalent to a finding by the court to the extent to which the verdict covers the issues made by the pleadings. It is the duty of the court, when it adopts a verdict, to find upon all the issues not covered by it unless such findings are waived.—Warring v. Freear, 64 Cal. 54, 28 Pac. 115.

[b] In an equity case, the court may not enter judgment on the jury's general finding on issues, but must itself find, the general verdict not being determinative of the issues made by the pleadings.—Learned v. Castle, 67 Cal. 41, 7 Pac. 34.

[c] Where, in a suit to quiet title, there is an issue out of chancery, it is sufficiently shown that the court adopted the verdict of the jury by recitals in the judgment that the court made its findings of fact and conclusions of law in part from such verdict.—Goldman v. Rogers, 85 Cal. 574, 24 Pac. 782.

[d] It is not necessary that word "adopt" be used to show adoption of verdict by court. Goldman v. Rogers, 85 Cal. 578, 24 Pac. 782.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 471-474; 19 Cent. Dig., cols. 1492-1519, §§ 932-951.

§ 117. Nature and Extent of Relief.

[a] In an action to compel the conveyance to the plaintiff of certain stock, if the particular stock in question has passed out of the control of the defendant, the plaintiff, if successful, is not entitled on this ground to a judgment for the market value of the stock at the commencement of the suit, if the defendant still has in his possession other shares of the same stock equivalent in amount to the particular stock sued for.—Hardenbergh v. Bacon, 33 Cal. 356.

[b] In a case in equity where issues are joined the court is authorized to grant any relief consistent with the case and embraced within the issues, though not specifically prayed for.—Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 478-487; 19 Cent. Dig., cols. 1568-1588, §§ 986-1000; cols. 1605-1618, §§ 1009-1014.

§ 118. —— Interlocutory Orders.

[a] Under the Code of Civil Procedure and the decisions of this state, an interlocutory order may be rendered in an equity case. Thompson v. White, 63 Cal. 505.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 471; 19 Cent. Dig., cols. 1508-1516, §§ 947-949.

§ 119. —— Final Adjustment of all Issues.

[a] A court of equity, to which a creditor has resorted to get personal property and fixtures protected from detriment, may also decree a sale of the real estate proper, included in the same deed of trust.—Kraft v. De Forest, 53 Cal. 656.

§ 120. —— Parties.

[a] Where the plaintiff sued on behalf of some two hundred persons besides himself, who claimed separate parts of a tract of land, deraigning title from the same source, with the object of removing a cloud cast upon the title by the execution of invalid conveyances, it was held that a judgment, enjoining the defendants from future alienations in respect to the land of the plaintiff, and adjudging the previous conveyances to be invalid, was all that he was entitled to. He had no such community of interest with the other parties as entitled him to an injunction in their favor.—Gibbons v. Peralta, 21 Cal. 629.

[b] Where a decision is made in a suit in equity on any particular subject matter, the rights of all persons whose interests are immediately connected with that decision and affected by it should be provided for.—McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129.

[c] If a sale of lands, made under a power of attorney procured through fraud, be set aside as fraudulent and void ab initio, the fraudulent vendee is not entitled to a decree against the vendor for restitution of a part of the purchase money paid to the attorney who was privy to the fraud.—Sanchez v. McMahon, 35 Cal. 218.

[d] Where a suit is brought to have a deed absolute on its face declared a mortgage, and to redeem the defendant, by cross-complaint, may assert the deed to be absolute, and, if successful, may have a judgment for possession.—Taylor v. McLain, 64 Cal. 513, 2 Pac. 399, 401.

[e] In an action to enjoin the sale by defendants of certain stock pledged by plaintiff to defendants, to have judgments recovered by the latter against the former, for money loaned, adjudged paid, and for an accounting, plaintiff alleged that the money loaned to him by defendants was embezzled from him by one of them, who was his clerk, under a conspiracy between all the defendants. Defendants denied the fraud and conspiracy, alleged that the stock was pledged to secure the loans, pleaded as estoppels the judgments against plaintiff, and asked for affirmative relief. Held, that under Code of Civil Procedure, section 580, authorizing the court to grant any relief consistent with the case made, the court could decree that plaintiff was indebted to defendants in certain sums, that defendants had a lien on the stock for such sums, and to order a sale to satisfy such indebtedness.—Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

[f] Although the answer in an action for an accounting is confined to a denial of the allegations of the complaint, and does not ask for affirmative relief, a court of equity, hav-

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ing obtained jurisdiction of the cause, may render an affirmative judgment in favor of defendant, even though such judgment is inconsistent with the denials.—Vierra v. Fontes, 135 Cal. 126, 66 Pac. 241.

§ 121. Conformity to Pleading and Proofs.

[a] The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs.—(Cal. 1870) Bachman v. Sepulveda, 39 Cal. 688.

[b] Where the complaint alleged that all the defendants except two had acquired interests in the land in controversy the prayer was that the "defendants" be required to convey to the plaintiff the interest which he claimed, and the action was dismissed as to two of the defendants, the other defendants being required by the judgment to convey to the plaintiff the whole amount claimed, held, that the relief granted by the judgment was not in excess of the prayer of the complaint. Brooks v. Carpentier, 53 Cal. 287.

[c] In an action for an accounting, it appeared that plaintiff, being indebted to defendant, executed several notes, to the amount of the indebtedness, payable to one F., who was also indebted to defendant, and that, at the same time F. executed notes to the amount of his indebtedness, which were payable to plaintiff and indorsed by him to defendant, both plaintiff and F. conveyed to defendant certain lands to secure their debts. Held, that a contention by plaintiff that he was entitled to the proceeds of the sale by defendant of the land conveyed to it by F. as security would not be considered, where there was no prayer for such relief.—Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896.

[d] Where, in an action to determine water rights, each defendant answered, setting up affirmatively his rights to the water, and prayed to have the same adjudicated, a decree determining the relative rights of the defendants among themselves was within the issues, notwithstanding the rights of such defendants were not urged by way of cross-complaint.—Miller v. Dondero, 139 Cal. 643, 73 Pac. 583.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 483-487; 19 Cent. Dig., cols. 1588-1604, §§ 1001-1008.

§ 122. Relief Under General Prayer.

[a] Although the prayer of a bill be inartificially framed, the court will, under the general prayer for relief, disregard mistakes, and grant such relief as will conform to the bill. Truebody v. Jacobson, 2 Cal. 269.

[b] Under a prayer for general relief, no relief can be granted in equity beyond that which is authorized by the facts stated in the bill.—Carpentier v. Brenham, 50 Cal. 549.

[c] In an action to compel the return to a city of bonds issued by it to defendants for the construction of a waterworks costing less than the value of the bonds, a judgment that the bonds should not be affected, but that the defendants be charged with their value, and credited with the value of the waterworks, is warranted, under a prayer for general relief.—Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826.

[d] In courts of equity, if the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under a prayer for general relief; but under such prayer no relief can be granted beyond that which is authorized by the facts stated in the bill.—Oliver v. Blair, 8 Pac. 612.

§ 123. Amendment—During Term of Entry.

[a] Where amended decree rendered at same term as first decree, is simply what the original decree should have been, and does no injustice to a party, this court will not disturb it on account of any alleged irregularity not affecting the merits.—Gronfier v. Minturn, 5 Cal. 492.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 501-512; 19 Cent. Dig., cols. 1622-1635, §§ 1020-1033.

§ 124. —— Interlocutory Decrees.

[a] That a final decree is inconsistent with an interlocutory decree is immaterial as the latter may be modified on final hearing. Thompson v. White, 76 Cal. 381, 18 Pac. 399.

§ 125. Opening or Vacating—Notice.

[a] Where the notice of the motion to set the decree aside is defective, the order is not void on that account.—Pedrorena, In re, 80 Cal. 144, 22 Pac. 71.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 501-512; 19 Cent. Dig., cols. 1635-1652, §§ 1034-1047.

§ 126. Construction.

[a] In a petition for divorce, plaintiff described a certain homestead, alleging it to be community property; and the decree, granting her a divorce, awarded in general terms all community property to the husband. Held, in an action of ejectment brought by her against the husband's administrator to recover as homestead a portion of such community property, that the petition in the divorce suit might be considered in determining what property was awarded to the husband by the decree, and that the homestead was included in such award.—Stockton v. Knock, 73 Cal. 425, 15 Pac. 51.

FOR AUTHORITIES FROM OTHER STATES:
Title, when devested by decree in equity: 36 Am. Dec. 37, note. See, also, 16 Cyc. 498; 19 Cent. Dig., cols. 1653-1658, §§ 1048-1051.

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§ 127. Performance.

[a] In a suit in equity by a judgment creditor who had a sheriff's deed of land, to set aside and cancel a deed of the same given by the judgment debtor before the recovery of the judgment to defraud the creditor, a decree appointing a commissioner to execute to plaintiff a deed of all the interest of defendant grantee, if such grantee should fail to do so within a certain time, is not error affecting any substantial right of defendants, where said adverse deed was decreed null and void. Hager v. Shindler, 29 Cal. 47.

FOR AUTHORITIES FROM OTHER STATES:
See 19 Cent. Dig., cols. 1658, 1659, § 1052; cols. 1663, 1664, § 1054.

§ 128. —— Proceedings for Enforcement.

[a] A bill to carry a decree into effect must ordinarily show such decree to have been final in its character, and that, by reason of something occurring subsequently to its rendition, the rights of the parties cannot be properly enforced thereunder.—McFadden v. McFadden, 44 Cal. 306.

[b] Court of equity will always find means of enforcing its decree against delinquent defendant, and its power in this respect is as extensive as the exigencies of the case. Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

§ 129. Setting Aside Decree.

[a] Decree rendered on cross-bill held interlocutory merely, so that it was not within rule 19 of the rules of practice in equity in the federal courts, making decrees absolute unless set aside at same term, but within rule 1, providing that the circuit courts, as courts of equity, shall be deemed always open for certain purposes.—Blythe Co. v. Bankers' Inv. Co., 147 Cal. 82, 81 Pac. 281.

§ 130. Operation and Effect of Decree.

[a] Party to accounting accepting benefits thereof and making no objection thereto is bound thereby.—Wise v. Walker, 81 Cal. 13, 20 Pac. 81, 22 Pac. 293.

IX. BILL OF REVIEW.

§ 131. Grounds.

[a] Bill to vacate an affirmed judgment can be availed of only by bill of review, with proper averments.—Riddle v. Baker, 13 Cal. 295.

[ab] If a judgment is rendered payable in currency, and the record shows that it should have been made payable in gold, the error cannot be corrected by a bill of review.—San Francisco Savings etc. Soc. v. Thompson, 34 Cal. 76.

[b] It is doubtful whether a bill of review for errors apparent on the face of the record could be maintained under the old chancery system after an affirmance of the decree on appeal.—San Francisco Savings etc. Society v. Thompson, 34 Cal. 76.

[c] If judgment is erroneous upon face of record a bill of review will not lie to correct the same. In such case the error must be corrected by an appeal from the judgment. San Francisco Savings etc. Society v. Thompson, 34 Cal. 76.

[d] A bill of review to set aside a judgment as fraudulent will not be sustained on the ground that the opposing party was sworn as a witness in the case in which the judgment was rendered, and knew of a fact which, if proved, would have given judgment to the other party, and failed to disclose it, and witnesses have since been discovered who will testify to such fact.—Allen v. Currey, 41 Cal. 318.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 526-532; 19 Cent. Dig., cols. 1682-1705, §§ 1078-1094.

§ 132. —— Errors at Trial.

[a] In a chancery case it is doubtful whether the refusal to give instructions to the jury, even conceding them to be correct, can be assigned as error.—Branger v. Chevalier, 9 Cal. 353.

[b] Error in giving or refusing instructions is not ground for reversal of equity case. Hewlett v. Pilcher, 85 Cal. 545, 24 Pac. 781.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 526; 19 Cent. Dig., cols. 1686-1696, §§ 1079-1090.

§ 133. Time to Take Proceedings.

[a] Bill of review for new trial must be filed within time for which appeal or writ of error may be prosecuted.—Allen v. Currey, 41 Cal. 321.

[b] A court of equity will not entertain a bill of review for a new trial, after the lapse of the period within which an appeal or writ of error might be prosecuted; but the question is not decided whether a bill of review to set aside a judgment or decree for fraud is subject to such limitation by analogy, if the fraud is discovered after the lapse of such period.—Steen v. March, 132 Cal. 616, 64 Pac. 994.

EQUITY ACTS IN PERSONAM.

Maxim applied. See Equity, § 41.

EQUITY AIDS VIGILANT.

Maxim applied. See Equity, § 42.

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EQUITY FOLLOWS THE LAW.

Maxim applied. See Equity, § 40.

EQUITY OF REDEMPTION.

See references under Redemption.

ERASURES.

See Alteration of Instruments.

On election ballots. See Elections, § 62.

ERRONEOUS DECISION.

On former appeal as law of the case. See Appeal and Error, § 1341.

As authority. See Courts, § 77.

Operation and effect of. See Judgment, §§ 26, 384, 437.

ERRONEOUS DESCRIPTION.

Of property conveyed. See Deeds, § 36.

ERRONEOUS ORDER.

Disobedience of, as contempt of court. See Contempt, § 26.

ERROR.

Constituting ground for new trial—in criminal cases. See Criminal Law, §§ 520-527.

—— In civil cases. See New Trial, §§ 13-18.

Curing error occurring during trial by instructions or rebuke of court. See Criminal Law, § 370.

Reviewable by writ of prohibition. See Prohibition, § 16.

ERROR OF JUDGMENT.

In award of arbitrators. See Arbitration and Award, § 37.

ERROR, WRIT OF.

See Appeal and Error.

ESCAPE AND RESCUE.

Include voluntary departure and attempts of prisoners to depart from lawful custody of officers or other persons, or from any place where they are lawfully confined, with or without force or fraud, and voluntary or negligent allowance by officers of such departure, aiding such escape, and concealing or harboring escaped prisoners, as offenses against public justice and authority; nature and elements of the crimes of escape, jail breaking, prison breach, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

§ 1. Aiding Escape.

See also Obstructing Justice.

Escape of prisoners. See, also, Prisons, § 4.

Admissibility of evidence of attempt to escape. See Criminal Law, § 105.

Admissibility of evidence of refusal of accused to escape. See Criminal Law, § 178.

Escape of appellant as ground for dismissal of appeal. See Criminal Law, § 714.

Effect of escape and sentence therefor, on term of imprisonment. See Criminal Law, § 832.

[a] Departure from unlawful imprisonment or custody is not an escape, within the meaning of the law; and one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement is not guilty of the crime of assisting a prisoner to escape.—People v. Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190.

For Authorities from Other States:

See 16 Cyc. 542; 19 Cent. Dig., col. 1754, § 6.

ESCHEAT.

Include reversion of property, real or personal, to the state, for want of persons legally competent to hold or take it; and conveyance, release, and enforcement of the rights of the state.

IN GENERAL, § 1.
PROPERTY SUBJECT TO ESCHEAT, § 2.
STATUTORY PROVISIONS, § 3.
ENFORCEMENT, IN GENERAL, § 4.
—— WHERE ALLEGED FORGED WILL IS ADMITTED TO PROBATE, § 5.
NECESSITY FOR PROCEEDINGS, § 6.
TIME TO COMMENCE PROCEEDINGS, § 7.
CITATION AND APPEARANCE, § 8.

See, also, Forfeitures.

Political character of laws regulating. See International Law, § 4.

§ 1. In General.

[a] Escheats and forfeitures are not favored by the law; and the remedy of escheat does not exist, in the absence of an express provision therefor.—People ex rel. v. Stockton Savings etc. Soc., 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078.

[b] The state does not come in by way of succession on failure of heirs or next of kin to take an estate of a decedent, but in such event the property, whether real or personal, goes to the state by escheat—Miner's Estate, In re, 143 Cal. 194, 76 Pac. 968.

[c] Under the statute providing that if a nonresident alien takes by succession he must appear and claim the property within five years, and Civil Code, section 1404, declaring that no nonresident foreigner can take by succession unless he claims the property within five years, the portion of an estate to which a nonresident would be entitled if he claimed it in five years, but which he does not so claim, does not return to the estate to be distributed to other heirs, but goes to the state.—Pendergast's Estate, In re, 143 Cal. 135, 76

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Pac. 962; People v. Fitzpatrick, 143 Cal. 135, 76 Pac. 962.

§ 2. Property Subject to Escheat.

[a] Under Constitution, article 12, section 9, providing that no corporation shall hold for a longer period than five years any real estate not necessary for carrying on its business, and Civil Code, section 574, that savings and loan associations may purchase real estate at sales under mortgages made for their benefit, but must sell such real estate within five years, real estate so purchased does not escheat to the state at the expiration of five years, if not then sold.—People v. Stockton Savings etc. Soc., 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 550, 551; 19 Cent. Dig., cols. 1773-1778, §§ 3-5.

§ 3. Statutory Provisions.

[a] On the conquest of California, the Mexican law of escheats did not continue in force in California until the ratification of the treaty between the United States and Mexico, but was abrogated by such conquest so far as citizens of the United States and aliens were concerned.—People v. Folsom, 5 Cal. 373.

[b] Acquisition of California did not extend over it the common law doctrine of escheats. People v. Folsom, 5 Cal. 379.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1771-1773, § 2.

§ 4. Enforcement in General.

[a] Section 474, Political Code, providing proceedings for discovery of escheated property construed.—People v. Hibernia Savings etc. Soc., 72 Cal. 22-27, 13 Pac. 48.

[b] Section 474, Political Code, does not authorize attorney general or counsel appointed by him to examine books and papers of corporation except under order or supervision of court.—People v. German Savings etc. Soc., 72 Cal. 28, 13 Pac. 51.

[c] An order of the probate court reciting that the affairs of an estate had been finally settled and that there were no heirs or other claimants thereof, and ordering "that the county treasurer of this city and county forthwith pay into the state treasury all moneys and effects in his hands belonging to such estate," did not ipso facto operate to vest in the state the title to the fund ordered to be deposited in the state treasury, as upon a decree in an action brought to escheat the same.—Miner's Estate, In re, 143 Cal. 194, 76 Pac. 968.

[d] Under Civil Code, sections 1386, 1404, and Code of Civil Procedure, section 1269, certain allegations as to the absence of heirs held sufficient in a proceeding by information to enforce an escheat.—State v. Miller, 85 Pac. 609.

[e] Under Civil Code, sections 1386, 1404, and Code of Civil Procedure, section 1269, an escheat proceeding commenced within less than five years after the death held premature.—State v. Miller, 85 Pac. 609.

[f] Under Civil Code, sections 1386, 1404, and Code of Civil Procedure, sections 1269, 1271, absence of claimants in an escheat proceeding held sufficient, without other evidence, to authorize judgment for the state.—State v. Miller, 85 Pac. 609.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 552-556; 19 Cent. Dig., cols. 1779-1793, §§ 7-17; cols. 1801, 1802, § 24.

§ 5. —— Where Alleged Forged Will is Admitted to Probate.

[a] The state is not entitled to claim an escheat when a will has been admitted to probate, though alleged to be forged.—State of California v. McGlynn, 20 Cal. 234.

§ 6. Necessity for Proceeding.

[a] By civil law, as well as common law, king cannot take upon himself possession of estate said to have escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office.—People ex rel.. Attorney General v. Folsom, 5 Cal. 373.

[b] Twelve days before the ratification of the treaty of Guadalupe Hidalgo, Leidesdorff, a naturalized citizen of Mexico, died, seised of certain lands in San Francisco, and Anna M. Sparks, his mother and heir, through whom the defendant claims title, was not at the time of his death a citizen of the United States or of Mexico, but was a subject of Denmark, and never resided in Mexico or the United States. Held, that, in order that the United States should take any interest in the land, it was necessary that the forfeiture should have been ascertained, either by the United States or by Mexico.—People ex rel. Attorney General v. Folsom, 5 Cal. 373.

[c] Proceeds of estates of deceased persons dying without heirs do not become part of school fund under Constitution, section 4, article 9, without procedure in nature of office found.—State v. Smith, 70 Cal. 157, 12 Pac. 121.

[d] While the provision of the Code of Civil Procedure in reference to escheats, when taken by itself, might imply that an action of escheat is only necessary where real estate is involved, yet, under Political Code, section 4480, providing that the provisions of the various codes bearing upon the same subject matter must be construed together, the various provisions of the several codes bearing on the same subject make it evident that, in every case of a failure of succession for want of heirs or kindred of a decedent, an action of

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escheat becomes necessary to vest the title in the state, whether the estate so escheated consists of real or personal property.—Miner's Estate, In re, 143 Cal. 194, 76 Pac. 968.

[e] There is no limit to the time in which native-born American citizens may come forward and claim property to which they have succeeded, so long as no judgment or decree in a proper proceeding to escheat has been entered.—Miner's Estate, In re, 143 Cal. 194, 76 Pac. 968.

[f] Code of Civil Procedure, sections 1269, 1272, relating to escheats, providing that a person not a party or privy to a proceeding may, within twenty years after the judgment, file a petition showing his claim or right to the property, has no application to a case where no action has been brought or judgment rendered in favor of the state under the provisions of the Code.—Miner's Estate, In re, 143 Cal. 194, 76 Pac. 968.

§ 7. Time to Commence Proceedings.

[a] Escheat proceeding brought by attorney general under title 8, part 3, Civil Code., is premature if commenced before expiration of five years after death of ancestor of nonresident alien.—State v. Smith, 70 Cal. 157, 12 Pac. 121.

[b] Alien heirs have five years after descent cast to claim their right, and attorney general cannot begin escheat proceedings before that time.—People v. Roach, 76 Cal. 296-299, 18 Pac. 407.

§ 8. Citation and Appearance.

[a] On a bill for the discovery of property which has escheated, a citation must be issued before the right to examine a person accrues; and a judgment ordering certain defendants to permit the attorney general to examine their books and papers, upon a complaint alleging that he has made a demand on them to be allowed to do so, which demand has been refused, and upon findings in accordance with the allegations of the complaint, is erroneous.—People v. Hibernia Savings etc. Soc., 72 Cal. 21, 13 Pac. 48; People v. German Savings etc. Soc., 72 Cal. 28, 13 Pac. 51.

ESCROWS.

Include deeds, bonds, and other obligatory writings delivered to a person not a party thereto to be held by him until the performance of a specified condition or the happening of a certain contingency, and then to be delivered to the grantee or obligee; and rights, duties, and liabilities of parties to such instruments and of the depositaries, as affected by the delivery thereof as escrows and the final delivery.

NATURE AND REQUISITES, § 1.
RETENTION OF CONTROL BY DEPOSITOR, § 2.
CONDITIONS OR CONTINGENCIES, § 3.
REVOCATION OF DELIVERY, § 4.
PERFORMANCE OF CONDITIONS OR CONCURRENCE OF CONTINGENCY, § 5.
TIME WHEN INSTRUMENT TAKES EFFECT, § 6.
REPRESENTATIVE CHARACTER OF DEPOSITARY, § 7.
DELIVERY BY DEPOSITARY, § 8.

Conditional delivery of bill or note. See Bills and Notes, § 26.

Deposit of deed for delivery after grantor's death. See Deeds, § 51.

§ 1. Nature and Requisites.

[a] Escrow, defined.—Kile's Estate, In re, 72 Cal. 139, 140, 13 Pac. 320.

[b] Deed cannot be delivered in escrow to grantee.—Mowry v. Heney, 86 Cal. 475, 25 Pac. 17.

[c] An actual contract of sale on the one side and purchase on the other, definitely assented to by both parties, is essential to a delivery in escrow.—Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 289.

§ 2. Retention of Control by Depositor.

[a] A deed deposited with a third person by the grantor, to be delivered to the grantee upon the order of the grantor's agent, is not an escrow, as the contract is not so complete between the parties to the deed that it only remains for grantee to perform some condition in order to have the deed delivered to him; but the grantor may, before the agent gives such order, direct the third person not to deliver the deed.—Fitch v. Bunch, 30 Cal. 208.

[b] The essential requisite to the validity of a deed transferred in escrow is, that when placed in the hands of a third party it has passed beyond the power of the grantor for all time, and that question is to be determined by the grantor's intention in the matter, and is a question of fact to be solved by the light of all the circumstances surrounding the transaction.—Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 561-567; 19 Cent. Dig., cols. 1803-1808, §§ 1-3, 5.

§ 3. Conditions or Contingencies.

[a] Bill of sale delivered in escrow upon condition that claim be worked and proceeds applied in payment, is defeated by abandonment of work.—Beem v. McKusick, 10 Cal. 538.

[c] M., in consideration of the agreement of defendant, agreed to build a certain street railroad, for which defendant agreed to pay M. a certain amount, in notes of defendant one-half, by a two months note, when the grading was done and the iron was on the ground, the balance, by a four months note on completion of the road; that the road should be constructed, weather permitting, within four months; that the notes should be deposited with B. in trust till the conditions

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of the contract were performed by M., and the certificate of the engineer that the conditions had been performed should be served on said trustee, and on delivery to him of said certificate he should deliver to M. the two months note and the four months note, respectively. The notes were deposited with B., with instructions to deliver the two months note to M. on the certificate of the engineer that the grading was done and the iron on the ground, and the four months note on his certificate that the road was completed. Held, that the completion of the road within four months was not a condition precedent to the right of M. to a delivery to him of the notes.—Witmer Bros. Co. v. Weid, 108 Cal. 569, 41 Pac. 491.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 564-567; 19 Cent. Dig., cols. 1813-1817, § 8.

§ 4. Revocation of Delivery.

[a] Escrow is not revocable by vendor.—Cannon v. Handley, 72 Cal. 140, 13 Pac. 315; McDonald v. Huff, 77 Cal. 282, 19 Pac. 499.

[c] On the question whether a grantor had power to recall a deed delivered in escrow, evidence of subsequent acts of the grantor, tending to show his intentions at the time he made the deed, is inadmissible.—Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

§ 5. Performance of Conditions or Occurrence of Contingency.

[a] Delivery in escrow does not become absolute until conditions are fulfilled.—Beem v. McKusick, 10 Cal. 538.

[b] Where an instrument is conditionally delivered to a third party, it is not operative and binding until the conditions are performed.—Dyson v. Bradshaw, 23 Cal. 528; McLaughlin v. Clausen, 85 Cal. 322, 24 Pac. 636.

[c] When condition is performed by grantee of escrow he is absolutely entitled to it.—Cannon v. Handley, 72 Cal. 140, 13 Pac. 315.

[d] Where a deed of gift provided for its delivery to be held in escrow and delivered to the grantee at the moment of the grantor's death, a compliance with the provision constituted a delivery, and operated to convey title to the grantee.—Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298.

[e] Holder of option for the purchase of certain land, being in default, held not entitled to enforce a delivery of the deed either against the vendors or a depositary of the deed in escrow.—White v. Bank of Hanford (Cal. Sup.), 83 Pac. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 575; 19 Cent. Dig., col. 1829, § 16.

§ 6. Time When Instrument Takes Effect.

[a] The delivery of a note in escrow during the lifetime of a party becomes absolute upon the happening of the condition after his death.—Bostwick v. McEvoy, 62 Cal. 496.

[b] Deed delivered in escrow vests title in grantee upon delivery to him by depositary, but takes effect immediately as against intervening grantee with notice.—McDonald v. Huff, 77 Cal. 282, 19 Pac. 499.

[c] Contract to convey on certain conditions is binding on vendor from its delivery to depositary without signature or written contract from vendee.—McDonald v. Huff, 77 Cal. 282, 19 Pac. 499.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 588; 19 Cent. Dig., cols. 1823-1828, §§ 12-14.

§ 7. Representative Character of Depositary.

[a] When condition is performed depositary becomes custodian of grantee, holding deed for him.—Cannon v. Handley, 72 Cal. 141, 13 Pac. 315.

[b] Depositary is agent of both parties.—McDonald v. Huff, 77 Cal. 282, 19 Pac. 499.

§ 8. Delivery by Depositary.

[a] Facts held sufficient to show a valid delivery of a deed in escrow.—Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120.

[b] Depositary is bound to deliver deed on performance of condition in contract under which he holds it.—McDonald v. Huff, 77 Cal. 282, 19 Pac. 499.

[bc] A mortgagor agreed in writing to execute a deed to the mortgagee, and leave it in escrow, to be delivered on default by him in paying an agreed sum less than the amount due, provided the mortgagee gave a receipt in full. The deed was left with a third person. Default was made, but the mortgagor demanded the deed back, and, though he did not receive it, conveyed to another, who knew the facts. The holder delivered the deed to the mortgagee's attorney, who receipted for all demands against the mortgagor. Held, that this delivery and acceptance were binding on the mortgagor, and his grantee took no title.—McDonald v. Huff, 77 Cal. 279, 19 Pac. 499.

[c] Defendant executed a deed, naming plaintiff as grantee, and delivered it to M. There was no evidence to show for what purpose such deed was executed, nor was there any agreement between plaintiff and defendant in regard thereto. Held, that a delivery of the deed to plaintiff by M. could only constitute either an absolute sale of the land to plaintiff, or a mortgage of it by defendant to plaintiff, for some liability of her own to plaintiff, and that M. was not acting within the apparent scope of his authority when he delivered the deed to secure plain-

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tiff for advances made to himself.—Hubback v. Ross, 96 Cal. 426, 31 Pac. 353.

[d] Where an agent for the sale of land, intrusted with a deed thereof, through the negligence of the vendee, who knew that he was authorized to deliver the deed only after a purchase money note and mortgage were executed to the vendor, fraudulently took the note and mortgage in his own name, there was no valid delivery, and the vendor was entitled to a lien for the price, as against an innocent purchaser of the mortgage.—Raymond v. Glover, 37 Pac. 772.

FOR AUTHORITIES FROM OTHER STATES:
See 19 Cent. Dig., col. 1828, § 15.

ESSENCE OF CONTRACT.

Time as. See Contracts, § 157; Specific Performance, § 31.

Time as essence of contract to convey real estate. See Vendor and Purchaser, § 23.

ESTABLISHMENT.

Of boundaries. See Boundaries, II.
Of county boundaries. See Counties, § 9.
Of county seat. See Counties, § 17.
Of drains. See Drains, §§ 1, 18-30.
Of highways by prescriptions. See Highways, §§ 8-19.
Of homestead. See Homestead, I, C.
Of lost instrument. See Lost Instruments, § 2.
Of private roads. See Private Roads, § 3.
Of schools. See Schools and School Districts, § 1.
Of telegraphs and telephones. See Telegraphs and Telephones, §§ 1-4.
Of water rates. See Waters and Watercourses, § 225.

ESTATES.

Includs nature and incidents of interests in real or personal property in general, and of estates in fee or absolute ownership; and union or merger of estates.

EQUITABLE ESTATES, § 1.
—— DISTINCTION BETWEEN LEGAL AND EQUITABLE ESTATES, § 2.
PRESUMPTIONS IN FAVOR OF VESTING, § 3.
MERGER, § 4.
PRESUMPTIONS WHERE PARTY ENTERS ESTATE UNDER GOOD AND BAD CLAIM, § 5.
POWER OF OWNER TO ANNEX CONDITION TO HIS ESTATE, § 6.

Estate of assignor for creditors in assigned property. See Assignments for Benefit of Creditors, §§ 32, 33, 53.
Estates subject to seizure under writ of attachment. See Attachment, §§ 33-37.
Estates affected by attachment lien. See Attachment, § 100.
Passing to assignee in bankruptcy. See Bankruptcy, §§ 9-12.
Protected as vested rights. See Constitutional Law, §§ 136-140.
Estates created by deed. See Deeds, §§ 119-127.
Estate necessary to maintain ejectment suit. See Ejectment, I, B.
Estate created by condemnation proceedings. See Eminent Domain, § 166.
Passing of after-acquired estates by deed. See Estoppel, §§ 32-37.
Estate of holder of seat in stock exchange. See Exchanges, § 3.
Estates acquired by purchaser at execution sale. See Executions, §§ 117-124.
Subject to levy under execution. See Execution, § 16.
Of decedents and administration thereof. See Executors and Administrators.
Nature of estate in homestead. See Homestead, § 2.
Misrepresentation as to estate of insured as avoiding policy. See Insurance, § 85.
Joint estates. See Joint Tenancy.
Life estates. See Life Estates, §§ 1-3.
Subject to or affected by mechanic's lien. See Mechanics' Liens, §§ 5, 58.
Covered by land mortgage. See Mortgages, § 58.
Estates subject to partition. See Partition, §§ 1-9.
Nature of estate in party-walls. See Party-walls, § 1.
Nature and incidents of estates limited to take effect after the determination of preceding estates. See Remainders.
Nature and incidents of ulterior estates remaining in grantors of particular estates. See Reversions.
Subject to sale for taxes. See Taxation, § 162.
Acquired by purchase of tax title. See Taxation, § 177.
Estates in common. See Tenancy in Common.
Estates created by will. See Wills, §§ 278-296.

§ 1. Equitable Estates.

[a] Equitable estate is estate of inheritance.—Watson v. Sutro, 86 Cal. 527, 24 Pac. 172, 25 Pac. 64.

§ 2. —— Distinction Between Legal and Equitable Estates.

[a] In most cases difference between legal and equitable estates is of no practical importance.—Watson v. Sutro, 86 Cal. 527, 24 Pac. 172, 25 Pac. 64.

§ 3. Presumptions in Favor of Vesting.

[a] Law favors vesting of interests and every estate is presumed vested unless contrary is clearly manifest.—Williams v. Williams, 73 Cal. 102, 14 Pac. 394.

§ 4. Merger.

[a] At law, a merger always takes place when greater and less estate meet in the same person, in the same right, without an intermediate estate.—Rumpp v. Gerkens, 59 Cal. 496.

[b] In respect to the merger of a lesser estate in a greater, equity is not controlled by the rules of law; but is governed by the actual or presumed intention of the person in whom the interests are united.—Shafer v. McCloskey, 101 Cal. 576, 36 Pac. 196.

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[c] Where a cotenant on an estate for years is also the owner of the reversion, the estate for years will not be deemed merged in his reversionary interest so as to prevent a separate sale in partition of the estate for years, where his interests would be jeopardized by the sale of such reversionary interest.—Jameson v. Hayward, 106 Cal. 682, 46 Am. St. Rep. 268, 39 Pac. 1078.

FOR AUTHORITIES FROM OTHER STATES:

Merger of estates: 99 Am. St. Rep. 153, note.

Merger of dower in the fee: 99 Am. St. Rep. 156, note.

Merger of mortgages in the fee: 99 Am. St. Rep. 160, note. See, also, 16 Cyc. 665-669; 19 Cent. Dig., cols. 1845-1856, §§ 9-13.

§ 5. Presumptions Where Party Enters Estate Under Good and Bad Claim.

[a] Where a party has entered into the enjoyment of an estate, under two claims, one of which is good and the other bad, he will be regarded as having entered under the better claim.—Wood v. Curran, 99 Cal. 137, 33 Pac. 774.

§ 6. Power of Owner to Annex Condition to His Estate.

[a] One owning land, and who continues to hold all the interest he ever had in it, cannot annex a condition to his estate of such a character that, upon its breach, the estate shall vest by a forfeiture in a person who never held any interest in the land.—Wiseman v. McNulty, 25 Cal. 230.

ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators.

ESTATES OF INSOLVENTS.

See Assignments for Benefit of Creditors; Bankruptcy; Insolvency Receivers.

ESTATES TAIL.

Deeds creating. See Deeds, § 123.

ESTIMATE OF VALUE.

Wrong estimate of value of insured property as ground for avoiding policy. See Insurance, § 84.
In declaration of homestead. See Homestead, § 30.

ESTOPPEL.

Include preclusion of persons from asserting or denying matters of fact, rights, or claims, contrary to or inconsistent with previous allegations, admissions, denials, acts, or conduct of the same persons or those under whom they claim; nature and grounds of such preclusion; operation and effect of estoppel as to rights and titles subsequently acquired, as well as those previously existing; pleading estoppel; and evidence relating thereto.

I. BY RECORD, §§ 1-10.
II. BY DEED, §§ 11-37.
A. Creation and Operation in General, §§ 11-31.
B. Estates and Rights Subsequently Acquired, §§ 32-37.
III. EQUITABLE ESTOPPEL, §§ 38-95.
A. Nature and Essentials in General, §§ 38-53.
B. Grounds of Estoppel, §§ 54-81.
C. Persons Affected by Estoppel, §§ 82, 83.
D. Matters Precluded and Effect of Estoppel, §§ 84-86.
E. Pleading, Evidence and Trial, §§ 87-95.

Estoppel in pais as element of abandonment. See Abandonment, § 11.
To plead in abatement. See Abatement and Revival, § 42.
Of appellant to deny jurisdiction of appellate court. See Appeal and Error, § 30.
To appeal. See Appeal and Error, §§ 210-221.
To deny right to appeal. See Appeal and Error, § 208.
To object to want of service of notice of appeal. See Appeal and Error, § 413.
By brief filed in appellate court. See Appeal and Error, § 971.
To urge grounds for dismissal of appeal. See Appeal and Error, § 996.
To allege error. See Appeal and Error, § 1110.
To dispute award of costs by arbitrators. See Arbitration and Award, § 57.
To deny title of bailor. See Bailment, § 5.
To deny signature. See Banks and Banking, § 57.
Of bank to deny title of depositor. See Banks and Banking, § 56.
Of bank officer to deny his authority. See Banks and Banking, § 27.
To set up illegality of note or draft. See Bills and Notes, § 59.
To deny indorsement on commercial paper. See Bills and Notes, § 115.
Establishment of boundary by. See Boundaries, § 57.
To cancel instrument. See Cancellation of Instruments, § 18.
To apply for writ of certiorari. See Certiorari, § 10.
To question capacity or existence of corporation, See Corporations, §§ 54, 55.
To deny liability on contract of subscription to corporate stock. See Corporations, § 93.
To question appointment of corporate officer. See Corporations, § 283.
To question authority of corporate officers. See Corporations, § 353.
To question corporate powers. See Corporations, §§ 332-334.
To allege error. See Criminal Law, §§ 726-729.
To claim or deny dedication. See Dedication, §§ 51, 52.
To object to deposition. See Depositions § 466.
To dismiss cause. See Dismissal and Nonsuit, § 8.
Extinguishment of easement by estoppel. See Easements, § 22.
To claim compensation for land taken for public use. See Eminent Domain, § 42.

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To object to account of executor or administrator. See Executors and Administrators, § 531.
To claim exemption. See Exemptions, § 19.
Of creditor to question validity of conveyance of debtor. See Fraudulent Conveyances, § 114.
Of guarantor to avail himself of circumstances relieving him from liability. See Guaranty, § 31.
Of guardian to deny guardianship. See Guardian and Ward, § 8.
To assert invalidity of transfer or mortgage of homestead. See Homestead, § 96.
To claim homestead. See Homestead, § 192.
To deny nature of community. See Husband and Wife, § 134.
Of infants. See Infants, § 3.
Of infants by contract. See Infants, § 29.
To forfeit insurance policy. See Insurance, X.
To question authority of insurance agent. See Insurance, § 109.
To forfeit mutual benefit insurance. See Insurance, § 232.
By judgment. See Judgment, XIV.
Waiver of estoppel by judgment. See Judgment, § 508.
To deny relation of landlord and tenant. See Landlord and Tenant, §§ 5, 22.
To set up defects in leases. See Landlord and Tenant, § 10.
To rely on limitation laws. See Limitation of Actions, § 11.
To deny execution of mortgage. See Mortgages, § 31.
Of mortgagor to dispute title of mortgagee. See Mortgages, § 61.
Of purchaser of mortgaged land to contest mortgage. See Mortgages, § 130.
To deny validity of city improvement assessments. See Municipal Corporations, § 212.
To apply for new trial. See New Trial, § 11.
To deny appointment to office. See Officers, § 8.
To deny title to office. See Offices, § 34.
To deny partnership. See Partnership, § 12.
Of firm by acts of partner. See Partnership, § 59.
By holding one out as partner to deny partnership. See Partnership, § 15.
Of pledgee to deny title of pledgor. See Pledges, § 14.
To assert or deny liability of surety. See Principal and Surety, § 21.
To deny agency. See Principal and Agent, § 10.
As principal and agent. See Principal and Agent, § 31.
To deny receiver's right to possession. See Receivers, § 14.
As to defects in goods sold. See Sales, § 11.
To object to evidence. See Trial, § 53.
Of purchaser to deny title of vendor of land. See Vendor and Purchaser, § 69.
To rescind contract to purchase or convey real estate. See Vendor and Purchaser, §§ 31, 40.
To object to place of trial of civil action. See Venue, § 10.
By acceptance of devise or legacy. See Wills, § 315.

I. BY RECORD.

JUDICIAL PROCEEDINGS, IN GENERAL, § 1.
—— ESTOPPEL TO OBJECT TO PARTIES, § 2.
—— PLEADINGS, § 3.
—— ADMISSIONS DURING TRIAL, § 4.
—— STIPULATIONS, § 5.
—— MOTIONS, § 6.
PETITIONS, § 7.
ESTOPPEL OF CITY BY ORDINANCES, § 8.
PERSONS ESTOPPED, § 9.
PLEADING ESTOPPEL, § 10.

§ 1. Judicial Proceedings in General.

[a] If plaintiff offers competent testimony to prove certain facts, and it is rejected by the court on the objection of the defendant, the defendant will not afterward be permitted to allege that the plaintiff failed to prove the facts embraced in the offer.—Thompson v. McKay, 41 Cal. 221.

[b] Party whose appeal is entertained is estopped to deny to that judgment was final.—Clark v. Dunnam, 46 Cal. 208.

[c] Party cannot allow known irregularity to exist during whole trial, take chances on favorable verdict and object for first time after defeat.—Ipswitch v. Fernandez, 84 Cal. 641, 24 Pac. 298.

[d] Where the plaintiff obtained a decree of the superior court ordering a whole block of land to be sold by the sheriff, and purchased the whole block at the sheriff's sale as the property of the defendant in the foreclosure suit in satisfaction of the lien and after redemption attempted by a successor of the judgment debtor, seeks from the sheriff a deed of the whole block, by writ of mandate, the plaintiff will not be heard to object to the redemption of the land on the ground that the defendant in the foreclosure suit never owned the whole block.—Southern California Lumber Co. v. McDowell, 105 Cal. 99, 38 Pac. 627.

[e] The plaintiff, if interested in preventing a judgment against the receiver, had ample opportunity, as a party codefendant, to defend against such judgment; and if he had himself dismissed as to the action, and relied upon the receiver making a proper defense, he must abide the result.—Painter v. J. B. Painter Co., 133 Cal. 129, 65 Pac. 311.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 684, 685; 19 Cent. Dig., cols. 1885-1889, § 1.

§ 2. —— Estoppel to Object to Parties.

[a] Defendant sued by fictitious name, who fails to supply name, or to plead misnomer, cannot object to judgment against himself.—Sanchez v. Roach and Others, 5 Cal. 247.

[b] One who sues defendants as joint trespassers is estopped to deny they were such.—Fowler v. Frisbie, 37 Cal. 39.

§ 3. —— Pleadings.

[a] Parties are estopped to deny or disprove express allegations, or admissions of their own pleadings.—Edgar v. Gray, 5 Cal. 267.

[b] An allegation in a pleading does not estop the party pleading it from proving

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that the allegation is not correct, unless the allegation is made of an issuable fact.—Patterson v. Keystone Min. Co., 30 Cal. 360.

[c] A defendant on the trial cannot controvert a fact admitted by the pleadings.—Bradbury v. Cronise, 46 Cal. 287.

[d] If a defendant in his answer admits a material allegation in a complaint he is afterward precluded from contesting it.—Howard v. Throckmorton, 48 Cal. 482.

[e] Sureties made parties to an action and dismissed upon their own demurrer are estopped to deny that they were parties.—People v. Blake, 60 Cal. 504.

[f] Defendant is not at liberty to dispute a positive averment in his answer.—Brusie v. Gates, 96 Cal. 265, 31 Pac. 111.

[g] A party is not estopped by allegations in his pleadings in a prior action, admitting the existence of a corporation, when the parties to the second action and the issues presented therein are different.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

[h] Plaintiff, by bringing the lessor into court, and asking it to find the amount of rent due to him, and by allowing the court to pass upon the issues raised by the answer as though properly made, is estopped from claiming that the matter pleaded in the answer was not the subject of a counterclaim. He will not be allowed to lull his adversary into repose until his claim is barred by statute in an independent action, and then raise a point which is destructive of the claim.—McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278.

[i] A party in one action is not bound by allegations in a complaint in another action to which he is not a party.—Mellus v. Mellus, 8 Pac. 1.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1889-1901, §§ 2-5; cols. 1903, § 7.

§ 4. —— Admissions During Trial.

[a] Where one of the issues was the condition of the goods (hops) in question when they left New York, and defendant had admitted on the trial that "if merchantable when they left New York, he made no claim," held, that he was concluded by this admission.—Burritt v. Gibson, 3 Cal. 396.

[b] Party is estopped to deny an admission made upon the trial of a cause.—Vandall v. South etc. Co., 40 Cal. 92.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1903-1908, § 8.

§ 5. —— Stipulations.

[a] Where the parties stipulate that the deposition of a witness out of the state may be taken by a designated person, and when taken may be used on the trial, they are afterward estopped from objecting that the deposition was not taken under a commission issued by the trial court.—Palmer v. Uncas Min. Co., 70 Cal. 614, 11 Pac. 666; Holm v. Uncas Min. Co., 70 Cal. 614, 11 Pac. 666.

§ 6. —— Motions.

[a] The doctrine of res judicata not being applicable to motions for alias writs, and such other like motions made in the course of practice, the court may, on a proper showing, allow the renewal of such a motion, which has been once decided.—Ford v. Doyle, 44 Cal. 635.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1908, 1909, § 9.

§ 7. Petitions.

[a] A person held land under a Spanish grazing grant for a period of twenty years, and after his death his four sons occupied the same under a claim of ownership. On the death of two of the sons, the widows agreed with the survivors on a verbal partition of the premises, and later they presented a petition to the governor, representing that the premises had been granted to their ancestors, and asking that the title to the separate portions, as determined by the partition, be declared to be in petitioners. This petition was granted. Afterward the children of one of the widows mentioned brought an action for their father's share of the land in question, claiming that the title vested in them at his death, and that their mother had no right to convey. Held that, in this action, the averments of the petition to the governor did not work an estoppel as against the widow or her grantee, preventing their denial that at any time the title had vested in their ancestors.—Nieto's Heirs v. Carpenter, 21 Cal. 455.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1901-1903, § 6.

§ 8. Estoppel of City, by Ordinances.

[a] Subsequent ordinance appropriating proceeds of an invalid sale of city property under first ordinance does not ratify it by implication, and the city is not estopped from denying the sale and asserting title to the property sold.—McCracken v. City of San Francisco, 16 Cal. 591.

§ 9. Persons Estopped.

[a] A woman was twice married, and, having heard that her first husband was living, began proceedings to obtain a divorce from him. Held, that her affidavit in such case that she was the wife of defendant at the time of her subsequent marriage to another did not estop her from denying such fact in an action by her second husband to annul the second marriage.—Hunter v. Hunter, 111 Cal. 261, 43 Pac. 756.

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§ 10. Pleading Estoppel.

[a] If no objection is taken when an estoppel by record is offered in evidence that it was not specially pleaded, no objection can afterward be made for that reason.—Flandreau v. Downey, 23 Cal. 354.

[b] Estoppel by record, to be available, must be pleaded.—(1853) Hostler v. Hays, 3 Cal. 302; (1869) Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 590.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1913, 1914, § 17.

II. BY DEED.

A. Creation and Operation in General, §§ 11-31.

B. Estates and Rights Subsequently Acquired, §§ 32-37.

A. CREATION AND OPERATION IN GENERAL.

INSTRUMENTS OPERATING AS ESTOPPEL—DEEDS, § 11.
—— MORTGAGES, § 12.
—— ACKNOWLEDGMENT, § 13.
—— INVALID OR DEFECTIVE INSTRUMENTS, § 14.
RECITALS IN INSTRUMENTS, IN GENERAL, § 15.
—— RECITALS IN DEEDS, § 16.
—— RECITALS IN MORTGAGES, § 17.
—— RECITALS IN BONDS, § 18.
—— COVENANTS, § 19.
PERSONS ESTOPPED, § 20.
—— PERSONS ACTING IN PARTICULAR CHARACTER OR CAPACITY, § 21.
—— PURCHASER FROM MORTGAGOR, § 22.
GRANTORS OR MORTGAGORS AND PRIVIES, § 23.
—— TO IMPEACH OR DENY OWN TITLE, § 24.
—— TO SET UP TITLE IN ANOTHER, § 25.
GRANTEES, § 26.
—— TO DENY GRANTOR'S TITLE, § 27.
—— TO SHOW THAT DEED IS MORTGAGE, § 28.
—— TO DENY OWN TITLE, § 29.
MATTERS PRECLUDED, § 30.
PLEADING ESTOPPEL, § 31.

§ 11. Instruments Operating as Estoppel—Deeds.

[a] A deed of conveyance, release, and partition, between all the claimants of a certain tract, with a proviso that it is to take effect when, and only when, the commissioners thereby appointed to make partition shall have recorded their report, estops a party to it to deny that he had title, and to dispute the title the other parties derive under it. He cannot afterward set up that he only released a certain title to the land, and that he held at the time, and now holds, by a paramount title.—Tewskbury v. Provizzo, 12 Cal. 20.

[b] A deed of land executed by a defendant in an action of ejectment, to which the plaintiff in the action is an entire stranger, cannot operate in that action as an estoppel by deed upon the defendant who executed it.—Franklin v. Dorland, 28 Cal. 175.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 688, 689, 706-710; 19 Cent. Dig., cols. 1915-1917, §§ 19-21.

§ 12. —— Mortgages.

[a] A mortgage or any encumbrance gives rise to an estoppel, under our statute, as much as an absolute conveyance.—Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

FOR AUTHORITIES FROM OTHER STATES:

Estoppel created by mortgage against the mortgagor: 45 Am. Dec. 392, note. See, also, 16 Cyc. 689; 19 Cent. Dig., col. 1917, § 23.

§ 13. —— Acknowledgments.

[a] Where a person named in a grant of real property appears in person before a notary and acknowledges a signature attached thereto as his own he is estopped from afterward denying his declaration, as well as his signature, against anyone who, without any other notice or knowledge than is conveyed by the deed, parts with his property on the strength thereof.—Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65, 35 Pac. 1019.

§ 14. —— Invalid or Defective Instruments.

[a] Where a deed of partition is invalid as a conveyance by reason of its nonacceptance by some of those who were parties to it, and some of the parties entered under such imperfect deed upon the portion set apart therein, a party who had signed the deed, but who had not done anything to adopt or ratify the partition, is not estopped to deny the validity of the deed.—Tewksbury v. O'Connell, 21 Cal. 60.

[b] Married woman is not estopped to dispute validity of her defectively executed mortgage which was of no benefit to her, where mortgagee was not deceived into contracting the loan.—Tolman v. Smith, 74 Cal. 350, 16 Pac. 189.

§ 15. Recitals in Instruments in General.

[a] Estoppel is not created by a recital in a sublease that she held a lease of the property for the unexpired term, which only tended to show that she then knew of the assignment, which in fact had no existence for want of delivery.—Canale v. Copello, 137 Cal. 22, 69 Pac. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 1921-1962, §§ 27-51.

§ 16. —— Recitals in Deeds.

[a] Party is not allowed to controvert declaration he has made by deed.—Tartar v. Hall, 3 Cal. 263.

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[b] A party making a deed is not estopped, as between the original parties to it, by recitals unnecessary to the conveyance.—Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498.

[c] Recital of payment in a deed is not an estoppel.—Cahoon v. Robinson, 6 Cal. 226.

[d] A grantor and his representatives, in the absence of fraud, are estopped by the consideration clause in a deed from alleging that it was executed without consideration.—(Cal. 1862) Coles v. Soulsby, 21 Cal. 47.

[e] Recital of material fact in deed is binding and conclusive upon the party reciting it, and all claiming under him as privies. This rule applies to a recital of the fact that a notice of sale, essential to the validity of the deed, was fully given.—Simson v. Eckstein, 22 Cal. 580.

[f] The parties to a deed are not estopped by the consideration expressed in it from showing the real consideration.—(Cal. 1863) Irvine v. McKeon, 23 Cal. 472.

[g] An executor is estopped from denying the recitals of a deed made by him, as to his having taken the oath of office and received letters testamentary.—Larco v. Casaneuava, 30 Cal. 560.

[h] A deed is not conclusive evidence of the existence of facts therein recited dehors the contract of transfer, such as its date, acknowledgment of payment, consideration, etc.—Rhine v. Ellen, 36 Cal. 362.

[i] Parties to deed are not estopped from denying collateral facts recited therein, not essential to its validity, as an operative conveyance of the estate granted.—Ingersoll v. Truebody, 40 Cal. 603.

[j] A recital in a deed, to the effect that the grantee is about to divert the waters of a certain creek (which flowed through the grantor's land) and to appropriate the same, followed by a grant of the right of way to conduct water over the land of the grantor, does not estop the grantor from denying the right of the grantee to divert the waters of said creek.—Zimmler v. San Luis Water Co., 57 Cal. 221.

[k] Particular recitals in a deed are binding upon parties and privies, and this doctrine applies to the authorized acts of a corporation; but it is essential to an estoppel by deed that the deed itself should be a valid instrument, and if void, though under seal, it does not work an estoppel at law or in equity.—Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18.

§ 17. —— Recitals in Mortgages.

[a] Where defendant gave plaintiff his note in consideration of certain lands conveyed by plaintiff to defendant, and at the same time gave a mortgage on the lands as security, it was held that, in an action on the note, defendant was estopped by his declarations in the mortgage to deny the want of title of plaintiff in the lands, as a want of consideration to the note.—Tartar v. Hall, 3 Cal. 263.

[b] Where a surety gives a mortgage to secure payment of a note and also payment of three thousand and sixty-four dollars according to terms of an agreement attached to and made part of the mortgage, by which the mortgagee makes a sale to the principal, in the form of a lease, of certain enumerated articles, and the principal agrees to pay three thousand and sixty-four dollars therefor, the mortgagor is not estopped by recitals of the mortgage that the principal is justly indebted in the sum of three thousand and sixty-four dollars, "agreed to be paid as rent . . . . for [certain enumerated articles] in accordance with the lease, ... of which a copy is attached hereto and made a part hereof," to assert that thereafter the lease was materially altered as to what was to be done by the mortgagee, and that, consequently, no indebtedness accrued "in accordance with the lease."—Parke & Lacy Co. v. White River Lumber Co., 110 Cal. 658, 43 Pac. 202.

[c] A husband who signs a mortgage in which it is stipulated that, in case of foreclosure, the surplus of the purchase money should be paid to his wife or her heirs or assigns, is estopped, both as against the mortgagee and as against his wife, from asserting that the mortgaged property was community property.—Hoeck v. Greif, 142 Cal. 119, 75 Pac. 670.

[d] A mortgagor is estopped by the terms of the mortgage deed importing a conveyance of the fee to deny that his estate was other than an estate in fee.—Trope v. Kerns, 20 Pac. 82.

§ 18. —— Recitals in Bonds.

[a] The sureties on a statutory undertaking given to release property attached, reciting the fact of the levy, cannot, when sued on the undertaking, question the fact of the levy.—McMillan v. Dana, 18 Cal. 339.

[b] The recitals of a bond given to dissolve an attachment are conclusive as between the parties, and the sureties cannot show that the property attached did not belong to the principal, as whose property it was attached.—Pierce v. Whiting, 63 Cal. 538.

[c] A recital in an executor's bond that, "by order of the probate court . . . . duly made and entered, ... the above-bounden H. was appointed executor," etc., estops the surety to deny that the order appointing the executor was duly made and entered.—Moore v. Earl, 91 Cal. 632, 27 Pac. 1087.

§ 19. —— Covenants.

[a] A covenant of nonclaim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel.—Gee v. Moore, 14 Cal. 472.

[b] Defendant conveyed the premises in controversy by warranty deed to C., and

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plaintiff claimed under an execution sale thereof against C. Held, that defendant was estopped by his deed from asserting any title against all claiming under C.—Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61.

§ 20. Persons Estopped.

[a] Estoppels are mutual, and bind both parties or neither.—Schuhman v. Garratt, 16 Cal. 101.

[b] Estoppels by deed bind only parties and privies.—(Cal. 1865) Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111.

[c] Estoppels must be mutual; and where it does not appear that the first grantee of a city, or his successor to an undivided half of a pueblo lot, do not still hold an undivided interest in the west half of the lot, the city cannot be estopped from claiming its original undivided interest in the east half thereof by reason of the conveyance of the west half of the lot as a specific tract to a subsequent grantee.—Gordon v. City of San Diego, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18.

[d] Estoppels must be mutual; and the party failing to sign the contract cannot be estopped by a voluntary compliance with a part of its conditions, where the party signing the same cannot be held bound under the proposed contract, but can repudiate it at any time.—Spinney v. Downing, 108 Cal. 666, 41 Pac. 797.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 710-718; 19 Cent. Dig., cols. 1974-1980, §§ 61, 62.

§ 21. —— Persons Acting in Particular Character or Capacity.

[a] A deed executed by an attorney who has a general power "to make and execute conveyances," the consideration for which has been received by the principal, cannot be assailed by him.—Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

§ 22. —— Purchaser from Mortgagor.

[a] In action for possession of a city lot, defendant claimed under a sale and deed to him, made under a power of sale mortgage. Plaintiff claimed under a deed from mortgagor, dated subsequent to defendant's deed. Held, that plaintiff, as claiming under mortgagor, is estopped from denying that notice of sale under mortgage was properly given.—Simson v. Eckstein, 22 Cal. 580.

§ 23. Grantors or Mortgagors and Privies.

[a] Grantor cannot question his own conveyance.—Burkett v. Burkett, 78 Cal. 316, 12 Am. St. Rep. 58, 20 Pac. 715.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 686, 715, 716; 19 Cent. Dig., cols. 1980-2000, §§ 63-68.

§ 24. —— To Impeach or Deny Own Title.

[a] Mortgagor, having mortgaged land as his own property, is estopped, as are his privies in estate, from saying it is public land.—Haffley v. Maier, 13 Cal. 13.

[b] A mortgagor who mortgages in fee is estopped from denying that the estate mortgaged was other or less than an estate in fee simple.—Vallejo Land Assn. v. Viera, 48 Cal. 572.

[c] Where court finds that plaintiff became a purchaser by a deed from defendants and others, and entered into possession, without proof of a subsequently acquired title from a paramount source, defendants are estopped from denying that they were the owners when deed to plaintiff was executed.—Belcher Consol. Gold Min. Co. v. Deferrari, 62 Cal. 160.

[d] Under the facts held that, as it was the intention of the first grantor to convey a perfect title to the specific tract, he was estopped to impeach it.—Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

[e] Grantor of land is estopped by his deed of grant, bargain, and sale to the grantee, purporting to convey an absolute title to the land, from denying that before and at the time of that deed he had such absolute title, and by that deed conveyed it to the grantee; and, if any title is thereafter acquired by the grantor through a tax deed, such title inures to the benefit of the grantee alone.—De Frieze v. Quint, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1.

§ 25. —— To Set Up Title in Another.

[a] A mortgagor is estopped from setting up an outstanding title in another, in bar of a bill for foreclosure.—(Cal. 1854) Redman v. Bellamy, 4 Cal. 247.

§ 26. Grantees.

[a] Where the owner of realty executed conveyances to his children, and remained in possession until his death, the children, by accepting confirmation deeds, were not estopped from claiming title under the former conveyances.—Tully v. Tully, 137 Cal. 60, 69 Pac. 700.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 686-716; 19 Cent. Dig., cols. 2000-2010, §§ 69-74.

§ 27. —— To Deny Grantor's Title.

[a] Where the plaintiff and defendant both derive title to land from the same person, the plaintiff is estopped, by his purchase, from denying the title of the common grantor for the purpose of establishing a title in himself by virtue of location of the land under school land warrants.—Ellis v. Jeans, 7 Cal. 409.

[b] A vendee may deny the title of his vendor. Parties with clear titles may buy out settlers and trespassers rather than incur the

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expense and delay of establishing their rights by litigation; and where, in such case, they are made parties to a suit to foreclose a mortgage executed by their grantor previously to the conveyance to them, they are not estopped from denying the title of the mortgagor, and from claiming that their rights under their previous titles are superior to those of the mortgagee.—San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

[c] A grantee of land in fee may deny that he received any estate by the conveyance. With the execution of the conveyance the transaction between the parties is closed. Thenceforth the grantee holds the property for himself, and is neither bound to surrender possession to his grantor or to maintain the validity of his title.—San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

[d] The doctrine that grantees are estopped to deny the title of their grantors does not apply where the only title derived by the grantee from the grantor is a real or pretended claim to the premises set up by the grantor and bought in by the grantee to quiet his title. The purchase of the grantor's adversary title, if it does not strengthen the grantee's title, does not impair it.—(Cal. 1869) Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

[e] When two or more persons separately purchase distinct parcels of land from a common grantor, who possesses the same under an invalid title, and one of them afterward acquires the true title to the whole, he is not estopped from denying, in ejectment against the others, that the purchase from the holder of the invalid title was void. Collins v. Bartlett, 44 Cal. 371.

[f] A grantee is not estopped from denying his grantor's title.—(Cal. 1893) Wenzel v. Schultz, 100 Cal. 250, 34 Pac. 696.

§ 28. —— To Show That Deed is Mortgage.

[a] Grantee is estopped as against innocent purchaser from showing deed a mortgage.—Jackson v. Lodge, 36 Cal. 43.

§ 29. —— To Deny Own Title.

[a] Where after marriage husband purchased with common funds and took a deed of lands which he had occupied without title before marriage, in action for the division of common property after divorce he is estopped to deny, as far as his wife is concerned, that he acquired a good title by the purchase.—Johnson v. Johnson, 11 Cal. 200, 70 Am. Dec. 774.

[b] Grantee of water right is estopped to deny his title at time of grant.—Roberts v. Krafts, 141 Cal. 27, 74 Pac. 281.

§ 30. Matters Precluded.

[a] One contracting to sell whole land without fraud or mistake is estopped from averring that he sold an undivided interest.—Marshall v. Caldwell, 41 Cal. 611.

[b] Party giving a release of damages for negligence is estopped to deny the negligence, or that money was paid in satisfaction therefor.—Tompkins v. Clay St. R. R. Co., 66 Cal. 164, 4 Pac. 1165.

[c] Where one gave a trust deed to a bank, he was estopped to deny its power to take it.—Camp v. Land, 122 Cal. 167, 54 Pac. 839.

[d] Person selling another a strip of land for right of way is estopped from denying, as against his grantee, that it is a highway.—Hartley v. Vermillion, 141 Cal. 349, 74 Pac. 987.

[e] Plaintiff, having written the contract, may not question the plain and obvious meaning of its terms.—Boyd v. Liefer, 144 Cal. 336, 77 Pac. 953.

[f] In an action to quiet title to the east half of a tract of land, it appeared that defendant, being the owner of the entire tract, conveyed to plaintiff the undivided half interest therein; that afterward, but before plaintiff's deed was recorded, defendant conveyed to another the west half of the tract in fee. Held, that the fact that defendant thus undertook to convey the entire interest in the west half of the tract did not estop it to claim its undivided interest in the east half.—Gordon v. City of San Diego, 32 Pac. 885.

[g] A delivered deed is conclusive as to the intent of the grantor to convey the property described.—Mascarel v. Mascarel's Exrs. (Cal. App.), 86 Pac. 617.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 695-697; 19 Cent. Dig., cols. 2013-2018, §§ 81-83.

§ 31. Pleading Estoppel.

[a] An estoppel by deed must be specially pleaded.—Hostler v. Hays, 3 Cal. 302.

[b] An estoppel by record or deed is conclusive as a plea when there is an opportunity to plead it, but when there is no such opportunity it is conclusive as evidence. Flandreau v. Downey, 23 Cal. 354.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 806-810; 19 Cent. Dig., cols. 2017, 2018, §§ 82½, 83.

B. ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

APPLICATION OF RULE, IN GENERAL, § 32.
INSTRUMENTS OPERATING ON TITLE SUBSEQUENTLY ACQUIRED—DEEDS, § 33.
—— DEDICATION, § 34.
—— CONVEYANCES WITH COVENANTS, § 35.
PERSONS ESTOPPED, § 36.
TITLE ACQUIRED BY ADVERSE POSSESSION AS AGAINST GRANTEE, § 37.

FOR AUTHORITIES FROM OTHER STATES:

Acquisition of after-acquired title by estoppel: 37 Am. Dec. 129, note. See, also, 16 Cyc. 689-698, 710-719, 808; 19 Cent. Dig., cols. 2018-2061, §§ 84-120.

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§ 32. Application of Rule in General.

[a] Under the Spanish law, an after-acquired title cannot by estoppel inure to the benefit of a former grantee.—(Cal. 1881) Bixby v. Bent, 59 Cal. 522.

§ 33. Instruments Operating on Title Subsequently Acquired—Deeds.

[a] A subsequently acquired title inures by way of estoppel to the benefit of a grantee in a deed, where it distinctly appears upon the face of the instrument, by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate.—Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

[b] Since the act of conveyances (section 33) gives to deeds an operation equivalent to covenant of warranty, as to subsequently acquired interest by the grantor, where an owner conveyed by bargain and sale, and afterward purchased the land on foreclosure of a mortgage executed before his conveyance, the title acquired at such purchase inures by estoppel to the benefit of the grantee.—Green v. Clark, 31 Cal. 592.

[c] A quitclaim deed will not estop the grantor from setting up an after-acquired title.—(Cal. 1867) Cadiz v. Majors, 33 Cal. 288.

[d] An execution sale and sheriff's deed does not estop the execution debtor from asserting a subsequently acquired interest or right of possession to the land sold, as against the right of possession and interest sold and transferred by the sheriff's deed.—Emerson v. Sansome, 41 Cal. 552.

[e] One's quitclaim is rendered ineffectual by his after-acquired title.—Tabler v. Peverill (Cal. App.), 88 Pac. 994.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 692-694; 19 Cent. Dig., cols. 2021-2051, §§ 91-109.

§ 34. —— Dedication.

[a] Owner without title at time of dedication and his grantee are estopped to question dedication and after-acquired title feeds estoppel.—Napa v. Howland, 87 Cal. 86, 25 Cal. 247.

§ 35. —— Conveyances with Covenants.

[a] Covenant of nonclaim is confined to the estate granted, and where that is "the right, title, and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after-acquired interest.—Gee v. Moore, 14 Cal. 472.

[b] A warranty against all encumbrances, claims, or demands created, made, or suffered by, through, or under the grantor, and against none other, in a deed conveying the grantor's interest in land, attaches itself to the interest conveyed, and not to the land, and does not preclude the grantor from setting up an after-acquired title, nor does it cause such after-acquired title to inure to the benefit of the grantee.—Kimball v. Semple, 25 Cal. 440.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 692-695; 19 Cent. Dig., cols. 2029-2044, §§ 99-107.

§ 36. Persons Estopped.

[a] Heirs of licensee are not estopped to deny his title as against a subsequent grant. Nieto v. Carpenter, 21 Cal. 456.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 710-719; 19 Cent. Dig., cols. 2052-2055, §§ 111-113.

§ 37. Title Acquired by Adverse Possession as Against Grantee.

[a] Where a grantor holds lands adversely to his grantee for the statutory period, the title vests in him, and a subsequent conveyance to him of an outstanding title inures to his benefit, and not that of his grantee.—Garabaldi v. Shattuck, 70 Cal. 511, 11 Pac. 778.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 697; 19 Cent. Dig., cols. 2056-2058, §§ 116-118.

III. EQUITABLE ESTOPPEL.

A. Nature and Essentials in General, §§ 38-53.
B. Grounds of Estoppel, §§ 54-81.
C. Persons Affected by Estoppel, §§ 82, 83.
D. Matters Precluded and Effect of Estoppel, §§ 84-86.
E. Pleading, Evidence and Trial, §§ 87-95.

A. NATURE AND ESSENTIALS IN GENERAL.

NATURE OF DOCTRINE, IN GENERAL, § 38.
ESSENTIALS AND ELEMENTARY FACTS CREATING ESTOPPEL, § 39.
—— DECEIT, § 40.
INTENT, § 41.
KNOWLEDGE OF FACTS, § 42.
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PREJUDICE TO PARTY SETTING UP ESTOPPEL, § 45.
—— SUBSTANTIAL CHARACTER OF PREJUDICE SUFFERED, § 46.
ESTOPPEL TO TAKE ADVANTAGE OF ONE'S OWN FAULT OR WRONG, § 47.
APPLICABILITY TO CRIMINAL PROCEEDINGS, § 48.
WRONGFUL OR ILLEGAL ACTS OR TRANSACTIONS, § 49.
EFFECT OF REGISTRY ACTS, § 50.
EFFECT OF LACHES OR DELAY IN CLAIMING ESTOPPEL, § 51.
OPERATION AND EFFECT OF ESTOPPEL, § 52.
ESTOPPEL AGAINST PUBLIC, § 53.

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§ 38. Nature of Doctrine in General.

[a] "If one is silent when he should speak, justice will compel him to silence when he would speak."—Bryan v. Ramirez, 8 Cal. 467.

[b] At common law a purely equitable estoppel, or purely equitable title, could not be entertained even if it were represented upon the record.—Clarke v. Huber, 25 Cal. 593.

[c] Whenever an act is done or statement made by a party which cannot be contravened or contradicted by him without fraud on his part and injury to others, whose conduct, without fault on their part, has been influenced by the act done or statement made, the character of estoppel will attach to what would otherwise be mere matter of evidence.—Davis v. Davis, 26 Cal. 23.

[d] Doctrine of estoppel which may be said to be founded upon the adage that "the truth is not to be spoken at all times" is a harsh one, and is never to be applied except where to allow the truth to be told would consummate a wrong to the one party or enable the other to secure an unfair advantage.—Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129.

[e] Equitable estoppels are founded solely on theory that to permit the party to maintain the right which he asserts would operate as a legal fraud upon his adversary.—Farish v. Coon, 40 Cal. 33.

[f] Estoppel can only be invoked to preclude party making false statement from denying its truth as against party ignorant of its falsity. (McKee, dissenting.)—Hand v. Hand, 68 Cal. 141, 58 Am. Rep. 5, 8 Pac. 705.

[g] Estoppel in pais is where defendant has been induced by act, declarations or conduct of plaintiff.—Lux v. Haggin, 69 Cal. 266, 10 Pac. 674.

[h] Estoppel in pais is a defense at law and equity.—Lux v. Haggin, 69 Cal. 266, 10 Pac. 674.

[i] Where person, by word or conduct, induces another to act on belief in the existence of a certain state of facts, he will be estopped as against him to allege a different state of facts.—Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328.

[ij] An estoppel in pais addresses itself to equity, and it is to be distinguished from ratification, which is a question of legal cognizance; and it is only where the acts fall short of a legal ratification that the necessity exists of invoking the doctrine of estoppel.—Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

[j] One who is silent when in conscience he ought to speak will not be allowed to speak when conscience requires him to be silent.—Cummings v. Kearney, 141 Cal. 160, 74 Pac. 759.

For Authorities from Other States:

See 16 Cyc. 719-726; 19 Cent. Dig., cols. 2062-2069, §§ 121-125; cols. 2073, 2074, § 127.

§ 39. Essentials and Elementary Facts Creating Estoppel.

[a] Before a party can urge an estoppel against another he must be misled by the conduct of the other as to facts known to the latter.—Burritt v. Dickson, 8 Cal. 113.

[b] To constitute an estoppel in pais as to the title to land, it must appear that the party making the admission by his declarations or conduct was apprised of the true state of his own title, that he intended to deceive or was culpably negligent in the nonassertion of his rights, that the other party had no knowledge or means of acquiring knowledge of the true state of the title, and that he relied upon such admission to his injury.—Boggs v. Merced Min. Co., 14 Cal. 279.

[c] An estoppel in pais rests upon the principle that the party has misled another to his prejudice, under such circumstances that it would be a fraud for him to assert what may be the truth. Hence to raise an estoppel from former admissions by a party to prevent him from setting up his title to property, the facts must show (1) that when making the admission relied upon he was apprised of the true state of his own title; (2) that he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; (3) that the other party had neither knowledge of the true state of the title nor convenient means of acquiring such knowledge by the use of ordinary diligence; and (4) that he relied directly upon such admission, and will be injured by allowing it truth to be disproved.—Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

[d] Facts necessary to constitute equitable estoppel stated.—Lux v. Haggin, 69 Cal. 266, 10 Pac. 674.

[e] There must be some element of wrong in action of party creating equitable estoppel. He must know or have reason to believe that other party will be injured in consequence of his act or statement.—Wheaton v. North British etc. Co., 76 Cal. 432, 9 Am. St. Rep. 216-n, 18 Pac. 758; Dean v. Parker, 88 Cal. 288, 26 Pac. 91.

[g] The vital principle of equitable estoppel is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted; and when a person tacitly encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the party to change his position, so that he will be pecuniarily prejudiced by the assertion of an adverse claim.—Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695.

§ 40. —— Deceit.

[a] Without element of deceit there can be no estoppel.—Watson v. Sutro, 86 Cal. 526, 24 Pac. 172, 25 Pac. 64.

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§ 41. Intent.

[a] Where the owner of property represents that certain property in his possession belongs to a third party, and a creditor of such third party, hearing of the fact, attaches it, the particular intent with which the declaration was made is not material on the question of estoppel.—Mitchell v. Reed, 9 Cal. 204, 70 Am. Dec. 647.

[b] Party making admissions or declarations must know true state of his own title to be estopped by them, and they must have been made with intent to deceive the party or with culpable negligence claiming an estoppel.—Boggs v. Merced M. Co., 14 Cal. 280.

[c] Statement must be made with express intention to deceive or such negligence as to amount to constructive fraud.—Montgomery v. Keppel, 75 Cal. 133, 16 Pac. 705.

[d] Declaration must be made or act done with intent to deceive or culpable negligence amounting to constructive fraud.—Griffeth v. Brown, 76 Cal. 262, 18 Pac. 372.

[e] Declaration not made to deceive and not appearing to have deceived or induced any action will not estop.—Morgan v. Lones, 78 Cal. 61, 20 Pac. 248.

[f] In a sheriff's interpleader action, a finding that plaintiff in the execution was estopped from setting up a previous assignment to him was not a necessary inference from a further finding that the execution was levied by the sheriff under instructions from the execution plaintiff, where the execution defendant was not misled thereby, but successfully resisted the execution proceedings, and it was not shown that the execution plaintiff's action was the result of intentional deceit or negligence.—Lackmann v. Kearney, 142 Cal. 112, 75 Pac. 668.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 726-728; 19 Cent. Dig., cols. 2070-2073, § 126.

§ 42. Knowledge of Facts.

[a] Mere disclaimer of ownership will not amount to an estoppel where the person making it at the time was ignorant of the true state of his title.—Boggs v. Merced Min. Co., 14 Cal. 280.

[b] Party claiming an estoppel need not be destitute of all possible means of knowledge if he has no convenient means.—Miller & Board of Education of Sacramento City, 44 Cal. 166.

[c] There can be no estoppel where the facts are not known.—Wheaton v. North British etc. Co., 76 Cal. 429, 9 Am. St. Rep. 216-n, 18 Pac. 758.

[d] The fact that the owner of the lot on the east side of the former street, under a mistaken belief of right, took possession of all the land between his premises and the east line of the new street, does not waive his claim to just compensation before he can be deprived of his easement in the former street, nor estop him by conduct, acquiescence, or election from contesting the closing of the former street.—Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307.

[e] Delivery of property, by mistake of fact, or law, does not estop party delivering it from recovering it or its value.—Davis v. Winona Wagon Co., 120 Cal. 249, 52 Pac. 487.

FOR AUTHORITIES FROM OTHER STATES:

Forgetfulness or mistake as a defense to a claim of estoppel: 38 Am. Rep. 315, note. See, also, 16 Cyc. 730-734; 19 Cent. Dig., cols. 2074-2084, §§ 128-135.

§ 43. —— Mistake of Law.

[a] Corporation acting in disposal of its property, under a full knowledge of the facts, cannot plead ignorance of the law, and its contract being binding on it, is also binding upon the parties purchasing.—Holland v. San Francisco, 7 Cal. 361.

[b] Where a partnership crop, amounting to less than nineteen tons, was sold under attachment against one of the partners and purchased by the attaching creditor, although the other partner, through mistake of law, notified the officer at the time of the attachment that he owned one-half the crop, "less nineteen tons belonging to" the lessor, he was not estopped to recover his share from the purchaser.—Leedom v. Ham (Cal.), 48 Pac. 222.

§ 44. Reliance on Adverse Party.

[a] The fact that the plaintiff in ejectment stood by and saw the defendant erect improvements on the land cannot be pleaded as an estoppel by a trespasser, where the fact of title is open and notorious, or can be easily ascertained, as by reference to the recorder's office.—Ferris v. Chapman, 10 Cal. 589.

[b] Acts or declarations must have influenced conduct of party to his injury.—Wheaton v. North British etc. Co., 76 Cal. 432, 9 Am. St. Rep. 216-n, 18 Pac. 758.

[c] Person claiming benefit of estoppel must show that he was misled by conduct of other party.—Washington v. Black, 83 Cal. 294, 23 Pac. 300.

[d] Party claiming estoppel must have relied on conduct of other and have been induced by it to do something which he would not otherwise have done.—McCormick v. Orient Ins. Co., 86 Cal. 263, 24 Pac. 1005.

[e] One of the necessary elements of an estoppel is that the party setting it up was induced to act by the conduct or directions of the party sought to be estopped.—Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50.

[f] It is an essential element of estoppel by conduct that the party claiming the estoppel

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should have relied upon the conduct of the other, and was induced by it to do something which he otherwise would not have done.—First Nat Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 Pac. 980.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 734-741; 19 Cent. Dig., cols. 2084-2093, §§ 136-141.

§ 45. Prejudice to Party Setting up Estoppel.

[a] To constitute an act an estoppel in pais, or to operate as an equitable estoppel, it must be of such a character that the repudiation of it by one party would work an injury to another.—Boggs v. Merced Min. Co., 14 Cal. 279.

[b] Party invoking an estoppel must show some act or omission by which he was misled to his injury.—Kelly v. Taylor, 23 Cal. 15, 207.

[c] To constitute an estoppel in pais there must be some act or admission or neglect to act on the part of the party estopped upon which the other party has acted or relied, and in consequence thereof, and through the fault of the party estopped, has placed himself in some respect in a worse position than he otherwise would have been.—Bowman v. Cudworth, 31 Cal. 148.

[d] H., who had no title to a parcel of land, brought an action to recover it of C., who was in possession. During the pendency of the action, G., who owned the title, conveyed it to B. Before the trial, B. surrendered his deed to G., and it was canceled, and G. gave a deed of the same land to H. C. recovered a judgment for the land by stipulation with H. Afterward H. gave up his deed from G. to be destroyed, which was done, and G. again conveyed to B. C. was not acquainted with these transactions. Only the last deed was recorded. Held, in an action by B. against C. for the land, that there was no estoppel in pais to prevent B. from setting up his title to the land, since B. did not mislead C. to place him in a less advantageous position.—Bowman v. Cudworth, 31 Cal. 148.

[e] Where person tacitly encourages act to be done, he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adverse claim.—Scott v. Jackson, 89 Cal. 258, 26 Pac. 898.

[f] Acts by or on account of which no prejudicial change in the position of the parties is effected do not work an estoppel.—Conway v. Supreme Council, Catholic Knights of America, 137 Cal. 384, 70 Pac. 223.

[g] An estoppel in pais cannot be claimed by a corporation as to transactions with its agent, where nothing said or done therein misled the agent to the injury of the corporation.—Gates v. Quong (Cal. App.), 85 Pac. 662.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 744; 19 Cent. Dig., cols. 2099-2106, §§ 144, 145.

§ 46. —— Substantial Character of Prejudice Suffered.

[a] An expenditure to support an estoppel should not be trivial in amount.—McCarthy v. Mutual Relief Assn., 81 Cal. 584, 22 Pac. 933.

§ 47. Estoppel to Take Advantage of One's Own Fault or Wrong.

[a] If action be properly commenced, the party bringing it having obtained the benefit cannot avoid the responsibility he may have thus incurred by pleading his own misfeasance.—Turner v. Billagram, 2 Cal. 520.

§ 48. Applicability to Criminal Proceedings.

[a] Principle of equitable estoppel applies to criminal prosecutions.—People v. Treadwell, 69 Cal. 235, 236, 10 Pac. 502.

§ 49. Wrongful or Illegal Acts or Transactions.

[a] Transaction, imbued with fatal infirmity of being in violation of law, cannot be purged of its infirmity by means of an estoppel.—Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

§ 50. Effect of Registry Acts.

[a] Estoppels in pais are not within the registry act.—Bryan v. Ramirez, 8 Cal. 467.

§ 51. Effect of Laches or Delay in Claiming Estoppel.

[a] In an action to recover possession of land held by an innocent purchaser who deraigns title through a forged deed, which has been of record five years with knowledge of the plaintiff, the delay of the plaintiff to attack the forged deed is not material if it be not relied upon as extinguishing the plaintiff's title by the operation of the statute of limitations; and such delay does not estop the plaintiff to say that the alleged deed is not his deed.—Meley v. Collins, 41 Cal. 663, 10 Am. Rep. 279.

§ 52. Operation and Effect of Estoppel.

[a] Estoppel in pais has no more force in binding parties than contract including same subject matter would have.—Thompson v. Doaksum, 68 Cal. 599, 10 Pac. 199.

§ 53. Estoppel Against Public.

[a] Doctrine of estoppel can be invoked against municipal corporations, if at all, only in cases of informality, irregularity, etc., on the part of an authorized agent.—Sutro v. Pettit, 74 Cal. 336, 5 Am. St. Rep. 442, 16 Pac. 7.

[b] The principle of estoppel in pais may be applied against the public in exceptional cases where justice and right require it.—City

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of Los Angeles v. Cohn, 101 Cal. 373, 35 Pac. 1002.

[c] It is only in exceptional cases that doctrine of equitable estoppel may be invoked against a city.—Sacramento v. Clunie, 120 Cal. 31, 52 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

16 L. R. A. 178, note; 16 C. C. A. 353, note. See, also, 16 Cyc. 780, 781; 19 Cent. Dig., cols. 2109-2114, §§ 151-153.

B. GROUNDS OF ESTOPPEL.

INCONSISTENT ACTS, CLAIMS OR CONDUCT, § 54.
INCONSISTENT CLAIM OR POSITION IN LEGAL PROCEEDING, § 55.
—— ELECTION OF REMEDIES AND WHAT CONSTITUTES ELECTION, § 56.
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—— RELYING AND ACTING ON APPARENT TITLE OR AUTHORITY, § 59.
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—— OFFICERS, § 61.
—— RECOGNITION OF TITLE, § 62.
CONTRACTS AND CONVEYANCES NOT OPERATING AS DEEDS, § 63.
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—— ASSENT TO OR RATIFICATION OF ACTS OF OTHERS, § 75.
—— ACCEPTANCE OF BENEFITS, § 76.
—— PERMITTING IMPROVEMENTS OR EXPENDITURES, § 77.
—— KNOWLEDGE OF FACTS BY PERSON ESTOPPED, § 78.
—— FAILURE TO ASSERT TITLE, § 79.
SILENCE, § 80.
NEGLIGENCE, § 81.

FOR AUTHORITIES FROM OTHER STATES:

Estoppel by conduct: 13 Am. Dec. 237, note.

Carlessness as a bar to relief in equity: 32 Am. St. Rep. 384, note.

Estoppel to resist assignments of expectancies: 56 Am. St. Rep. 351, note. See, also, 16 Cyc. 719-721, 749-777, 784-804; 19 Cent. Dig., cols. 2114-2416, §§ 154-288.

§ 54. Inconsistent Acts, Claims or Conduct.

[a] When a partnership induced plaintiff to believe in and act upon a partnership liability, they are estopped from denying it.—Burritt v. Dickson, 8 Cal. 113.

[b] Where one having a grant of an unlocated lot of public lands, in good faith, but without authority, makes a survey, and claims thereunder, he is not estopped thereby, as against one who enters upon and occupies adjoining land, upon claiming such land after it has been set off and patented to him under an official survey in the place of part of the land which he claimed.—Boggs v. Merced Min. Co., 14 Cal. 279.

[c] Parties cannot assume inconsistent positions.—Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Simpson v. Applegate, 75 Cal. 345, 17 Pac. 237.

[e] Party is estopped to enforce payment of debt by verbal agreement to forbear.—McDonald v. Huff, 77 Cal. 283, 19 Pac. 499.

[f] Land owner may, by acts or conduct, be estopped from questioning acts of reputed owner.—Santa Cruz etc. Co. v. Lyons, 117 Cal. 213, 59 Am. St. Rep. 174, 48 Pac. 1097.

[g] One of the plaintiffs, after conversation with defendant about the boundary between the mining claims in question, without the knowledge of his cotenant put three stakes across plaintiffs' location, a considerable distance north of the line claimed by plaintiffs in their suit as their south line, but the line thus indicated was afterward repudiated by both plaintiffs and defendant. Held, that plaintiffs were not estopped from claiming any ground south of the line so indicated.—Conway v. Hart, 129 Cal. 480, 62 Pac. 44.

[h] An assignment of a lease by a deceased to his widow had never been delivered or accepted, but she continued to occupy the premises and pay the rent reserved in the lease, though she never told the lessors that she was holding under the lease. Held, that the payment of rent did not estop her from claiming that she did not hold under the assignment.—Canale v. Copello, 137 Cal. 22, 69 Pac. 698.

[i] The fact that the mayor of a city, as a member of the state board of tide land commissioners, participated in a survey by which certain lands were excluded from the city, and that the city by ordinances approved the survey and maps in accordance therewith—all such acts being prior to a confirmation of the city's title to the land—did not estop the city from claiming the land.—United Land Assn. v. Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064.

[j] Where defendant's principal accepted papers tendered by plaintiff as an assignment of its claims against another, and possession of property securing plaintiff's lien for such claims, as a sufficient transfer within the requirements of an agreement therefor and the conditions of bonds executed by defendant to secure the payment of plaintiff's claims, both

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the principal and defendant, having induced plaintiff to abandon its claim on the faith of such bonds, are estopped to assert that the transfer was ineffectual.—Davis, Belau & Co. v. National Surety Co., 139 Cal. 223, 72 Pac. 1001.

[k] An election to disaffirm a contract induced by fraud, and an effort to obtain a rescission, will not, if resisted, and especially if rendered impossible or of doubtful advantage by the act of the guilty party, bar an action on a subsequent affirmance.—Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964.

[l] The assignee of a note secured by a deed of trust, who purchases the property at a sale under the deed of trust, cannot deny that the payee of the note, his assignor, accepted the deed of trust as security for such note.—Herbert Craft Co. v. Bryan, 68 Pac. 1020.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 784, 785.

§ 55. Inconsistent Claim or Position in Legal Proceeding.

[a] Parties are estopped from assuming inconsistent positions in legal proceedings.—Turner v. Billagram, 2 Cal. 520.

[b] In an action to try the right to a mining claim, counsel cannot claim that there was a bill of sale to the opposite party, for the purpose of excluding evidence of a verbal sale, and at the same time insist that the bill of sale is void.—Patterson v. Keystone Min. Co., 30 Cal. 360; Dyer v. Scalmanini, 69 Cal. 641, 11 Pac. 327; Trick v. Sinon, 75 Cal. 340, 17 Pac. 439; Winter v. McMillan, 87 Cal. 263, 22 Am. St. Rep. 243, 25 Pac. 407.

[f] In an action to recover a balance due for services as president of a corporation, plaintiff is not estopped by reason of having signed, with other directors, an application to the superior court to dissolve the corporation, which stated that all claims of the corporation had been discharged, which was made several months after the corporation had disposed of its property to defendant, who agreed to assume all its indebtedness, and signed by plaintiff under the belief that the assumption of the debts by defendant discharged such debts.—Bushnell v. Simpson, 119 Cal. 658, 51 Pac. 1080.

[g] The fact that, before the trial of claim and delivery for chattels attached to the creditors of plaintiff's vendor, the property was purchased by plaintiff at a sale under the judgment in the attachment suit, did not estop him from asserting that the property was wrongfully attached.—Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15.

[h] Litigant cannot change his legal position as the wind changes.—Davis v. Winona Wagon Co., 120 Cal. 248, 52 Pac. 487.

[i] A party is not precluded from a claim because inconsistent with some claim previously asserted by him, but not successfully maintained.—Lackmann v. Kearney, 142 Cal. 112, 75 Pac. 668.

[j] The fact that on appeal counsel for plaintiff erroneously claimed before the supreme court that the action was brought only for the foreclosure of plaintiff's lien on a certain piece of land did not estop him from thereafter claiming, in accordance with the opinion of the supreme court on appeal, the right in the same action and on the original complaint to foreclose a lien not only on such tract, but on another.—Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 796-801; 19 Cent. Dig., cols. 2126-2137, §§ 165-169.

§ 56. —— Election of Remedies and What Constitutes Election.

[a] Party having inconsistent remedies having clearly elected to proceed upon one, is barred from invoking the other.—Hines v. Ward, 121 Cal. 120, 53 Pac. 427.

[b] Mere fact that plaintiff proceeds on erroneous theory as to relief he is entitled to is not such election as precludes him from amending complaint so as to entitle him to relief which facts warrant.—Hines v. Ward, 121 Cal. 119, 53 Pac. 427.

§ 57. Disavowal or Renunciation of Title or Right.

[a] A disclaimer of title to land made by one who has no claim or right thereto cannot operate as an estoppel unless the person to whom it is made is directly influenced to act on it, and does act on it, so that it would be a fraud on him to permit the disclaimer to be retracted.—Carpentier v. Thirston, 24 Cal. 268.

[ab] In ejectment, where the owner of land innocently and without gross negligence had disclaimed all title to a piece of it, in reply to a question by defendant, who had some knowledge of the true condition of the title, and who subsequently bought it of a third person, it was not error to refuse to instruct that one claiming to own land is bound to know the state of his own title.—Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157.

[ac] A party who disclaims all interest in land to one whom he knows is about to purchase it, and who relies on such disclaimer in consummating his purchase, is not estopped to set up a title to the land, if he made the disclaimer in ignorance of his title, and not with intent to deceive, or with gross carelessness.—Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157.

[b] In an action of replevin against a sheriff, the defendant justified under an execution against a third person, and pleaded that, before levying on the goods in plaintiff's possession, plaintiff stated to him in answer to his inquiries, that the goods belonged to the execution debtor, and that plaintiff held possession as pledgee. The answer further stated "that the levy was made in sole reliance upon

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the statement of the plaintiff." Held, that the answer sufficiently pleaded an estoppel, under Code of Civil Procedure, section 1962, subdivision 3, which provides that, "whenever a party has deliberately led another to believe a particular thing true, and to act upon such belief, he cannot be permitted to falsify it."—Barnhart v. Fulkerth, 90 Cal. 157, 27 Pac. 71.

[c] A party holding a two thousand dollar mortgage on land, who, when nursery stock valued at twelve thousand dollars was placed thereon, and afterward when portions of it were sold, expressly disclaimed all interest therein, and after foreclosure, and before execution of the sheriff's deed, promised "that he would not claim those trees when he got his sheriff's deed," was estopped to claim them after the time for redemption had expired.—Wallace v. Dodd, 136 Cal. 210, 68 Pac. 693.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 757; 19 Cent. Dig., cols. 2140-2149, §§ 173-179.

§ 58. Clothing Another with Apparent Title or Property.

[a] Owner of certain premises held estopped to deny the execution of a lease on her behalf by her agent.—Niles v. Gonzales, 1 Cal. App. 324, 82 Pac. 212.

[b] In an action to recover rent, facts held to estop plaintiff from claiming that he executed the lease in his own behalf.—Niles v. Gonzales, 1 Cal. App. 324, 82 Pac. 212.

[c] The fact alone that one as the attorney in fact for another executes to a third person a deed of land does not constitute an equitable estoppel, so as to prevent him from afterward setting up a title to the property acquired by him from the person for whom he acted as attorney in fact, before he executed the deed. Smith v. Penny, 44 Cal. 161.

[d] Where the legal title to land is in a trustee, the land having been paid for with funds of the cestui que trust, the latter is not estopped, as against the trustee's creditors, from asserting his title, where he simply allowed the title to stand on record as that of the trustee, but did no act to induce creditors to believe the land belonged to him, and did not know that he was getting credit on the faith of his ownership of the land.—Breeze v. Brooks, 71 Cal. 169, 9 Pac. 670, 11 Pac. 885.

[e] S., the owner of an undivided half interest in a mine, as shown by the records, though witnessing an agreement of V., the owner of the other half, to sell the property, and though present at the mine when it was visited by plaintiff after receiving a deed of the entire property from V., and then wishing plaintiff success, is not estopped to assert his title; he not having known that the deed purported to convey the entire property, and not having made any representations to plaintiff respecting the character of his title.—Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

[f] In an action against C. and her son for conversion of farming implements on a ranch, it appeared that C. and her husband sold the ranch, and all farming implements on it, to H., who afterward sold all the personal property to plaintiff; that, before the sale to H., the son bought all the implements on the ranch. H.'s foreman and the agent of C. and husband making an inventory thereof; that the son did not point them out: that before the transfer of the personal property the son told H.'s agent that the implements were his, and the agent knew he was using them; and that, at the time, defendants were living on the ranch, the son being a tenant of H. There was no claim that the son had misled H. as to the ownership of the implements. Held, that he was not estopped from asserting his ownership as against H. or plaintiff.—Warren v. Connor (Cal.), 47 Pac. 43.

[g] Where the vendee in an unrecorded deed, acting as attorney in fact for the vendor, procures a mortgage for the latter on the property, and represents that the vendor is the owner, he is estopped thereafter to set up title to the land except in subordination to the mortgage.—Filippini v. Trobock, 62 Pac. 1066.

[h] Where an attorney in fact borrows money from another on a representation that the money is for his principal, and that the mortgage to secure the same is on land owned by such principal, in whose name the title stands on the record, such attorney and his successor in interest are estopped from afterward claiming title, except subject to the mortgage, under a deed from such principal, executed before the mortgage, which was then unrecorded, but of which the grantee had knowledge. Order (1900) 62 Pac. 1066, reversed.—Filippini v. Trobock, 134 Cal. 441, 66 Pac. 587.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 773-777; 19 Cent. Dig., cols. 2162-2185, §§ 189-197.

§ 59. —— Relying and Acting on Apparent Title or Authority.

[a] An attaching creditor of the bailee, levying on the money in the hands of a stakeholder with whom it had been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailor by reason thereof. Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 781.

[b] One of the defendants, having borrowed money from plaintiff, obtained a further personal loan by giving him a deed to certain property executed by third persons, representing to plaintiff that he was its real owner. He did not own the property, and obtained the deed by falsely representing to the third persons that plaintiff would loan the money to them. The additional loan was repaid later, but the other borrowed money was not repaid. Held, that, though of two innocent persons the one whose negligence causes the

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loss must suffer, plaintiff was not entitled to claim the property as against the third persons, as he sustained no loss, the consideration being a mere pre-existing debt, and the additional money secured having been repaid.—Macdonald v. Cool, 134 Cal. 502, 66 Pac. 727.

[c] Where a husband pastures his wife's cattle in return for their use for dairy purposes, she reserving the increase, such use by the husband, accompanied by a representation on his part that they were his, cannot, in the absence of any such representation on her part, or any act tending to mislead one holding a judgment against her husband as to the ownership of the stock, estop the wife from setting up ownership to defeat an execution levied on the stock under such judgment.—Paden v. Goldbaum, 37 Pac. 759.

§ 60. Dealing with Person Asserting Title or Exercising Authority.

[a] An offer to buy out a hostile claim will not estop the party making such offer from asserting title by adverse possession previously acquired.—Frick v. Sinon, 75 Cal. 337, 7 Am. St. Rep. 177, 17 Pac. 439.

[b] The fact that a city purchased a part of a tract of land lying in a street is not sufficient to show that the city recognized a right to the street in the person in possession of the land.—Mills v. City of Los Angeles, 90 Cal. 522, 27 Pac. 354.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 2185-2192, §§ 198-203.

§ 61. —— Officers.

[a] Petitioners for a writ of prohibition to restrain the court from taking any further proceedings with respect to a receiver are not estopped from denying the jurisdiction of the court to appoint said receiver by reason of the fact that they, in an action against them by the receiver to determine their claims to a certain fund, answered, setting up their judgment against the corporation; nor because, in an action by them against the corporation, the receiver was substituted as defendant therein; nor by the fact that in said action a deposition was taken wherein the deponent described himself as the receiver of said corporation; nor because the petitioners did not move the court to desist from taking any further proceedings under the appointment until the receiver refused to satisfy their judgment against the corporation out of the funds in his hands—the petitioners not having been parties to nor having any knowledge of the pleadings in the action wherein said receiver was appointed.—Yore v. Superior Court of City and County of San Francisco, 108 Cal. 431, 41 Pac. 477.

§ 62. —— Recognition of Title.

[a] One who enters recognizing another's title, and continues to recognize such title, is estopped from afterward disputing it.—Downer v. Ford, 16 Cal. 345.

§ 63. Contracts and Conveyances not Operating as Deeds.

[a] Where A and B own adjoining lots, and B mortgages his to a third person, describing it by metes and bounds, B is not estopped in pais to assert as against A that the dividing line between the lots is different from that inserted in the mortgage; it not being inserted to influence A in the conduct of his own affairs, and he not being in fact influenced thereby.—Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111.

[ab] Statement of fact in contract cannot be contradicted by obligor to evade payment. Eaton v. Richeri, 83 Cal. 186, 23 Pac. 286.

[b] In a suit to restrain defendants from diverting the waters of a stream which plaintiff claims by adverse user, where there was put in evidence a written agreement between plaintiff and defendants that the latter should pay him for the use of the water during seasons, when there is not enough for all parties, held, that plaintiff was not estopped from claiming the water by a recital in the agreement that defendants are "the owners of the surplus waters."—McLear v. Hapgood, 85 Cal. 555, 557, 24 Pac. 788.

[c] Where, after plaintiff and defendant had executed a written agreement, they entered into a second one, which was designated as supplemental to and explanatory of the first, the fact that it was so designated did not estop defendant from showing that the supplemental agreement was not a part of the original, and that it was without consideration.—Main St. etc. R. Co. v. Los Angeles Traction Co., 129 Cal. 301, 61 Pac. 937.

[d] County contractors held estopped to show that their verified claim for part payment on a heating system contract was not a payment on that contract, but was chargeable to a contract for a ventilating plant. Russell-Vail Engineering Co. v. Kirby (Cal. App.), 82 Pac. 1078.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 719-721; 19 Cent. Dig., cols 2193-2204, §§ 204-210.

§ 64. —— Recognition of Rights.

[a] A party to a charter-party, which acknowledges the property in a vessel to be in another party to it, is estopped to deny this to one who has given credit to the latter on the faith of it.—Hostler v. Hays, 3 Cal. 302.

§ 65. —— Agreements Collateral to Conveyances.

[a] One who accepts a deed on the express condition that it is in lieu of a former deed is estopped, in equity, from asserting title

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under the former deed.—Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

§ 66. Official Certificates.

[a] A county auditor, as required by the County Government Act (section 115), settled the accounts of a tax collector, certified to the treasurer the amount payable into the county treasury, and, on the presentation and filing of the treasurer's receipt therefor, discharged the collector, and charged the treasurer with the amount. The county treasurer gave his receipt to the collector, and charged himself with the amount in his official books; and in making his monthly settlements with the auditor, as required by section 80, he made a sworn statement that he had received such amount from the collector, and that it was then on hand. Held, that the treasurer was estopped by his receipt and his statement under oath to deny the receipt of such amount from the collector.—San Luis Obispo County v. Pettit, 100 Cal. 442, 34 Pac. 1082.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 2207-2209, §§ 214, 215.

§ 67. Stipulations and Consents in Judicial Proceedings.

[a] One who has sui juris, and stipulated that an executor of an estate in which he owns an interest may permit the proceeds of a sale thereof by leave of court to be expended to his advantage in the payment of claims against a trust estate in which he had an interest, cannot afterward call upon the executor to account for his interest in the proceeds of the sale, which he induced him to expend in payment of the trust obligations.—Kennedy's Estate, In re, 120 Cal. 458, 52 Pac. 820.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 798; 19 Cent. Dig., cols. 2204-2207, §§ 211-213.

§ 68. Representations.

[a] In a suit on a note, plaintiff held estopped as against one of the signers to claim that it did not evidence a firm debt.—Kellam v. Brode, 1 Cal. App. 315, 82 Pac. 213.

[b] The maker of the following instrument: "Due M. the sum of $5,591, in settlement of land purchased in S. county, the payment of which to be mutually arranged,"—stated, to one about to purchase the same, that it was valid and binding, and had been delivered in the ordinary course of business, and would be paid. Held, that he was not estopped from denying that the instrument had matured.—McAfee v. Fisher, 64 Cal. 246, 30 Pac. 811.

FOR AUTHORITIES FROM OTHER STATES:

Estoppel arising from admissions or representations: 38 Am. Dec. 631, note. See, also, 16 Cyc. 749-757; 19 Cent. Dig., cols. 2216-2278, §§ 218-234.

§ 69. —— Relying and Acting on Representations.

[a] When an estoppel in pais is set up against a vendee, arising from the declarations of his vendor, the party setting it up must show that such declarations were the main inducement to their act in obtaining the right in controversy.—Duell v. Bear River etc. Min. Co., 5 Cal. 84.

[b] To estop party from claiming goods as against creditor of third party it must appear that he stated to the creditor himself that he had sold the articles to the third party, and that the creditor parted with some right or advantage on the faith of the information.—Goodale v. Scannell, 8 Cal. 27.

[c] Where declarations of grantor controlled conduct of grantee in the purchase of land, the grantor, and those subsequently claiming under him, are estopped from the assertion of any interest in the land in opposition to the title of such grantee.—Stanley v. Green, 12 Cal. 148.

[d] The statements in an affidavit filed with an application for a deed under the townsite act that affiant's wife was the owner of the property, not being made to her, nor with intent to deceive her, or to induce her to take any action whatever, and no such results appearing to flow from them, do not estop the husband from denying that the transaction was a gift to the wife.—Morgan v. Lones, 78 Cal. 58, 20 Pac. 248.

[e] One who calls a physician to attend a person whom he represents to be his wife is estopped to deny that fact in an action for services rendered on the faith of such representation.—Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870.

[f] In an action to subject certain lands owned by defendant's brother to the payment of an account due plaintiffs from defendant, it appeared that the lands were in defendant's name, and in his possession, and that plaintiffs relied on defendant's statement that he was the owner of the land, in giving him credit, but there was no finding that defendant's brother had any knowledge that defendant was obtaining credit with plaintiffs on the faith of his apparent ownership of the land. Held, that a judgment refusing to subject the land to the payment of plaintiffs' claim was justified.—Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257.

[g] Representations as to the ownership of property, not communicated to defendant, cannot be relied upon by it to raise an estoppel against plaintiff.—Bashore v. Parker, 146 Cal. 525, 80 Pac. 707.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 734-741; 19 Cent. Dig., cols. 2245-2278, §§ 230-234.

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§ 70. Possession or Acts of Ownership Under Claim of Title.

[a] The fact that intestate was in possession of land, claiming to hold under the owner, but never having paid any consideration or received a deed, does not estop his widow from securing a deed from the owner, having the claim confirmed by the United States courts, and acquiring the title for herself instead of for his estate.—McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421.

§ 71. Requests.

[a] A residuary legatee is estopped from objecting to an allowance for money advanced by a mortgagee of property belonging to the estate, at her request, in payment of an assessment against mortgaged property, although the assessment was invalid.—Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254.

FOR AUTHORITIES FROM OTHER STATES:

See 19 Cent. Dig., cols. 2209-2215, §§ 216, 217.

§ 72. Legal Opinions.

[a] Statement made in answer to question of law does not operate as estoppel.—Chim Kem You v. Ah Joan, 75 Cal. 133, 16 Pac. 705.

§ 73. Admissions and Receipts.

[a] Admission made to third party does not operate as estoppel.—Moore v. Boyd, 74 Cal. 173, 15 Pac. 670.

[b] Receipt by a principal of accounts and proceeds of fruit sold by a factor will not, as a matter of law, bar a suit against the factor for failure to secure the best price.—Pugh v. Porter Bros. Co., 118 Cal. 628, 50 Pac. 772.

FOR AUTHORITIES FROM OTHER STATES:

Estoppel arising from admissions or representations: 38 Am. Dec. 631, note. See, also, 16 Cyc. 755-757; 19 Cent. Dig., cols. 2278-2284, §§ 235-240.

§ 74. Acquiescence.

[a] Where defendant enters on a lot which had been owned and occupied by plaintiff and her deceased husband, and plaintiff afterward assented to his appointment as administrator of her husband's estate, she was not estopped to set up the illegality of his possession.—Taylor v. Woodward, 10 Cal. 90.

[b] The failure of a proprietor to object to the diversion by an adjacent proprietor of a disproportionate share of the water from a stream for irrigation purposes, during a season when there is an abundance of water for all claimants, will not estop him from making such objection thereafter, on the supply of water becoming from natural causes insufficient.—Anaheim Water Co. v. Semitropic Water Co., 64 Cal. 185, 30 Pac. 623.

[c] Where defendant saw work done from day to day and made no objection to mode in which it was done, and paid part of contract price, he is estopped to defend against whole contract price on ground that work was not properly done.—Katz v. Bedford, 77 Cal. 322, 19 Pac. 523.

[d] Acquiescence is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his right.—Scott v. Jackson, 89 Cal. 258, 26 Pac. 898.

[e] In an action for the diversion of water by the building and maintenance of a dam by defendants, where it appears that plaintiff assisted in maintaining the dam and diverting the water, he cannot recover.—Churchill v. Baumann, 95 Cal. 541, 30 Pac. 770.

[f] Where the directors of a bank permit its cashier to transfer accounts from a bank which it succeeded, and render statements showing accounts to have been transferred, and lead depositors to believe their accounts to have been transferred, such bank is estopped from denying its liability on such accounts.—Nicholson v. Randall Banking Co., 130 Cal. 533, 62 Pac. 930.

[g] Plaintiff transferred land to a corporation, taking a mortgage for part of the price. The corporation neglected to pass a resolution authorizing the transaction, but took possession and handled the property as its own for two years, when it surrendered possession to plaintiff in lieu of paying interest, and asked for extension of time. Liability under the mortgage was not disputed until suit to foreclose was brought, five years after the purchase. These facts were known to the directors and stockholders. Held, that the corporation was estopped to deny the execution of the note and mortgage.—Blood v. La Serena Land etc. Co., 134 Cal. 361, 66 Pac. 317.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 765-769, 791-795; 19 Cent. Dig., cols. 2288-2407, §§ 242-284.

§ 75. —— Assent to or Ratification of Acts of Others.

[a] Parties are not estopped by reason of their assent and approval of acts of third person.—Lux v. Haggin, 69 Cal. 288, 289, 10 Pac. 674.

[b] A bank, which has given its consent to a contract for the sale of personalty on which it held a mortgage, is estopped to deny the validity of such contract after it has been entered into, and a portion of the prop-

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erty delivered for shipment thereunder.—Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695.

[c] In an action to recover a balance due for services as president of a corporation, plaintiff is not estopped by his knowledge of entries in the corporation's books showing the expense account charged with a less amount each month as his salary than he claims, when he testifies to an agreement with the principal stockholder to draw a less amount than his full salary on account of the financial condition of the corporation.—Bushnell v. Simpson, 119 Cal. 658, 51 Pac. 1080.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 791; 19 Cent. Dig., cols. 2289-2327, §§ 242-256.

§ 76. —— Acceptance of Benefits.

[a] On a bill for specific performance defendant alleged fraud in the contract sued upon, but admitted payment of the consideration money under protest affirming the fraud. Held, that the receipt of payment was no waiver of the defense, and that defendant was not estopped from showing the fraud, and that it was error in the court not so to instruct the jury when requested.—Russell v. Amador, 3 Cal. 400.

[b] Party notified of an assignment and receiving money under it, is estopped to deny that contract was assignable.—Cal. Steam Nav. Co. v. Wright, 6 Cal. 261.

[c] The defendant having received the benefit of a bond is estopped from denying its legality.—Baker v. Bartol, 7 Cal. 551.

[d] An assignee of a judgment, in an action against him to recover the consideration of the assignment, cannot object that it is void, if it has been received in payment of his purchase of the judgment debtor's land at a sale on execution.—Brown v. Scott, 25 Cal. 189.

[e] Party is estopped to hold land and deny trust on ground that his title is defective.—Broder v. Conklin, 77 Cal. 339, 19 Pac. 513.

[f] Party receiving profits arising from contract is estopped to claim that it was void.—Coward v. Clanton, 79 Cal. 27, 21 Pac. 359.

[g] Principal accepting benefits from verbal agency to sell land is estopped to deny agency.—Bogart v. Crosby & Van Haren, 80 Cal. 198, 22 Pac. 84.

[h] Parties entering into, and accepting benefits of, contract in name not their own, are estopped to impeach it on that ground.—Karns v. Olney, 80 Cal. 100, 13 Am. St. Rep. 101, 22 Pac. 57.

[i] Parties who have realized on a note cannot be allowed to withhold the proceeds by pleading its non-negotiability.—Kelly v. Matlock, 85 Cal. 130, 24 Pac. 642.

[j] Party cannot adopt benefits of transaction and reject its burdens.—Peers v. McLaughlin, 88 Cal. 299, 22 Am. St. Rep. 306, 26 Pac. 119.

[k] By receiving damages for opening a road a person is not estopped to consider the road as located the true public road, and to establish his fence accordingly, and hold the land inside it.—Patterson v. Munyan, 93 Cal. 128, 29 Pac. 250.

[l] Party is estopped to object that contract is not performed according to its terms after accepting performance in different manner.—Ryer v. Oesting, 119 Cal. 568, 51 Pac. 857.

[m] Civil Code, section 1589, enacts that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all obligations arising from it. Held, that where a widow, after the death of her husband, continued to occupy premises leased to him, an assignment of the lease to her by her husband never having been delivered or accepted, she was not liable for the rent for the term under section 1589; the statute only applying to those who are parties to a transaction.—Canale v. Copello, 137 Cal. 22, 69 Pac. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 787-791; 19 Cent. Dig., cols. 2333-2351, §§ 260-263.

§ 77. —— Permitting Improvements or Expenditures.

[a] One who knowingly and silently permits another to spend money upon land, under a mistaken impression that he has title, will not be permitted to set up his right.—Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Bryan v. Ramirez, 8 Cal. 461; McGarrity v. Byington, 12 Cal. 426.

[b] When prior claimant silently stands by and sees a ditch owner appropriate water at great expense, he and his vendees are estopped.—Parke v. Kilham, 8 Cal. 78, 68 Am. Dec. 310.

[c] Mortgagee who silently allows a bona fide purchaser without notice to expend large sums of money, cannot enforce the mortgage without reimbursement.—Grattan v. Wiggins, 23 Cal. 37.

[d] The facts that a person has constructed a canal at large expense through another's land, and has maintained and used it, together with a strip of land on each side of it, for irrigation, for more than five years, with the knowledge of the land owner, and that the latter has never objected to nor opposed it, are not sufficient to estop the land owner to question the other's title to the canal and land in question.—Stockman v. Riverside Land etc. Co., 64 Cal. 57, 28 Pac. 116.

[e] Where a creditor of the seller of chattels, after the sale, recognized the purchaser's

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title, and he, on the faith thereof, took the property, and made large expenditures in its care, which otherwise he would not have done, the creditor is estopped to question the validity of the sale on the ground that it was not accompanied by an immediate delivery and continued change of possession.—Escolle v. Franks, 67 Cal. 137, 7 Pac. 425.

[f] Construction of ditches with plaintiff's knowledge and without objection will not estop him from objecting to diversion of water through them.—Lux v. Haggin, 69 Cal. 266, 10 Pac. 674.

[g] Acquiescence in erection of valuable improvements on land after agreement as to division line will estop party from alleging mistake in line so as to deprive builder of his improvements.—Helm v. Wilson, 76 Cal. 486, 18 Pac. 604.

[h] Where a creditor recognized a sale of her debtor's personal property, so that the buyer expended money thereon which he would not otherwise have done, she and those claiming under her are estopped to question its validity because unaccompanied by an immediate delivery, followed by an immediate and continued change of possession, as demanded by Civil Code, section 3440, to rebut a conclusive presumption that it was fraudulent and void as to creditors and their successors in interest.—Sullivan v. Johnson, 127 Cal. 230, 59 Pac. 583.

[i] Evidence that a subsequent purchaser of real estate acquired the legal title with knowledge of the claim of a prior purchaser, who had not obtained the legal title, but who acquired his interest in the lands from the same source of title, and that the prior purchaser had made improvements on the land, and that the subsequent purchaser allowed him to continue making such improvements, and to use the land for a period of eight or nine years, without notifying defendant of any claim to the land or warning her not to improve the same, is sufficient to estop the subsequent purchaser from recovering the property.—Pacific Imp. Co. v. Carriger, 136 Cal. xix, 68 Pac. 315.

[j] Owners of land and of shares of stock in an irrigation company, who stand by and permit the company to extend its canal through their land, and, though they have full knowledge of the progress of the work, make no objection thereto, and who, after the completion of the canal, sell, with their lands, certain of their shares of stock as part of the same transaction, are, together with their grantees, estopped to assert any right to destroy or injure the canal.—Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940.

[k] One who executes a voluntary deed to her husband, which she does not deliver, but he steals from her possession, is estopped to assert title against an innocent purchaser from him, she being informed of the abstraction and conveyance within ten days thereof, and giving no notice to the purchaser, though it had commenced improvements, which continued to be made for six months thereafter and aggregated five hundred dollars.—Baillarge v. Clark, 145 Cal. 589, 79 Pac. 268.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 765-769; 19 Cent. Dig., cols. 2352-2379, §§ 264-275.

§ 78. —— —— Knowledge of Facts by Person Estopped.

[a] It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property as against the owner or even the improvements; but it is the fraud of the owner who silently, or otherwise, encourages the expenditure. But this fraud only exists, at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the bona fide reasonable belief that he is the owner of the property.—McGarrity v. Byington, 12 Cal. 426.

§ 79. —— Failure to Assert Title.

[a] The owner of property, who stands by and sees a third person selling it under claim of title, without asserting his own title or giving the purchaser any notice thereof, is estopped, as against such purchaser, from afterward asserting his title.—Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Snodgrass v. Ricketts, 13 Cal. 359.

[b] Where the mortgagee, on the nonfulfillment of the condition of a mortgage, entered into possession of the lands and conveyed them to a purchaser, and the mortgagor, after the said sale, sold his right and interest to another purchaser pendente lite, and he conveyed to a third person, it was held, if the evidence had shown that the mortgagor stood by and saw the mortgagee sell the property without interposing, and a knowledge of this could be brought home to the mortgagor's subvendees, he and those claiming under him would be estopped from asserting title on the ground of fraud.—Ferguson v. Miller, 4 Cal. 97.

[c] Fact that plaintiff stood by and permitted defendant to settle on land will not warrant an instruction that the plaintiff is thereby estopped from asserting his title.—Gunn v. Bates, 6 Cal. 263.

[d] The holder of the legal title, standing by and suffering the public sale of a title of the invalidity of which he has legal notice, is estopped to dispute its validity.—Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340.

[e] The owner of real property is under no obligations to attack a forged deed of his property; and the fact that he knew of the existence of such a deed, and knew that through a series of conveyances the property had been purchased by an innocent purchaser for value without remonstrance on his part, gives such purchaser no title to the land.—

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Meley v. Collins, 41 Cal. 663, 10 Am. Rep. 279.

[f] Defendant having a lease of certain land, as representative of the owner, placed the land in the hands of brokers for sale, through whom plaintiff purchased, and also delivered to the latter the deed, and received the purchase money, without at any time disclosing to plaintiff any interest in the land under his unrecorded lease. Held, that defendant was estopped from claiming any interest in the land.—Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

§ 80. Silence.

[a] The mere nonmention of a claim for a partial breach of a contract, at the time of settlement between the parties to the contract for work done, will not estop the party from setting up such claim.—Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952.

[b] Mere silence will not create estoppel.—Lux v. Haggin, 69 Cal. 279, 10 Pac. 674.

[c] The mere fact that defendant knew that a physician was treating a third person, at the request of another, on defendant's account, and relied for compensation on defendant, and that it made no objection, does not estop it to deny its liability.—Deane v. Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 Pac. 443.

[d] A statement made by the assistant counsel in the argument to the jury, in support of the contest of a will, that the contestant would pay all the attorneys' fees in the case, did not call for the expression of any dissent, and could not create an estoppel by silence of the contestant, to dispute the obligation to pay the fees of the assistant counsel.—Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899.

[e] An equitable estoppel to plead to setoff of a note in an action on an account against defendant, which had been assigned to plaintiff by the maker of the note, did not arise out of the assignor's direction to defendant, after the assignment, to pay the amount of the account to plaintiff, and defendant's silence as to his possession of said note; it not appearing that plaintiff had knowledge of such request.—Randol v. Rowe, 44 Pac. 1068.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 681-759; 19 Cent. Dig., cols. 2407-2413, §§ 285-287.

§ 81. Negligence.

[a] Where ignorance of fact is due to party's negligence, he is estopped to deny knowledge.—Karns v. Olney, 80 Cal. 100, 13 Am. St. Rep. 101, 22 Pac. 57.

[b] Defendant agreed with A to sell him certain land, part cash, and balance secured by mortgage. Defendant went with A to a notary's office, where a deed was executed. While the mortgage was being prepared, A said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, to whom he gave a mortgage on the property, to secure a loan. Held, that defendant's negligence in allowing the deed to be removed from the room was not such as would justify an estoppel against a plea of nondelivery of the deed. Gould v. Wise, 97 Cal. 532, 32 Pac. 576.

[c] A party employed an agent to obtain a loan for a certain sum, and left with him to deliver a note and mortgage therefor, with the amounts written in lead pencil. The agent erased the amounts, and substituted larger ones, and kept the difference. Neither borrower nor lender knew of the alterations until a year afterward. Held, that the borrower was not so negligent as to be estopped from setting up the fraud.—Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 772-777; 19 Cent. Dig., cols. 2413-2416, § 288.

C. PERSONS AFFECTED BY ESTOPPEL.

§ 82. Persons to Whom Estoppel is Available.

[a] Where an express declaration to a third party is not confidential, but general, and this is afterward acted upon by others, the party making the declaration should be estopped.—Mitchell v. Reed, 9 Cal. 204, 70 Am. Dec. 647.

[b] Where a party has purchased land of the government under the pre-emption law, and the government has recognized his claim by taking and receipting for the purchase money, the objection that such land was not subject to pre-emption cannot be raised by one not in privity with the government.—Mahoney v. Van Winkle, 33 Cal. 448.

[c] One who has a certificate of purchase from the state for a sixteenth section is not estopped from claiming that the state owned the land, as against one who is a mere trespasser and has no privity with the title of the United States, by the fact that the state had, before issuing the certificate, selected other land in its place and sold the same, and the purchaser had received therefor a patent from the United States.—Figg v. Handley, 52 Cal. 244.

[d] One using the property of another without his consent can invoke the doctrine of estoppel.—Southside Improvement Co. v. Burson, 147 Cal. 372, 81 Pac. 1107.

§ 83. Persons Estopped.

[a] If one makes a bargain with another for land, the latter claiming the title and the right to sell it, in the presence of a third party who has the title, the third is estopped from setting up the title as against the pur-

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chaser, and all persons in privity with such third person are likewise estopped, unless they are purchasers for valuable consideration without notice.—Snodgrass v. Ricketts, 13 Cal. 359.

[b] Where a married woman represents that she is a widow, and, for a valuable consideration, executes a deed of land as a single woman, and after her husband's death, without consideration, deeds the land to her daughter, who has actual notice of the prior deed, the daughter is estopped from denying that her mother was a widow when the prior deed was executed.—Ramboz v. Stowell, 103 Cal. 588, 37 Pac. 519.

[c] The validity of an agreement reciting that defendant furnished as a gift the purchase money for land conveyed to his mother, and that his mother agreed that the land should not be reconveyed without his consent, could be attacked by defendant's sister, though she signed the same.—Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

[d] A plaintiff who purchased the title of an owner and who is estopped to claim title as against the defendant, with knowledge of the facts upon which the estoppel is based, is in no better situation than his grantor, and is bound by the estoppel.—Ions v. Harbison, 112 Cal. 260, 44 Pac. 572.

[e] A delivery of property by an assignee of an insolvent company to defendant on his demand therefor, the title to which for the benefit of creditors was in the company, does not estop the assignee from recovering the property or suing for its value; and the question whether the delivery was made by a mistake of law or of fact, or with full knowledge, is immaterial.—Davis v. Winona Wagon Co., 120 Cal. 244, 52 Pac. 487.

[f] Persons claiming under decedent estopped during her lifetime are subject to same estoppel.—McKeag's Estate, 141 Cal. 410, 99 Am. St. Rep. 80, 74 Pac. 1039.

[g] Under Code of Civil Procedure, section 1848, declarations of plaintiff's wife and stepson held not available to estop plaintiff to claim property as belonging to the community.—Bashore v. Parker, 146 Cal. 525, 80 Pac. 707.

[h] Where the vendee in an unrecorded deed, acting as attorney in fact for the vendor, procures a mortgage on the latter's property, and represents that the vendor is its owner, one succeeding to his interest as a mere volunteer is equally estopped to set up title except in subordination to the mortgage.—Filippini v. Trobock, 62 Pac. 1066.

D. MATTERS PRECLUDED AND EFFECT OF ESTOPPEL.

§ 84. Extent of Estoppel in General.

[a] Where six persons held in common the legal title, one of whom was present and remained silent when the holder of the equity purchased, under the opinion that he was obtaining the title, held, that the one-sixth of the legal title, in the hands of the subsequent purchasers, was subject to that equity coupled with possession prior to their purchase.—Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340.

[b] Where plaintiffs sue as heirs and as grantees of a remaining heir of an intestate to recover certain real estate, claiming two-thirds of the land described in the complaint as heirs and one-third under the deed, the fact that they may be estopped by their conduct from claiming under the deed does not render the complaint insufficient to support their claim as heirs at law of the decedent for the other two-thirds of the land described therein.—Alcorn v. Brandeman, 145 Cal. 62, 78 Pac. 343; Alcorn v. Howard, 145 Cal. 62, 78 Pac. 343; Alcorn v. Gieseke, 145 Cal. 62, 78 Pac. 343.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 782; 19 Cent. Dig., cols. 2432, 2433, § 291.

§ 85. Title or Claim to Property.

[a] Rule that party, by failing, under certain circumstances, to assert his title to property is thereby estopped from saying that he had title, does not extend so far as to debar him from asserting an after-acquired title.—Gluckauf v. Reed, 22 Cal. 468.

[b] A party is not estopped, by matters in pais, to assert title unless, at the time when it is claimed the estoppel was worked, he held the title.—Marquart v. Bradford, 43 Cal. 526.

[c] The grantee in fee who owes no duty to his grantor is not estopped from disputing the title of such grantor.—Wenzel v. Schultz, 100 Cal. 250, 34 Pac. 696.

[d] The vendee or grantee of land is not estopped from disputing the validity of the title under which he entered, and he may show another and independent title in himself.—Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120.

[e] Execution of a deed of trust by a husband and wife after conveyance of the property by the wife to her husband held not to operate as a reconveyance, nor estop the husband from denying that she was the owner of the property.—Tyler v. Currier, 147 Cal. 31, 81 Pac. 319.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 783.

§ 86. Effect of Estoppel.

[a] Void acts cannot be cured by aid of doctrine of estoppel.—Raish v. San Francisco, 80 Cal. 6, 22 Pac. 22.

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E. PLEADING, EVIDENCE AND TRIAL.

PLEADING—NECESSITY, § 87.
—— SUFFICIENCY, § 88.
—— EFFECT OF PLEADING FACTS UPON WHICH ESTOPPEL IS BASED, § 89.
DEMURRER RAISING DEFENSE, § 90.
ISSUES, PROOF AND VARIANCE, § 91.
ADMISSIBILITY OF EVIDENCE, § 92.
—— WEIGHT AND SUFFICIENCY, § 93.
QUESTIONS FOR JURY, § 94.
INSTRUCTIONS, § 95.

§ 87. Pleading—Necessity.

[a] An estoppel in pais which is relied upon as a defense must be pleaded.—Clarke v. Huber, 25 Cal. 593.

[ab] An estoppel which is of equitable cognizance must be pleaded or it will not be considered on the trial.—Etcheborne v. Auzerais, 45 Cal. 122.

[b] Estoppel in pais must be pleaded as defense.—Dyer v. Scalmanini, 69 Cal. 642, 11 Pac. 327.

[c] Under the circumstances estoppel in pais could be proved without pleading it.—Dyer v. Scalmanini, 69 Cal. 642, 11 Pac. 327.

[d] An estoppel in pais may be shown, without pleading, by way of equitable rebuttal to defendant's proof of want of authority to execute the note and mortgage sued upon, after plaintiff has established a prima facie case, by proof that they bear the corporate seal; and it is only when a plaintiff must rely upon an estoppel in pais in order to maintain his action against the defendant at all, that it must be pleaded. Blood v. La Serena Land etc. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

[e] Where an alleged servant, suing the master for personal injuries, is met by the defense at the trial that another than defendant was independently conducting the work on his own account, plaintiff can prove an ostensible agency between defendant and such other person, without having pleaded it, since he did not know that his demand would ultimately rest on it.—Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559.

[f] Plaintiff brought an action to foreclose a mortgage, making a judgment creditor of the mortgagor a codefendant, and judgment was rendered for defendant on demurrer because action was not brought within the period of limitations. Such creditor subsequently bought the mortgaged land at execution sale, and plaintiff thereafter brought another action to foreclose, alleging an acknowledgment of the debt before the expiration of the original period of limitations. Held, that a defense that plaintiff was estopped from asserting his mortgage lien against the creditor's rights because of plaintiff's failure to set out the fact of acknowledgment in the prior action or to amend on demurrer must be specially pleaded. Judgment, 64 Pac. 250, reversed.—Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673.

[g] An estoppel in pais, in order to be available, must be pleaded and proven. Judgment on rehearing (1900) 60 Pac. 974, affirmed.—Chapman v. Hughes, 134 Cal. 641, 66 Pac. 982.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 809; 19 Cent. Dig., cols. 2441-2444, § 300.

§ 88. —— Sufficiency.

[a] Where an equitable estoppel in pais is not properly pleaded, but, on the trial, evidence is introduced without objection in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded.—Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157.

[b] An estoppel by matters in pais is sufficiently pleaded by pleading the facts constituting it.—Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695.

[c] Answer held to sufficiently allege an estoppel against plaintiff to claim, as community property, property levied on as belonging to his wife.—Bashore v. Parker, 146 Cal. 525, 80 Pac. 707.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 816; 19 Cent. Dig., cols. 2444-2447, § 302.

§ 89. —— Effect of Pleading Facts upon Which Estoppel is Based.

[a] Pleading fully the facts constituting an estoppel, is no waiver of the estoppel.—San Francisco v. Spring Valley Waterworks, 39 Cal. 481.

§ 90. Demurrer Raising Defense.

[a] The question whether plaintiffs, suing to recover lands as heirs at law of a decedent, are estopped to impeach a decree making a partial distribution of the estate by which they were given certain other lands, while those in controversy were distributed to defendant's predecessor in title, cannot arise on the face of the complaint, so as to be presented for consideration by a demurrer, where the proceedings for distribution and decree are set out merely to show the source of defendant's claim, and the complaint does not show that plaintiffs took under the decree, but alleges its invalidity, and that it was made without their consent or knowledge.—Alcorn v. Brandeman, 145 Cal. 62, 78 Pac. 343; Alcorn v. Howard, 145 Cal. 62, 78 Pac. 343; Alcorn v. Gieseke, 145 Cal. 62, 78 Pac. 343.

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§ 91. Issues, Proof and Variance.

[a] It is error for the court to assume in the progress of the trial, for the purpose of deciding on admissibility of the testimony, that an estoppel would be found by the jury; but the facts of the estoppel must be found or given before any of its consequences can be claimed.—Lackman v. Wood, 25 Cal. 147.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 811; 19 Cent. Dig., cols. 2448, 2449, § 305.

§ 92. Admissibility of Evidence.

[a] Evidence is admissible to show that party claiming benefit of estoppel placed no reliance on declarations when they were made.—Mitchell v. Amador etc. Min. Co., 75 Cal. 478, 17 Pac. 246.

[b] Plaintiff claimed certain wheat in his possession which was attached by defendant as sheriff, and sold on an execution of M. against one D. Plaintiff, in reply to a question by M.'s attorney just before the attachment issued, said that the wheat belonged to D., and he (plaintiff) had a lien on it. Defendant claimed that plaintiff was estopped by such declaration from denying that the wheat belonged to D., and at the trial asked M.'s attorney whether, in instructing the sheriff to levy, he relied solely upon the declaration of plaintiff and the belief that that declaration was true. Held, that the question was competent.—Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 812; 19 Cent. Dig., cols. 2450-2452, § 307.

§ 93. —— Weight and Sufficiency.

[a] Evidence of estoppel in pais should be strong and decisive.—Bryan v. Ramirez, 8 Cal. 468.

[b] Parol evidence of declarations and admissions of persons made long anterior to the trial, upon which an estoppel in pais is sought to be founded, should be carefully scrutinized by courts and juries, as it is a dangerous species of evidence, and liable to abuse. Davis v. Davis, 26 Cal. 24.

[c] A party will not be held to be estopped by inference, when the estoppel is not clearly made to appear.—Greer v. Tripp, 56 Cal. 212.

[d] Estoppels are not favored and must be clearly proved.—Wheaton v. North British etc. Co., 76 Cal. 429, 9 Am. St. Rep. 216-n., 18 Pac. 758.

[e] Party relying on expenditure on faith of license as estoppel must clearly show facts constituting estoppel and expenditure should not be trivial.—McCarthy v. Mutual Relief Assn., 81 Cal. 588, 22 Pac. 933.

[f] Estoppel cannot be based upon mere conjecture even if proper foundation is laid in other respects.—Janin v. London etc. Bank, 92 Cal. 14, 27 Pac. 1100.

[g] In an action for services under a contract of employment against a partnership composed of one B. (with whom plaintiff lived under the assumed relation of wife) and others, it was shown that, at the inception of the partnership, B. represented that plaintiff was his wife. The other partners testified that he agreed to furnish her services gratuitously, but B. denied it. Held, that plaintiff was not estopped, as against B.'s partners, from showing that she was not B's wife; it not appearing that she had any knowledge of B.'s representations in that regard, or that B.'s partners relied on such representations, or that such representations operated to their damage.—Grosse-Becker v. Becker, 102 Cal. 226, 36 Pac. 433.

§ 94. Questions for Jury.

[a] Estoppels from standing by and permitting another to settle on the land proceed upon the ground of fraud or culpable silence, which are facts for the jury and not matters of legal construction by the court.—Gunn v. Bates, 6 Cal. 263.

[b] Whether one is estopped by his conduct is a question of fact to be determined from the evidence.—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 813; 19 Cent. Dig., cols. 2459-2461, § 309.

§ 95. Instructions.

[a] In an action for trespass on a mining claim, in which the title to the locus in quo was the main issue, the court instructed that if the jury believed, from the evidence, that plaintiffs, more than five years before the commencement of the suit, in good faith and under a claim of right, entered into possession of the disputed tract and continued in possession, expending labor thereon with defendants' knowledge, they making no objection, and that defendants had not forbidden plaintiffs possession so acquired, then plaintiffs are entitled to a verdict. Held, that such instruction, failing as an abstract proposition to state the essential elements of an estoppel in pais, was improperly given. Maine Boys' Tunnel Co. v. Boston Tunnel Co., 37 Cal. 40.

[b] A charge that if defendant made certain misrepresentations concerning his claim to the property in dispute, which misled plaintiffs, he is estopped to set up any claim to such property, but which fails to state that such representations must have been made with the express intention to deceive, or with such culpable negligence as to amount to constructive fraud, is erroneous, and is not cured by another distinct charge, which

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states the rule more accurately.—Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372.

[c] Instruction on estoppel against a husband arising out of the use of his property by his wife held defective, under Code of Civil Procedure, section 1962, subdivision 3. Bashore v. Parker, 146 Cal. 525, 80 Pac. 707.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 813; 19 Cent. Dig., cols. 2461-2464, § 310.

ESTOPPEL BY DEED.

See Estoppel, II.

ESTOPPEL BY RECORD.

See Estoppel, I.

ESTOPPEL IN PAIS.

See Estoppel, III.

ESTRAYS.

See Animals, §§ 13-16.

EVICTION.

As breach of covenant of quiet enjoyment. See Covenants, § 30.

As breach of covenant of warranty. See Covenants, § 33.

Of tenant. See Landlord and Tenant, §§ 51, 90-92.

EVIDENCE.

Include means of ascertaining the truth respecting matters of fact in issue in civil actions and proceedings in general; admissibility for that purpose of relevant facts, statements, oral or written, opinions, character, reputation, etc.; modes of proof and production of evidence other than testimony of witnesses, particularly documentary evidence, and exclusion of oral by documentary evidence; burden of making proof, and operation of presumptions; and sufficiency and effect of evidence in civil cases in general.

I. JUDICIAL NOTICE, §§ 1-44.
A. In General, §§ 1-26.
B. Laws of States, United States and Foreign Countries, §§ 27-31.
C. Existence, Organization and Proceedings of Courts, §§ 32-39.
D. Officers and Official Proceedings and Authority, §§ 40-44.
II. PRESUMPTIONS, §§ 45-77.
III. BURDEN OF PROOF, §§ 78-81.
IV. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL, §§ 82-157.
A. Facts in Issue and Relevant to Issue, §§ 82-114.
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C. Similar Facts and Transactions, §§ 130-142.
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A. Nature, Form and Incidents in General, §§ 252-265.
B. As to Pedigree, Birth and Matters of General Public Interest, §§ 266-271.
C. Proof and Effect, §§ 272, 273.
IX. HEARSAY, §§ 274-282.
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XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS, §§ 370-447.
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1. Writings Excluding Extrinsic Evidence in General, §§ 370-394.
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B. Invalidating Written Instrument, §§ 421-427.
C. Separate or Subsequent Oral Agreements, §§ 428, 429.
D. Construction or Application of Language of Written Instrument, §§ 430-444.
E. Showing Discharge or Performance of Obligation, §§ 445-447.
XII. OPINION EVIDENCE, §§ 448-509.
A. Conclusions and Opinions of Witnesses in General, §§ 448-474.

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1. Conclusions and Matters of Opinion or Facts, §§ 448-458.
2. Special Knowledge as to Subject Matter, §§ 459-465.
3. Subjects of Opinion Evidence and Examination of Witness, §§ 466-474.

B. Subjects of Expert Testimony, §§ 475-488.

C. Competency of Experts, §§ 489-497.

D. Examination of Experts, §§ 498-505.

E. Comparison of Handwriting and Effect of Opinion Evidence, §§ 506-509.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDINGS, §§ 510-515.

XIV. WEIGHT AND SUFFICIENCY, §§ 516-522.

In action on account. See Account, Action on, § 5.
In action on account stated. See Account Stated, § 18.
Of acknowledgment. See Acknowledgment, § 65.
In admiralty cases. See Admiralty, § 6.
Of adoption. See Adoption, § 16.
To establish title by prescription. See Adverse Possession, §§ 133-135.
Of alienage. See Aliens, § 3.
Of alteration of instrument. See Alteration of Instruments, § 20.
Necessity for objections to evidence in lower court. See Appeal and Error, §§ 273-279.
Necessity for exception in lower court to obtain review of rulings on evidence. See Appeal and Error, § 317.
Necessity for exception in lower court to obtain review of sufficiency of evidence. See Appeal and Error, § 319.
Necessity for motion for new trial to obtain review of. See Appeal and Error, § 339.
Proof of service of notice of appeal. See Appeal and Error, § 400.
As part of bill of exceptions. See Appeal and Error, § 692; Criminal Law, § 705.
Time to appeal in order to obtain review of sufficiency of evidence. See Appeal and Error, § 481.
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Proof of items in proceedings to tax costs. See Costs, § 55.
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I. JUDICIAL NOTICE.

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A. IN GENERAL.

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§ 1. Matters of Common Knowledge.

[a] The court will take judicial notice of the fact that a "fence pole" is a heavy club.—Baker v. Hope, 49 Cal. 598.

[b] Court will take judicial notice of evils preceding legislation against adulteration and mischiefs intended to be prevented thereby etc.—Kohler, Ex parte, 74 Cal. 42, 15 Pac. 436.

[c] No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence.—Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

[d] In a suit by the state board of railway commissioners, in whom such power was vested, to compel a railroad corporation to restore an alleged lower rate between two points in the state than the established rate with an unlimited ticket, the court will take judicial notice that comparatively few of the traveling public exercise or claim any of the privilege of unlimited tickets, such as transfer, stopover, and liability for loss of baggage in excess of one hundred dollars in value, which were denied by the limited tickets.—Edson v. Southern Pac. R. Co., 144 Cal. 182, 77 Pac. 894.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 852; 20 Cent. Dig., cols. 35, 36, § 4.

§ 2. Course and Laws of Nature.

[a] Under Code of Civil Procedure, section 1875, subdivision 8, authorizing courts to take judicial notice of the laws of nature, the court judicially knows the rules of mensuration by which the cubic contents of an irregular prismoidal body are ascertained. Scanlan v. San Francisco etc. Ry. Co., 55 Pac. 694.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 854; 20 Cent. Dig., cols. 36, 37, § 5.

§ 3. Time for Gathering and Harvesting Crops.

[a] Courts will take judicial notice of the time of harvest in the counties where they preside.—Mahoney v. Aurrecochea, 51 Cal. 429.

[b] Court takes notice of time for gathering fruit crop.—Brown v. Anderson, 77 Cal. 239, 19 Pac. 487.

[c] Court will take judicial notice of the time for the harvesting of grain.—Haines v. Snedigar, 110 Cal. 18, 23, 42 Pac. 462.

§ 4. Nature and Growth of Particular Industries.

[a] Court takes judicial notice of nature and growth of wine growing interests of this state.—Kohler, Ex parte, 74 Cal. 42, 15 Pac. 436.

§ 5. Geographical Facts.

[a] Judicial notice cannot be taken that conditions as to climate, soil, topography, and rainfall are the same in two counties of the same state.—City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

[b] A court will not take judicial notice that a certain tract of land is or is not included within the boundaries of a particular patent.—Goodwin v. Scheerer, 106 Cal. 600, 40 Pac. 18.

FOR AUTHORITIES FROM OTHER STATES:
Judicial notice of boundaries and localities: 82 Am. St. Rep. 439, note. See, also, 16 Cyc. 858-863; 20 Cent. Dig., cols. 39-47, §§ 9-14.

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§ 6. —— Source, Outlet and Location of Rivers.

[a] Judicial notice will be taken of the location and course of a river frequently mentioned in the public statutes of the state. De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

[b] Court takes judicial notice of the source and outlet of a river flowing through the state.—People v. Truckee Lumber Co., 116 Cal. 401, 58 Am. St. Rep. 183, 48 Pac. 374.

§ 7. —— Distances Between Places.

[a] Courts in California will take judicial notice of the legal distances from place to place in the state of California, as established by the Political Code in sections 150 to 202, inclusive, for the purpose of computing the time within which notice of intention to move for a new trial must be served. Hegard v. California Ins. Co., 11 Pac. 594.

§ 8. Existence, Location and Boundaries of States, Counties, Cities and Towns.

[a] Courts will take judicial notice of territorial extent of jurisdiction and sovereignty, exercised de facto by their own government, and of the local divisions of the country into states, counties, cities, towns, etc.—People v. Smith, 1 Cal. 9.

[b] San Francisco having been constituted, by a public, political act of the formen government, a pueblo, courts will take judicial notice of its existence, powers, and rights, and among these last its general boundary and jurisdiction.—Payne v. Treadwell, 16 Cal. 220.

[c] Court will take judicial notice that "Potrero" in the year 1850, was separated from city of San Francisco, as it then was, by Mission creek, and that it is now a portion of the city of San Francisco, divided in lots, blocks and streets.—Brumagim v. Bradshaw, 39 Cal. 24.

[d] Court takes judicial notice that there is but one San Diego County in California. Graham v. Stewart, 68 Cal. 380, 9 Pac. 555.

[e] Courts take judicial notice of counties in California.—Humboldt County v. Dinsmore, 75 Cal. 606, 17 Pac. 710.

[f] Court will take judicial notice of county boundaries.—Campbell v. West, 86 Cal. 200, 24 Pac. 1000.

[g] Court will take judicial notice that a certain city or town is in a certain county. Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109.

[h] The courts will take judicial notice of the incorporation of a city.—City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[i] Court will take judicial notice of the actual possession by a city of part of its public lands, and of its constructive possession of the remainder.—Labory v. Los Angeles Orphan Asylum, 97 Cal. 270, 32 Pac. 231.

[j] The courts must take judicial notice of the boundaries and extent of the counties of the state.—Rogers v. Cady, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.

[k] A court may take judicial notice of the boundaries of an incorporated city.—De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

[l] Judicial notice will be taken that Eureka and San Francisco are incorporated cities in the state of California.—Matter of Chope, 112 Cal. 630, 44 Pac. 1066.

[m] Under Political Code, sections 3918, 3919, held that it was the duty of the court, in an action against a county to recover taxes paid to it on the ground that the land taxed was in another county, to take judicial notice as to which county the land was in.—Merritt v. Trinity County (Cal. App.), 84 Pac. 675.

[n] The courts will take judicial notice that the city of Los Angeles is a municipal corporation, by virtue of the several statutes organizing it into such corporation and extending its limits, and adding to and changing the powers of its officers.—Bituminous Lime-Rock Pav. etc. Co. v. Fulton, 33 Pac. 1117.

For Authorities from Other States:

See 16 Cyc. 907-910; 20 Cent. Dig., cols. 72-75, §§ 31-33.

§ 9. —— Location of Streets.

[a] The courts will take judicial notice of the streets of San Francisco as designated on the official map of the city approved by Statutes of 1858, pages 52-56.—Whiting v. Quackenbush, 54 Cal. 306.

[b] The courts take judicial notice of the streets of San Francisco and of their relation to each other, and of the directions in which they run. Therefore, in an action upon a street assessment, the absence of an arrow or scroll in the diagram is immaterial.—Brady v. Page, 59 Cal. 52.

[c] Court takes judicial notice of public streets.—Barton v. McDonald, 81 Cal. 267, 22 Pac. 855.

[d] Courts will take judicial notice of the streets of San Francisco, of their relation to each other and their location, and that a crossing where an improvement was located necessarily forms a part of the public street. Williams v. Savings and Loan Society, 97 Cal. 122, 31 Pac. 908.

[e] Statutes of 1858, page 56, making the Van Ness map the official map of San Francisco, does not enable the court to take judicial notice of the correct location on the ground of the streets therein platted.—Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

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[f] The courts will take judicial notice of streets established by act of the legislature, and of their relation to each other, and of the directions in which they run; but they do not take judicial notice of the existence and location of streets established by dedication, or opened or adopted by a municipal ordinance. The dedication or the passage of the ordinance is a question of fact to be determined upon the sufficiency of evidence.—Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

§ 10. —— Classification of Counties.

[a] The court will take judicial knowledge whether any county in the state has a population which places it in a specified class, and what number of counties belong to a particular class.—Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66.

[b] The courts will take judicial notice of the fact that a particular county is of a certain class under the statutory classification.—Alameda County v. Dalton (Cal. Sup.), 82 Pac. 1050.

§ 11. —— Incorporation of Cities Under Particular Law.

[a] Courts are bound to take judicial notice of the fact that no city was ever organized under the code.—Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580.

§ 12. Personal Status.

[a] The court will not take judicial notice that a defendant is a resident of Austria because he affixes to his name a title of nobility. De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

§ 13. Character of Land and Geological Formation of State.

[a] Court cannot take judicial notice of character of land.—Leviston v. Ryan, 75 Cal. 297, 17 Pac. 293.

[b] Court takes judicial notice of geological formation of state.—Katz v. Walkinshaw, 141 Cal. 125, 99 Am. St. Rep. 33, 70 Pac. 663, 74 Pac. 766.

§ 14. Fluctuating Value of Ore Veins and Mountain Streams.

[a] Court takes judicial notice of fluctuating volume of mountain streams, and fact that prior appropriators allow unused water to pass down stream to advantage of subsequent ones.—Wixon v. Devine, 80 Cal. 387, 22 Pac. 224.

[b] Courts judicially know that veins of ore rich at one point are often barren a few yards distant.—Richards v. Dower, 81 Cal. 47, 22 Pac. 304.

§ 15. Quantity of Water Used by City or Town.

[a] Court cannot judicially notice that population of town at one time used less water than greater population did at later time.—San Luis Water Co. v. Estrada, 117 Cal. 180, 48 Pac. 1075.

§ 16. Political and Social Condition of Country.

[a] Courts are bound to take notice of political and social condition of country which they judicially rule.—Irwin v. Phillips, 5 Cal. 140.

§ 17. —— Public Sentiment.

[a] Court will take judicial notice of condition of public mind.—Ross v. Austill, 2 Cal. 192.

§ 18. Historical Facts.

[a] Courts take judicial notice of matters of public history.—Payne v. Treadwell, 16 Cal. 220.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 864-870; 20 Cent. Dig., cols. 47-52, §§ 15, 16.

§ 19. —— Nature and Value of Circulating Medium.

[a] Court cannot say judicially that one kind of money, made a legal tender, is of greater or less value than another; nor can evidence be received that a dollar of one kind is of greater or less value than another.—Carpentier v. Atherton, 25 Cal. 564.

[b] Courts will take judicial notice of market value of legal tender notes as part of history of the time.—Belloe v. Davis, 38 Cal. 257.

[c] Courts take judicial notice that coin was always treated as the standard of value in this state.—In re Sanderson, 74 Cal. 214, 15 Pac. 753.

§ 20. —— Irrigation District Bonds.

[a] Court can take judicial knowledge of the financial history of irrigation district bonds.—Hughson v. Crane, 115 Cal. 404, 47 Pac. 120.

§ 21. Statistical Facts.

[a] The courts will take judicial notice of the results of the United States census, as shown by the returns.—People v. Williams, 64 Cal. 87, 27 Pac. 939.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 870, 871; 20 Cent. Dig., cols. 52, 53, § 17.

§ 22. Language, Words, Phrases and Abbreviations.

[a] Courts cannot judicially know that names intended to represent monuments in

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describing land are not such.—Tredinnick v. Red Cloud etc. Co., 72 Cal. 81.

[b] Court takes judicial notice of meaning of words and phrases and may resort for aid to appropriate books of reference.—Grennan v. McGregor, 78 Cal. 262, 20 Pac. 559.

[c] Defendants published the following: "Venality. It is understood that the Electric Improvement Company will put a large sum of money into the fight to-day to corrupt voters. . . . It is also reported that E. is to have charge of the sack." Held that, in an action for publishing such article, the court would take notice of the meaning the word "sack" has acquired in newspaper literature, when used in connection with election corruption funds, and it was unnecessary for plaintiff to allege or prove such meaning or how it was intended to be understood.—Edwards v. San Jose Printing etc. Soc., 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128.

[d] Courts take judicial notice of the true meaning of all legal expressions, including all the terms used in constitution or in acts of the legislature.—Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393.

[e] The court will take judicial notice of the significance of the word "kindergarten." Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329.

[f] Under Code of Civil Procedure, section 1875, providing that courts will take judicial notice of "the true significance of all English words and phrases and of all legal expressions," courts will take notice that the terms "shafts, tunnels, levels, chutes, stopes, uprises, crosscuts, and inclines," as applied to mines, are instrumentalities by which mines are opened, developed, prospected, improved and worked.—Hines v. Miller, 122 Cal. 517, 55 Pac. 401; Reader v. Miller, 122 Cal. 517, 55 Pac. 401.

[g] Courts will take judicial notice of the meaning of customary abbreviations of common words, including all conventional expressions or arbitrary signs that have passed into common use.—Estate of Lakemeyer, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961.

[h] Under Code of Civil Procedure, section 1875, enacting that the court will take judicial notice of the true signification of all English words and phrases, the courts have common and current knowledge relating to automobiles.—Berry, Ex parte, 147 Cal. 523. 82 Pac. 44.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 875; 20 Cent. Dig., cols. 54-56, § 20.

§ 23. Time, Days, and Dates.

[a] It cannot be objected that an almanac was put in evidence for the purpose of showing, upon a trial, when the sun rose on a certain day, as the court in any event would take judicial notice of that.—People v. Chee Kee, 61 Cal. 404.

[b] Court takes judicial notice of days of week and month.—Campbell v. West, 86 Cal. 202, 24 Pac. 1000.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 856; 20 Cent. Dig., cols. 56, 57, § 21.

§ 24. Management and Conduct of Occupations.

[a] The courts will take judicial notice of the political and social condition of the country which they rule, in order that legislation may be made properly applicable to protect the rights of miners in their selected locality, and the rights of those who by prior appropriation have taken waters from their natural bed and by costly works have conducted them to other localities to supply the necessities of gold miners.—Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113.

[b] The court will not take judicial notice of rules of a board of brokers with reference to which a contract was made, where such rules do not amount to usages or customs of the trade in general.—Goldsmith v. Sawyer, 46 Cal. 209.

[c] It seems that court may take judicial notice of usual course or mode of transactions in mining stocks.—Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 325, 22 Pac. 665.

[d] Judicial notice does not extend to necessity for employment of certain class of agent. Harris v. San Diego etc. Co., 87 Cal. 529, 25 Pac. 758.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 854-876; 20 Cent. Dig., cols. 59-61, § 24.

§ 25. Matters Relating to Government and Its Administration—In General.

[a] Judicial notice cannot be taken that title to land is in the public.—Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 899-919; 20 Cent. Dig., cols. 68-75, §§ 29-34.

§ 26. —— Public Surveys.

[a] Courts take judicial notice of the fact that, under the United States system of surveys of public lands, a quarter section is intended to be just forty chains square; and that a quarter section contains a greater area must be proven by affirmative evidence. Quinn v. Windmiller, 67 Cal. 461, 8 Pac. 14.

[b] Court takes judicial notice of location of lands described by government subdivisions, as township, range and section, but not of lands designated simply by name or reference to private survey.—Campbell v. West, 86 Cal. 200, 24 Pac. 1000.

[c] The courts will take judicial notice of the government surveys and the legal subdi-

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visions of the public lands.—Faekler v. Wright, 86 Cal. 210, 24 Pac. 996; Rogers v. Cady, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.

B. LAWS OF STATES, UNITED STATES AND FOREIGN COUNTRIES.

IN GENERAL, § 27.
PRIVATE STATUTES, § 28.
—— MUNICIPAL ORDINANCES, § 29.
LAWS OF THE UNITED STATES, § 30.
LAWS OF FOREIGN COUNTRIES, § 31.

§ 27. In General.

[a] A legislative act by which a city is incorporated is a public act of which courts are bound to take judicial notice.—People v. Potter, 35 Cal. 110.

[b] Under section 1875 of the Code of Civil Procedure the court will take judicial notice of "public and private official acts" of the legislature.—People v. Hagar, 52 Cal. 171.

[c] Courts take judicial notice of the revenue laws, and, if a tax recites the performance of the acts required by those laws, the burden of proving a noncompliance is cast upon those who attack the regularity of the essential facts.—Carpenter v. Shinners, 108 Cal. 359, 41 Pac. 473.

[d] Judicial notice is taken by courts of the statutes of the state.—Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448.

[de] Where a complaint alleges that plaintiff, at the special instance and request of defendant state, rendered certain services as its agent, and seeks to recover the agreed compensation therefor, the objection that the alleged employment was illegal may be raised by demurrer, since the court will take cognizance of the fact that there could be no valid contract without legislative authority, and by Code of Civil Procedure, section 1875, subdivisions 2, 3, is charged with knowledge of all public and private acts.—Mullan v. State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262.

[e] In determining a demurrer to a complaint, the court may take judicial notice of a legislative land grant, though the allegations of such complaint are directly contrary to such grant.—People v. Oakland Waterfront Co., 118 Cal. 234, 50 Pac. 305.

[f] Court must take judicial notice of all state laws whether they establish general rules of conduct or facts and status of particular places and things.—People v. Oakland W. F. Co., 118 Cal. 245, 50 Pac. 305.

[g] Court takes judicial notice of appropriations made by state legislature.—Meloin v. State, 121 Cal. 21, 53 Pac. 416.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 896; 20 Cent. Dig., cols. 81, 82, § 38.

§ 28. Private Statutes.

[a] Courts will not take judicial notice of a private act.—Ellis v. Eastman, 32 Cal. 447.

[b] The act of March 25, 1858, confirming sales previously made by the commissioners of the sinking fund of San Francisco, held to be a private, and not a public, act, and a party founding his title on such act must offer it in evidence.—Ellis v. Eastman, 32 Cal. 447.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 896; 20 Cent. Dig., cols. 81, 82, § 38.

§ 29. —— Municipal Ordinances.

[a] Ordinances and by-laws must be proven, and will not be judicially noticed.—Lucas v. San Francisco, 7 Cal. 474.

[b] Courts do not take judicial notice of the ordinances of municipal corporations authorizing tax proceedings, or of the time when, if passed, they take effect, and such an ordinance must be proved as a prerequisite to a tax deed becoming prima facie evidence of a compliance with such proceedings.—Carpenter v. Shinners, 108 Cal. 359, 41 Pac. 473.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 898; 20 Cent. Dig., cols. 87, 88, § 42.

§ 30. Laws of the United States.

[a] The court will take judicial notice that according to act of Congress of March 3, 1851, every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government should present his petition for confirmation of title to the board of land commissioners, and that such proceedings must be had thereon before said board or the district or supreme court of the United States, that a final decree confirming the title must be entered before the patent could issue.—Semple v. Hagar, 27 Cal. 163.

[b] The state courts take judicial notice of acts of Congress.—Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448.

[c] Courts take judicial notice of description of government township contained in public laws of United States.—Miller v. Grunsky, 141 Cal. 441, 66 Pac. 558, 75 Pac. 48.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 889; 20 Cent. Dig., cols. 92, 93, §§ 49, 50.

§ 31. Laws of Foreign Countries.

[a] Courts are bound to know the Mexican civil law applicable to a case.—Holliday v. West, 6 Cal. 526.

[b] The court is bound to take judicial notice of the general laws in force in this

FOR AUTHORITIES FROM OTHER STATES:

Judicial notice, laws, proof of, when necessary and how to be made: 11 Am. Dec. 780, note.

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state at the cession of California, which remained unrepealed until the act of April 22, 1850. Those laws are not regarded as foreign so as to require proof of their existence.—Wells v. Stout, 9 Cal. 479.

[c] Any foreign law is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved.—Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 98.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 884-886, 895; 20 Cent. Dig., cols. 98, 99, § 52.

C. EXISTENCE ORGANIZATION AND PROCEEDINGS OF COURTS.

EXISTENCE, ORGANIZATION AND TERMS OF COURTS, § 32.
—— JUDGES, § 33.
—— JUSTICES OF THE PEACE, § 34.
—— COURT OFFICERS, § 35.
—— JUDICIAL DISTRICTS, § 36.
RULES AND PROCEDURE OF COURTS, § 37.
JUDICIAL PROCEEDINGS AND RECORDS, § 38.
—— PROCEEDINGS IN OTHER COURTS, § 39.

§ 32. Existence, Organization and Terms of Court.

[a] Appellate courts take judicial notice of the terms of the circuit or district courts.—Ross v. Austill, 2 Cal. 183; (1871) Talbert v. Hopper, 42 Cal. 397.

[b] Court does not take judicial notice of time and place of holding courts, if not certain to public knowledge.—Ross v. Austill, 2 Cal. 190.

[c] Court will take judicial notice of the regular terms of the several district courts, as prescribed by statute, and of the contiguity of the several counties composing the judicial districts, but not of the distances and facilities for communication between the county seats of the counties composing such district.—Boggs v. Clark, 37 Cal. 236.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 911-919; 20 Cent. Dig., cols. 102-107, §§ 56-60.

§ 33. —— Judges.

[a] In an action by a county to recover possession of rooms in its courthouse, the court will not take judicial notice that defendants are judges of the superior court of the county.—San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967.

[b] Where an order fixing the day for the execution of a certain judgment of death was made by another than the judge who pronounced the original judgment, the court, on appeal from such order, will take judicial notice of the fact that he had ceased to be such judge before such order was made.—People v. Ebanks, 120 Cal. 626, 52 Pac. 1078.

§ 34. —— Justices of the Peace.

[a] Courts take judicial notice of the official character of justices of the peace in their own states. And an affidavit in which the official character of the justice before whom it is taken does not appear is good.—Ede v. Johnson, 15 Cal. 53.

§ 35. —— Court Officers.

[a] Where the law provides for the appointment of a deputy clerk of court, the courts will judicially recognize such deputy. Himmelmann v. Hoadley, 44 Cal. 213.

[b] The court will take judicial notice that the county clerk is ex officio clerk of the superior court, so that, though he indorses a complaint filed in the superior court as "county clerk," it will be deemed to have been filed with the proper officer.—Campbell v. West, 86 Cal. 197, 24 Pac. 1000.

§ 36. —— Judicial Districts.

[a] The supreme court will take judicial notice that the fourth judicial district is a district within and for the county of San Francisco.—People v. Robinson, 17 Cal. 363.

§ 37. Rules and Procedure of Courts.

[a] The supreme court does not take judicial notice of the rules of the district courts. Cutter v. Caruthers, 48 Cal. 178; Sweeney v. Stanford, 60 Cal. 362.

FOR AUTHORITIES FROM OTHER STATES:

4 L. R. A. 34, note. See, also, 16 Cyc. 915-919; 20 Cent. Dig., col. 107, § 61.

§ 38. Judicial Proceedings and Records.

[a] Court cannot take judicial notice of record in another case.—People v. De La Guerra, 24 Cal. 78.

[b] If two corporations each commence proceedings against the same person in the same court for the condemnation of the same lands, the court cannot, of its own motion, in one action, take judicial notice of the pendency of the other, and refuse to take any action in the matter on the ground of the pendency of the other action.—Lake Merced Water Co. v. Cowles, 31 Cal. 215.

[c] Court takes judicial notice of proceedings in action pending before it.—Ah Men, Ex parte, 77 Cal. 200, 11 Am. St. Rep. 263, 19 Pac. 380.

[d] The court cannot, in one case, take judicial notice of its records in another and different case.—Stanley v. McElrath, 86 Cal. 449, 22 Pac. 673, 25 Pac. 16, 10 L. R. A. 545, 26 Pac. 800; (1893) Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243.

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[e] Courts will take judicial notice of their records and officers, and when necessary for the administration of justice in a given case, will take such notice of all previous and undisputed proceedings therein appearing of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause.—Hollenbach v. Schnabel, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872.

[ef] The court takes judicial notice, without averment and proof, of how long after a certain event an action pending before it was commenced, the date of such event being averred and admitted in the action.—Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047.

[eg] Where record in case judicially before the court it takes judicial notice thereof. Harron v. Harron, 128 Cal. 303, 60 Pac. 932.

[f] On appeal from an order granting a wife alimony pending appeal from a judgment granting her husband a divorce, the supreme court will, in determining whether the appeal was taken in good faith, take judicial notice of mandamus proceedings before it by appellant to compel the trial judge to settle a bill of exceptions.—Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[g] On appeal from an order sustaining a demurrer to bill to set aside a judgment, judicial notice could not be taken of the record on a prior appeal from an order denying a motion to set aside such judgment.—Estudillo v. Security Loan etc. Co., 86 Pac. 19.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 915-920; 20 Cent. Dig., cols. 107-112, §§ 62-65.

§ 39. —— Proceedings in Other Courts.

[a] In the trial of one case, the court cannot take judicial notice of the record in another case in the same court, without its formal introduction in evidence; much less can it take such notice of a case in a different court without proof.—People v. De La Guerra, 24 Cal. 73.

[b] Neither the supreme court nor district court will take judicial notice of proceedings pending in federal courts for confirmation of a pueblo title, unless it is stated in the pleadings.—Vassault v. Seitz, 31 Cal. 225.

[c] The court in which an action is pending cannot take judicial notice of proceedings in bankruptcy subsequently commenced, however seriously they may affect the rights of the parties to the suit. It is the duty of the court to proceed to a decree, as between the parties before it, until by some proper pleading in the case it is informed of the changed relations of any of those parties to the subject matter of the suit.—Amador Canal etc. Co. v. Mitchell, 59 Cal. 168.

[d] All other courts are bound to take judicial notice of the decisions of the supreme court of the United States, and that it is the ultimate tribunal for interpreting and determining the effect of an act of Congress, and that its decision thereupon is binding upon all other courts.—Southern Pacific R. R. Co. v. Painter, 113 Cal. 247, 45 Pac. 320.

[e] Under Code of Civil Procedure, section 1875, subdivision 3, which permits courts to take judicial notice of the acts of the judicial department of the state, the supreme court will judicially notice the vacation by a federal court of a decree confirming a Mexican grant.—Ohm v. City and County of San Francisco, 25 Pac. 155.

D. OFFICERS AND OFFICIAL PROCEEDINGS AND AUTHORITY.

OFFICIAL POSITION, IN GENERAL, § 40.
ADMINISTRATION, RULES AND REGULATIONS, § 41.
OFFICIAL PROCEEDINGS AND ACTS, § 42.
—— AUTHORITY OF ATTORNEY GENERAL, § 43.
OFFICIAL SIGNATURES AND SEALS, § 44.

§ 40. Official Position—In General.

[a] It is not necessary, before introducing a tax deed as evidence, to prove that the person by whom it was executed held the office of tax collector at the time the sale was made. The courts will take judicial notice as to who fill county offices within their jurisdiction.—Wetherbee v. Dunn, 32 Cal. 106.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 899-904, 913-915; 20 Cent. Dig., cols. 112-115, § 60.

§ 41. Administrative Rules and Regulations.

[a] The courts of this state are not bound to take official notice of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners or surveyor general of the United States for California.—Hensley v. Tarpey, 7 Cal. 288.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 903; 20 Cent. Dig., cols. 117, 118, § 69.

§ 42. Official Proceedings and Acts.

[a] Court takes judicial notice whether patent was issued under authority of law.—People v. Center, 66 Cal. 566, 5 Pac. 263, 6 Pac. 481.

[b] Where the evidence showed the right of property in the defendant and the value averred in the complaint is not denied in the answer, the court may determine the question as to the possession by the plaintiff from judicial notice of the return of the sheriff showing its delivery to the plaintiff, and may determine therefrom the right of the defendant as a question of law to a judgment for

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its return.—Hollenbach v. Schnabel, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872.

[c] Under Code of Civil Procedure, section 1875, subdivision 3, judicial notice will be taken of proceedings entered upon the journal of the Senate by which members have been expelled.—French v. State Senate of California, 146 Cal. 604, 80 Pac. 1031.

[d] A letter of the commissioner of the public land office with reference to railroad lands, held a public document of which courts will take judicial notice.—Southern Pac. R. Co. v. Lipman (Cal. Sup.), 83 Pac. 445; Southern Pac. R. Co. v. Strauss (Cal. Sup.), 87 Pac. 451; Southern Pac. R. Co. v. Goldman (Cal. Sup.), 87 Pac. 452; Southern Pac. R. Co. v. Willard (Cal. Sup.), 87 Pac. 452.

[e] Judicial notice will be taken of the method of sale of public lands, the issue of patents and the uniform method of numbering and designating sections and their subdivisions.—Kimball v. McKee, 86 Pac. 1089.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 904-906; 20 Cent. Dig., cols. 118-120, § 70.

§ 43. —— Authority of Attorney General.

[a] Court should take judicial notice of supervisory control of attorney general over district attorneys.—Sacramento County v. Central etc. R. R. Co., 61 Cal. 254.

[b] Courts take judicial notice of authority of attorney general to institute proceedings. People v. Oakland W. F. Co., 118 Cal. 239, 50 Pac. 305.

§ 44. Official Signatures and Seals.

[a] Courts will take judicial notice of the signatures of their officers, as such, but there is no rule which extends such notice to the signatures of parties to a cause.—Alderson v. Bell, 9 Cal. 315.

[b] A patent from the United States proves itself. Courts take judicial notice of the signature of the President and of the seal of the government.—Yount v. Howell, 14 Cal. 465.

[c] Judicial notice is taken of the signature of a tax collector.—Wetherbee v. Dunn, 32 Cal. 106.

[d] Courts will take judicial notice of the officers of a county, and of the genuineness of their official signatures, and of the genuineness of the official signatures of such deputies as the law authorizes them to appoint.—Himmelmann v. Hoadley, 44 Cal. 213.

[e] Courts take judicial notice of the seals of notaries public. Code Civ. Proc., sec. 1875, subd. 7.—Pardee v. Schanzlin, 86 Pac. 812.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 902, 920; 20 Cent. Dig., cols. 120-122, § 71.

II. PRESUMPTIONS.

NATURE AND SCOPE—IN GENERAL, § 45.
IDENTITY OF PERSONS AND THINGS, § 46.
PERSONAL STATUS AND CONDITION—IN GENERAL, § 47.
NATURE AND CONDITION OF PROPERTY OR OTHER SUBJECT MATTER, § 48.
INNOCENCE, § 49.
KNOWLEDGE OF LAW, § 50.
KNOWLEDGE OF VACANCY IN PUBLIC OFFICE, § 51.
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OWNERSHIP OF PROPERTY FROM POSSESSION, § 53.
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In criminal cases. See Criminal Law, §§ 78-90.
Presumption of grant from lapse of time. See Adverse Possession, § 121.
Presumptions in appellate court—In civil cases. See Appeal and Error, §§ 1117-1174.
—— In criminal cases. See Criminal Law, §§ 731-746.
Presumption of injury from error—In civil cases. See Appeal and Error, §§ 1258-1263.
—— In criminal cases. See Criminal Law, § 774.
Presumption of authority of attorney. See Attorney and Client, § 57.
Presumptions on review by certiorari. See Certiorari, § 49.
Presumption as to common law of other states. See Common Law, § 7.
Presumptions as to ownership of confused goods. See Confusion of Goods, § 6.
Presumption as to jurisdiction of courts of record —Civil jurisdiction. See Courts, § 37.
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Presumption of damage from injury. See Damages, § 5.
Presumption of death from absence. See Death, § 1.
Presumption of survivorship of persons perishing in common calamity. See Death, § 2.
Presumption as to dedication or acceptance thereof. See Dedication, §§ 53, 54.
Presumption of identity of parties from identity of names. See Deeds, § 154.
Presumption of identity of land from identity of description. See Deeds, § 155.
Presumption of authority of district or prosecuting attorney. See District and Prosecuting Attorneys, § 18.
Presumptions in favor of vesting of estates. See Estates, § 1.
Presumption of validity of officer's acts. See Execution, § 116.
Presumption against forfeiture. See Forfeitures, § 4.
In actions to set aside conveyances in fraud of creditors. See Fraudulent Conveyances, §§ 134-139.
In homicide cases. See Homicide, VI, A.
Presumption as to validity of judicial sale. See Judicial Sales, § 5.
Presumptions as to jurisdiction of courts of justices of the peace. See Justices of the Peace, § 44.
Presumption of partnership from use of firm name. See Partnership, § 18.
Pleading matters of presumption or implication. See Pleading, §§ 8-11.
Presumptions in favor of validity of statutes. See Statutes, § 9.
Presumption as to validity of tax sale. See Taxation, § 168.

§ 45. Nature and Scope—In General.

[a] Presumptions are only indulged to supply absence of facts. There can be no presumption against ascertained and established facts.—Nieto v. Carpenter, 21 Cal. 455.

[b] The fact that "Blotter B," so called, in the possession of the recorder of San Francisco, shows a certain number of lots granted by the alcalde in a particular year, does not raise the presumption that he did not grant other lots during the same year.—Sill v. Reese, 47 Cal. 294.

[c] Prima facie evidence is that which suffices until overcome by other evidence. Moore v. Hopkins, 83 Cal. 272, 17 Am. St. Rep. 248, 23 Pac. 318; Vaca Valley etc. R. R. v. Mansfield, 84 Cal. 566, 24 Pac. 145.

[e] Slight proofs make out prima facie case where negative is to be proved,—Hussell v. McDowell, 83 Cal. 81, 23 Pac. 183.

[f] The rule of evidence prescribed in the Political Code declaring the effect of deed of the officer, and making it prima facie or presumptive evidence of other facts is not in conflict with the provisions of the Code of Civil Procedure relating to evidence, and it is not a ground of objection to the effect of such deed as prima facie evidence that the provision making it such is not found in the Code of Civil Procedure.—Clarke v. Mead, 102 Cal. 516, 36 Pac. 862.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1050, 1073; 20 Cent. Dig., cols. 125, 126, § 73.

§ 46. Identity of Persons and Things.

[a] Identity of persons is presumed from identity of name.—Finch v. Riverside etc. Co., 87 Cal. 602, 25 Pac. 765.

[b] Difference of names raises presumption that persons are different.—Smith v. Westerfield, 88 Cal. 382, 26 Pac. 206.

FOR AUTHORITIES FROM OTHER STATES:

17 L. R. A. 824, note. See, also, 16 Cyc. 1055-1057; 20 Cent. Dig., cols. 126-130, § 75.

§ 47. Personal Status and Condition—In General.

[a] On an issue as to the validity of a Mexican grant of public lands to a married woman, until the contrary is shown, it will be presumed that she had the capacity to take such a concession.—Reynolds v. West, 1 Cal. 322.

FOR AUTHORITIES FROM OTHER STATES:

Presumptions in support of a second marriage: 89 Am. St. Rep. 198, note. See, also, 20 Cent. Dig., col. 130, § 76.

§ 48. Nature and Condition of Property or Other Subject Matter.

[a] In a controversy respecting the use of the waters of a spring, where there was nothing to show that it was supplied by any defined flowing stream, held, that it must be presumed to be formed by the ordinary percolations of water in the soil.—Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 130-132, §§ 77, 78.

§ 49. Innocence.

[a] The presumption in favor of innocence holds in all civil suits in which it comes collaterally in question.—Case v. Case, 17 Cal. 598.

[b] Law presumes that conduct of men is lawful and in accordance with rules of morality.—White v. White, 82 Cal. 433, 23 Pac. 276.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1081; 20 Cent. Dig., cols. 133, 134, § 81.

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§ 50. **Knowledge of Law.**

[a] It is presumed that every man knows the law.—Taaffe v. Josephson, 7 Cal. 355; Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267.

[b] In cases involving questions of confirmation a party is not necessarily presumed to know the law. This is a fact to be established, and, even admitting the presumption to arise, it is not conclusive as against facts which go to establish ignorance of the law. Holland v. San Francisco, 7 Cal. 361.

[c] The stockholders of a corporation organized in one state to do business in another must be presumed to have known the latter's laws, particularly where they were resident therein.—Keystone Driller Co. v. Superior Court of City and County of San Francisco, 138 Cal. 738, 72 Pac. 398.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1083; 20 Cent. Dig., cols. 136, 137, § 85.

§ 51. **Knowledge of Vacancy in Public Office.**

[a] While all voters are presumed to know the law and the time when the full terms of office expire, they are not presumed to know the fact that an officer has resigned or died. Tillson v. Ford, 53 Cal. 701.

§ 52. **Intent.**

[a] Every man is presumed to intend the legitimate consequences of his acts.—Taaffe v. Josephson, 7 Cal. 356.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 135, 136, § 84.

§ 53. **Ownership of Property from Possession.**

[a] Law presumes ownership from possession of property.—Mayo v. Madden, 4 Cal. 27; Goodwin v. Garr, 8 Cal. 615; De Noon v. Morrison, 83 Cal. 166, 23 Pac. 374; Schneider v. Brown, 85 Cal. 207, 208, 24 Pac. 715; Eby v. Board of Trustees, 87 Cal. 171, 25 Pac. 240.

[b] Party in possession of public land, claiming title to it, must be presumed to be the owner of it.—Houseman v. Chase, 12 Cal. 390.

[c] The fact that a man is in possession of one acre of land does not raise any presumption that he has title to an unlimited tract in the same neighborhood.—Havens v. Dale, 18 Cal. 359.

[d] Possession of personal property by a person engaged in business on his own account is only prima facie evidence of ownership, and does not prevail against the true owner, except as to negotiable instruments, and whatever comes under the general denomination of currency.—Wright v. Solomon, 19 Cal. 64, 76 Am. Dec. 196.

[e] Thirty years' possession of premises raises presumption of ownership.—Williamson v. Tobey, 86 Cal. 498, 25 Pac. 65.

[f] Possession is presumed rightful until contrary appears.—Oglesby v. Santa Barbara, 119 Cal. 116, 51 Pac. 181.

§ 54. **Continuance of Fact or Condition.**

[a] Office once created is presumed to be continuing, unless the contrary appears.—People v. Addison, 10 Cal. 1.

[b] Condition of things, or status once shown to exist, is presumed to continue.—People v. Addison, 10 Cal. 1; White v. White, 82 Cal. 438, 23 Pac. 276.

[c] When it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged until the contrary appears.—Kidder v. Stevens, 60 Cal. 414.

[d] There is no presumption that fact once shown to exist continues regardless of nature of fact.—Scott v. Hood, 81 Cal. 404, 405, 22 Pac. 871.

[e] Illicit intercourse is presumed to continue until evidence shows that intercourse of parties has become matrimonial.—White v. White, 82 Cal. 434, 437, 23 Pac. 276.

[f] Where minds of parties have met as to what is to be done when time comes to act, law presumes that they remained in same condition until act was done.—Ward v. Waterman, 85 Cal. 502, 24 Pac. 930.

[fg] The presumption that a thing once proven to exist continues as long as usual with things of that nature is not applicable to a balance in one's favor in a bank, and there is no presumption that a small balance in bank, on open account, continues to exist. High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508.

[g] Under Code of Civil Procedure, section 1963, subdivision 32, providing that a thing once proven to exist will be presumed to continue to exist as long as usual with things of that nature, the title to land, having once been shown to have been vested in a grantor at a certain time prior to the execution of a deed by him, will be presumed to have continued to remain in him until the time of the execution of such deed, in the absence of any proof to the contrary.—Hohenshell v. South Riverside Land etc. Co., 128 Cal. 627, 61 Pac. 371.

[h] Acceptance of mortgage held to amount to admission by mortgagee that bank mentioned in mortgage was at the time of its execution a corporation, and that condition, having once been shown, was presumed to continue until contrary was shown.—Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

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[i] Where a witness was shown to have been absent when her deposition was taken, it would be presumed, in the absence of proof by the party objecting to the introduction of her deposition, that her absence continued. Dolbeer's Estate, In re, 86 Pac. 695; Schander v. Gray, 86 Pac. 695.

FOR AUTHORITIES FROM OTHER STATES:

Presumption of continuance: 50 Am. Rep. 297, note; 35 L. R. A. 117, note. See, also, 16 Cyc. 1052, 1053; 20 Cent. Dig., cols. 138-143, §§ 87, 88; cols. 178, 179, § 103.

§ 55. Existence of Fact or Condition Prior to Time Shown.

[a] The law presumes a fact continuous in its nature and character, when once established by proof, to continue, and, in the absence of evidence to the contrary, legally infers therefrom its subsequent existence; but such a presumption never runs backward, and the law never presumes, from proof of the existence of present facts, that the same facts existed many years previously.—Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557.

[b] Proof of the insanity of a person carries no presumption of its past existence.—Dolbeer's Estate, In re, 86 Pac. 695; Schander v. Gray, 86 Pac. 695.

§ 56. Health and Possession of Faculties.

[a] It will be presumed that a man strong and healthy is in full possession of his faculties, though he is comparatively advanced in years.—Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1073, 1074; 20 Cent. Dig., cols. 132, 133, § 80.

§ 57. Making and Genuineness of Writings.

[a] Where an appeal is taken and a bond or undertaking, with or by sureties, is annexed, the undertaking being executed for the benefit of the appellant, the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required.—Bostic v. Love, 16 Cal. 69.

[b] The genuineness of the signatures to the official documents of officers of Mexico, which are now in the custody of the surveyor general of the United States will be presumed in a case where such signatures are used for a collateral purpose, such as to enable a witness who has examined such documents to testify as to the genuineness of the signature to a paper offered in evidence from having seen such signature on such documents.—Sill v. Reese, 47 Cal. 294.

[c] Conceding that the record of a deed which is introduced in evidence without objection is prima facie evidence of the genuineness, due execution, and delivery of the original, still it is only prima facie evidence of those facts, and may be rebutted.—Burroughs v. De Couts, 70 Cal. 361, 11 Pac. 734.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 145-148, § 91.

§ 57½. That Person Riding on Passenger Train is a Passenger.

[a] A person on a train used for carrying passengers is, in the absence of countervailing circumstances, presumed to be a passenger.—People v. Douglas, 87 Cal. 284, 25 Pac. 417.

[b] It is presumed that person riding on platform of mail-car is not a passenger.—People v. Douglass, 87 Cal. 284, 25 Pac. 417.

§ 58. Regularity of Course of Business or Conduct of Affairs.

[a] It cannot be presumed that agent used his own funds in relation to subject of agency.—De Mallagh v. De Mallagh, 77 Cal. 128, 19 Pac. 256.

[b] It is presumed that bank keeps proper records of its transactions.—Robinson v. Nevada Bank, 81 Cal. 109, 22 Pac. 487.

[c] It is presumed that private transactions have been fair and regular.—Lattin v. Hazard, 85 Cal. 61, 24 Pac. 611.

[d] Under Code of Civil Procedure, section 1959, defining a presumption as a deduction which the law directs to be made from particular facts, and section 1963, subdivision 19, providing that private transactions are prima facie presumed to have been fair and regular, where an attorney redeemed land of his client from a sale made in the proceedings in which he represented such client, the mere relationship of attorney and client, and the fact that the redemption was made shortly before the expiration of the time allowed therefor, and for a consideration coinciding closely with the amount necessary to redeem, were not sufficient to raise any presumption that the land was redeemed by the attorney, with his client's money, with intent to defraud the client's creditors; but the presumption was rather that the transaction was fair and regular.—Fisher v. McInerney, 17 Cal. 28, 69 Pac. 622, 907.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1072; 20 Cent. Dig., cols. 143-145, § 80.

§ 59. Testacy or Intestacy of Decedent.

[a] There is no presumption that a decedent died testate.—Murphy v. Crowley, 141 Cal. 150, 73 Pac. 820.

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§ 60. Existence of Heirs.

[a] It is presumed that every intestate has left someone on earth entitled to claim as his heir, however remote.—People v. Roach, 76 Cal. 296, 18 Pac. 407.

§ 61. Mailing and Delivery of Mail Matter.

[a] Evidence that a letter was duly posted raises the presumption that it was received.—Stockton Combined Harvester etc. Works v. Houser, 109 Cal. 1, 51 Pac. 809.

[b] Under Code of Civil Procedure, section 1963, subdivision 24, where a husband had previously kept his insane wife at a hospital, and had corresponded with the officials with regard to her, it will be presumed that a letter directed to him by the hospital authorities was received by him, he not denying its receipt.—St. Vincent's Inst. for the Insane v. Davis, 129 Cal. 20, 61 Pac. 477.

§ 61½. Delivery and Receipt of Telegrams.

[a] When a telegram has been sent, it is a presumption of fact that it was received by the person to whom it was sent, and the fact that it was sent is admissible evidence tending to show that it was received; but its receipt may be disproved.—Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1065-1070; 20 Cent. Dig., cols. 148-152, § 92.

§ 62. Intercourse from Cohabitation.

[a] Law presumes intercourse from cohabitation and illicit intercourse from illicit cohabitation.—White v. White, 82 Cal. 438, 23 Pac. 276.

§ 63. Evidence Withheld or Falsified.

[a] Object of rule of law which requires production of best evidence of which the facts sought to be established are susceptible is the prevention of fraud; for if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes which its production would expose and defeat.—Bagley v. Administrator of McMickle, 9 Cal. 430.

[b] On a hearing upon affidavits, a copy of a deed, annexed to one of the affidavits, is entitled to no weight as evidence, where the original is under the control of the affiant, and he refuses to produce it, and assigns no reason for such refusal.—Leese v. Clark, 29 Cal. 664.

[c] If a party testifying fails to testify to a fact favorable to himself, it is presumable that such fact does not exist.—Tompkins v. Mahony, 32 Cal. 234.

FOR AUTHORITIES FROM OTHER STATES:

14 L. R. A. 470, note. See, also, 16 Cyc. 1058-1064; 20 Cent. Dig., cols. 154-172, §§ 95-100.

§ 64. —— Suppression or Spoliation of Evidence.

[a] Willful suppression of testimony raises a presumption that it would be adverse.—Bagley v. McMickle, 9 Cal. 430.

[b] On the trial of an action involving the question whether a drug store sold by R. was sold to J., the plaintiff, or to M., the court refused to instruct the jury that if they believed that J. tore up the note given for the price after the commencement of the suit, he knowing at the time that the note would be important evidence in it, then they would be warranted in presuming that it was a note of which J. was the indorser and M. the maker. Held, that this refusal was error. It was the destruction by the plaintiff of a piece of evidence of much importance in determining whether he was the purchaser of the drug store or not, for the fact that the purchase money was furnished by M. would outweigh the circumstance that the bill of sale had been taken in the name of J.—Johnson v. White, 46 Cal. 328.

[c] The doctrine that everything will be presumed against a spoliator does not apply to an action by a stockholder of a mining company against a milling company for improperly extracting the bullion, so as to leave a large quantity in the ore to be afterward worked over by defendant, because, in the process of milling, the identity of the ore was destroyed.—Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

[d] The fact that a witness for a party refused to produce books does not render such party a spoliator of testimony, no demand having been made for the production of the books.—Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

FOR AUTHORITIES FROM OTHER STATES:

34 L. R. A. 581, note. See, also, 16 Cyc. 1058, 1059; 20 Cent. Dig., cols. 168-171, § 98.

§ 65. Laws of Other States.

[a] Where one, under a foreign assignment, gained possession of property which he brought to California, a claimant there cannot refer to a local statute, and claim as a presumption of law that the foreign law is like it, and hence that the possessor's title is void.—Forbes v. Scannell, 13 Cal. 242.

[b] In the absence of proof as to the law of those states in which the common law is not presumed to prevail, the law will be presumed to correspond with that of the state in which

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the cause is tried.—Norris v. Harris, 15 Cal. 226.

[c] In the absence of proof it is presumed that laws of another state are the same as the laws of the forum.—Hickman v. Alpaugh, 15 Cal. 226; Hill v. Grigsby, 32 Cal. 55; Brown v. San Francisco Gaslight Co., 58 Cal. 426; Marsters v. Lash, 61 Cal. 622; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; Palmer v. Atchison etc. Co., 101 Cal. 187, 35 Pac. 630; Pierce v. Southern Pacific Co., 120 Cal. 158, 47 Pac. 874, 52 Pac. 302; Harrington's Estate, In re, 140 Cal. 244, 73 Pac. 1000; Harrington v. Union Trust Co., 140 Cal. 244, 73 Pac. 1000; rehearing denied, 140 Cal. 294, 74 Pac. 136; Dunphy's Estate, In re, 147 Cal. 95, 81 Pac. 315; Flood v. Dunphy, 147 Cal. 95, 81 Pac. 315.

[d] When plaintiff, suing on a note as the assignee, relied on an assignment executed by an executrix in Missouri, and there was no evidence that such assignment was authorized by any court having jurisdiction of the estate, and no evidence as to the laws of Missouri, there could be no recovery, since the Missouri law would be presumed to be the same as Code of Civil Procedure, sections 1517, 1524, declaring that a chose in action belonging to an estate may not be sold save under order of the superior court.—Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162.

[e] Where, on an issue of marriage, it is claimed to have taken place in another state, but the laws of such state are not shown, such laws will be presumed to be the same as in the state where the action is tried, and proof of facts sufficient to establish a marriage in the latter state will support a finding that the marriage was valid.—Richards' Estate, In re, 133 Cal. 524, 65 Pac. 1034.

[f] Where the second marriage took place in another state, under the law of which it is claimed to be absolutely void, if the law of such state is not proved as a fact, it must be presumed to be the same as the law of this state.—Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000.

FOR AUTHORITIES FROM OTHER STATES:

Presumption that the common law prevails in other jurisdictions: 37 Am. Rep. 584, note; 21 L. R. A. 467, 67 L. R. A. 33, notes. See, also, 16 Cyc. 1084; 20 Cent. Dig., cols. 172-177, § 101.

§ 66. Foreign Laws.

[a] It will be presumed that law of foreign country is same as law of this state.—Loaiza v. Superior Court, 85 Cal. 30, 20 Am. St. Rep. 197, 24 Pac. 707; Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 42 Pac. 918.

[b] In the absence of any showing to the contrary, an English judgment will be presumed to have drawn interest at seven per cent, the same as a domestic judgment.—Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1084; 20 Cent. Dig., cols. 177, 178, § 102.

§ 67. Territorial Acts.

[a] Acts of a legislative body are susceptible of proof either by records or parol proof, and cannot be presumed.—Vanderslice v. Hanks, 3 Cal. 47.

§ 68. Judicial Proceedings.

[a] When lost petition is proved by secondary evidence, it will be presumed after eight years that it averred jurisdictional facts shown to have existed.—Warfield's Will, 22 Cal. 51, 83 Am. Dec. 49.

[b] Everything is to be presumed in favor of the regularity of the proceedings of a court of justice.—Talbert v. Hopper, 42 Cal. 397.

[c] Presumption that court of general jurisdiction will not admit irrelevant evidence will prevail over doubt as to its admissibility under law of another state.—Meredith v. Santa Clara Min. Assn., 56 Cal. 178.

[d] Where there is but one defendant in an action, and the record states that the answer is verified, the inference is that it was verified by the defendant.—Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

[e] Judge of one county holding court in another is presumed to be acting at request of governor or one of judges of latter county. Meuman, In re, 75 Cal. 220, 7 Am. St. Rep. 146, 16 Pac. 887.

FOR AUTHORITIES FROM OTHER STATES:

48 L. R. A. 136, note. See, also, 16 Cyc. 1075; 20 Cent. Dig., cols. 179-183, § 104.

§ 69. Official Proceedings and Acts.

[a] Officers are presumed to have performed their duties faithfully and regularly without excess of power.—Vanderslice v. Hanks, 3 Cal. 28; Egery v. Buchanan, 5 Cal. 53; Guy v. Washburn, 23 Cal. 111; Rice v. Cunningham, 29 Cal. 492; Weaver v. Fairchild, 50 Cal. 360; Oakland Bank v. Murfey, 68 Cal. 463, 9 Pac. 843; Watkins v. Lynch, 71 Cal. 24, 11 Pac. 808; Pico v. Warner, 73 Cal. 20, 14 Pac. 377; Reclamation Dist. v. Wilcox, 75 Cal. 451, 17 Pac. 241; Doland v. Mooney, 79 Cal. 138, 21 Pac. 436; Bode v. Trimmer, 82 Cal. 516, 23 Pac. 187; McGuire v. Drew, 83 Cal. 231, 23 Pac. 312; Los Angeles v. Lankershim, 100 Cal. 525, 35 Pac. 153; Williams v. Bergin, 116 Cal. 60, 47 Pac. 877; Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076; Ellis v. Workman, 144 Cal. 113, 77 Pac. 822.

[b] The acts of the officer making the assessment must be presumed to be in conformity with law.—Palmer v. Boling, 8 Cal. 384.

[c] It will be presumed for the purposes of justice that the authority exercised by the

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officers of a municipal corporation was properly delegated to them, and that contracts made by them, without authority, have been ratified.—San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

[d] Presumption that officers have complied with law does not apply to statutory divestiture of title.—Keane v. Canovan, 21 Cal. 291, 82 Am. Dec. 738.

[e] Presumption that officer does his duty is a rule of evidence and not of pleading.—California etc. Co. v. Schafer, 57 Cal. 396.

[f] Surveyor general is presumed to have regularly performed official duties.—Eads v. Clarke, 68 Cal. 484, 9 Pac. 666.

[g] Officers are presumed regularly appointed.—People v. Otto, 77 Cal. 47, 18 Pac. 869.

[h] Official duty of supervisors is presumed regularly performed.—Spaulding v. North S. F. etc. Assn., 87 Cal. 48, 24 Pac. 600, 25 Pac. 249.

[i] Assessment of a railroad franchise within state properly susceptible of valuation by state board of equalization must be presumed, in absence of any other evidence than assessment itself, to have been assessed upon property within jurisdiction of board, rather than upon property which it had no power to include in assessment.—People v. Central Pacific R. R. Co., 105 Cal. 576, 38 Pac. 905.

[ij] Where a right of action depends upon an official act to be performed by a public officer, there is no presumption that any delay in the performance was unreasonable.—Williams v. Bergin, 116 Cal. 56, 47 Pac. 877.

[j] Under Code of Civil Procedure, section 1963, subdivision 15, establishing a rebuttable presumption that an official duty was regularly performed, a finding that "an order of sale was duly issued" raises a presumption that, if the signature of the clerk of the court was essential to its validity, it had been subscribed.—Spaulding v. Howard, 121 Cal. 194, 53 Pac. 563.

[k] Courts are bound to presume that legislature did not intend to exceed its authority. Burns v. Superior Court, 140 Cal. 7, 8, 73 Pac. 597.

[l] Presumption that official duty has been performed applies to acts of acting mayor.—City Street Imp. Co. v. Rontet, 140 Cal. 56, 73 Pac. 729.

[lm] Where a police officer is authorized to make an arrest only where he has a warrant for the offender, or the offense was committed in his presence, under an allegation that plaintiff was arrested by a police officer it will be presumed that he had a warrant, or that the offense was committed in his presence.—Davis v. Pacific Telephone etc. Co., 57 Pac. 764.

[m] Under Statutes of 1895, page 269, chapter 207, and Code of Civil Procedure, section 1963, subdivisions 15 and 17, providing that it will be presumed that official duty has been performed, and that a judicial record, when not conclusive, still correctly determines or sets forth the rights of the parties, it will be presumed that failure to file the remittitur for four months after it was sent down was because the fee for filing had not been paid or tendered, or for some other sufficient reason.—Mabb v. Stewart, 143 Cal. xviii, 77 Pac. 402.

[n] In a suit to quiet title to land claimed by defendant under a certificate of purchase which had been annulled, held, under the issues, that it would be presumed that the judgment of annullment had been filed in the office of the registrar as required by Political Code, section 3550.—Shepard v. Mace (Cal. Sup.), 82 Pac. 1046; Winnek v. Mace (Cal. Sup.), 82 Pac. 1046.

[o] The performance of official acts of notaries public are presumed to have been regular as provided by Code of Civil Procedure, section 1963, subdivision 15.—Pardee v. Schanzlin, 86 Pac. 812.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1076-1079; 20 Cent. Dig., cols. 183-190, § 105.

§ 70. —— Acts of Officers of Foreign Government.

[a] The general rule is that when the acts of the officers of a foreign government are brought in question in our courts, the acts performed by them will be presumed to have been within the scope of their lawful authority, unless the contrary appears.—Mott v. Reyes, 45 Cal. 379.

[b] The presumption is that public officers in charge of official documents have done their duty in preventing forged papers from being placed among them, and this presumption applies equally to the public functionaries of Mexico, as to those of the United States.—Sill v. Reese, 47 Cal. 294.

§ 71. Executors and Administrators.

[a] It must be presumed, in absence of allegations and evidence to contrary, that administratrix has obeyed the law and performed her official duty, and that all the property and money of the estate for which she was accountable at the time of her death has passed into the possession of her successor.—Gray v. Farmers' Exchange Bank, 105 Cal. 60, 38 Pac. 519.

§ 72. Corporate Acts.

[a] Corporate officers are presumed not to have exceeded their authority.—Schallard v. Eel River etc. Co., 70 Cal. 146, 11 Pac. 590.

[b] Presumption that official duty has been regularly performed cannot be availed of by directors of corporation who have not

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performed their duty.—Schenck v. Bandmann, 81 Cal. 235, 22 Pac. 654.

§ 73. Boundaries Established by Federal Government.

[a] Boundaries established and approved by federal government are presumed correct.—People v. Brown, 74 Cal. 306, 16 Pac. 1.

[b] In the absence of evidence to the contrary, there is a presumption that a meander line forming the boundary of land bordering the ocean was run along the beach, so as to enable the surveyor to locate the line of ordinary high tide.—Kimball v. McKee, 86 Pac. 1089.

§ 74. Operation and Effect.

[a] Wherever the law declares that certain facts are conclusive evidence of fraud, a verdict against such evidence should be set aside; but, where such facts are declared to be only presumptive evidence of fraud, the jury may decide against such presumption. Billings v. Billings, 2 Cal. 107, 56 Am. Dec. 319.

[b] Presumption of law that is disputable when not changed by evidence becomes to the court a rule indisputable for the case, and the court is bound to apply it.—Kidder v. Stevens, 60 Cal. 414.

[c] Where law makes certain fact a conclusive presumption, evidence cannot be received to contrary.—Mills' Estate, 137 Cal. 303, 70 Pac. 91.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1087; 20 Cent. Dig., cols. 192-195, §§ 107-109.

§ 75. —— Presumptions of Fact.

[a] Presumption of identity of person from identity of name is disputable.—People v. Riley, 75 Cal. 100, 16 Pac. 844.

[b] The certificate of acknowledgment or proof of a receipt and release from liability for breach of promise of marriage, taken before a notary public, is, under Code of Civil Procedure, section 1948, only prima facie evidence of the execution of the writing; and plaintiff, in an action for such breach, may by her own testimony controvert the facts therein contained under Code of Civil Procedure, section 1961, providing that "a presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect."—Moore v. Hopkins, 83 Cal. 270, 17 Am. St. Rep. 248, 23 Pac. 318.

[c] The presumption of consideration attaching to a written instrument is a disputable presumption, which may be overcome by evidence of facts showing a want of consideration.—Estate of Kennedy, 129 Cal. 384, 62 Pac. 64.

[d] The presumptions which under Code of Civil Procedure, section 1963, are declared to be disputable are in effect only inferences, which in the absence of any controverting evidence the jury is required to make, and, in civil cases, to accept as established evidence, creating a preponderance of the evidence.—People v. Wong Sang Lung (Cal. App.), 84 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1087; 20 Cent. Dig., cols. 192-195, § 109.

§ 76. Conflicting Presumptions of Fact.

[a] The possession of agricultural land is prima facie proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies.—Burdge v. Smith, 14 Cal. 380.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1087; 20 Cent. Dig., cols. 195, 196, § 110.

§ 77. Rebuttal of Presumptions of Fact.

[a] Presumption of sale from delivery of warehouse receipt is not rebutted by showing that party delivering receipt was agent for another.—Horr v. Barker, 8 Cal. 610.

[b] From proof of legal title right of possession will be presumed, but presumption may be rebutted by proof of an equitable title in another of a character to carry the right of possession.—Willis v. Wozencraft, 22 Cal. 607.

[c] Prima facie evidence may be contradicted and overcome by other evidence.—Davidson v. Cucamonga F. & L. Co., 78 Cal. 8, 20 Pac. 152.

[d] Prima facie evidence may always be overcome by other sufficient proof.—Godfrey v. Miller, 80 Cal. 424, 22 Pac. 590.

[de] Presumptions not declared by law to be conclusive may be controverted by other evidence, direct or indirect.—Moore v. Hopkins, 83 Cal. 272, 17 Am. St. Rep. 248, 23 Pac. 318.

[e] The presumptions that every man knows the condition of his own business, and that every man intends the consequences of his acts, are disputable, and an inference of the fact of fraudulent intent from a deed of gift by an insolvent debtor to his wife, which might rest upon those presumptions, is overcome by a finding that he was ignorant of the fact of his insolvency.—Bull v. Bray, 89 Cal. 286, 26 Pac. 873.

[f] The disputable presumptions that an obligation delivered up to a debtor has been paid, and that the ordinary course of business has been followed, do not raise a conflict in the evidence, where the fact is proven

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contrary to the presumptions by evidence without conflict, but in such case the presumption is simply overcome and dispelled; and such presumptions are allowed to stand as evidence, not against the facts they represent, but in lieu of proof of them.—Savings and Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922.

[g] In an action to recover taxes paid by plaintiff under protest, findings that plaintiff forwarded its statement of taxes to the assessor by mail, properly addressed, but that the assessor never received the statement so forwarded, show that plaintiff "neglected" to furnish to the assessor the statement of property subject to taxation, under Political Code, section 3629, providing for an arbitrary assessment where taxpayer "neglects or refuses" to furnish such statement; the presumption that a letter mailed was received, under Code of Civil Procedure, section 1963, being overcome by direct evidence of the assessor that he never received it.—Grade v. Mariposa County, 132 Cal. 75, 64 Pac. 117.

[h] The presumption created by Code of Civil Procedure, section 1963, subdivision 15, that official duty has been performed, is expressly made rebuttable, and proof that payment for supplies furnished to a library board by plaintiff and his assignor had never been made, and that no order, demand, warrant, or draft had been delivered to them, or to anyone for their use, sufficiently showed that they could not have indorsed, or authorized the indorsement of, warrants issued in payment therefor, and rebutted any presumption that the indorsements on the warrants were genuine, though the warrants themselves had been drawn and stamped "Paid" by the city treasurer.—Robertson v. Board of Library Trustees of Alameda Free Public Library and Reading Rooms, 136 Cal. 403, 69 Pac. 88.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1087; 20 Cent. Dig., cols. 196, 197, § 111.

III. BURDEN OF PROOF.

EXTENT OF BURDEN IN GENERAL, § 78.
—— EFFECT OF PRESUMPTIONS OR PRIMA FACIE CASE, § 79.
MATTERS OF DEFENSE, § 80.
FAILURE TO SUSTAIN BURDEN, § 81.

In criminal cases. See Criminal Law, §§ 78-90.
Burden to show abandonment. See Abandonment, § 19.
Burden of showing error—In civil cases. See Appeal and Error, § 1118.
—— In criminal cases. See Criminal Law, § 747.
Burden of proving damages. See Damages, § 109.
Burden of proving self-defense in actions for wrongful death. See Death, § 25.
Burden of proving dedication. See Dedication, § 55.
Burden of proving forfeiture. See Forfeitures, § 5.
In homicide cases. See Homicide, VI, A.

§ 78. Extent of Burden in General.

[a] The burden rests upon either party to establish his own right; and the fact that the complaint anticipates the case of the defendant by negative averments as to his qualifications and right to purchase does not alter the rule or shift the burden.—Lane v. Pferdner, 56 Cal. 122.

[b] Burden rests on party having affirmative of issue.—Harmon v. Ashmead, 68 Cal. 323, 9 Pac. 183.

[c] Party having affirmative of issue is bound to produce preponderance of evidence. Robinson v. Nevada Bank, 81 Cal. 109, 22 Pac. 487.

[d] Burden of proof may be burden of making or meeting prima facie case or burden of producing preponderance of evidence. Scott v. Wood, 81 Cal. 400, 401, 22 Pac. 871.

[e] Burden of making or meeting prima facie case may shift in course of trial.—Scott v. Wood, 81 Cal. 401, 22 Pac. 871.

[f] Burden of producing preponderance of evidence is on party having affirmative of issue and never shifts.—Scott v. Wood, 81 Cal. 401, 402, 22 Pac. 871.

[g] In ascertaining who has affirmative of issue substance controls form; fact that traverse is affirmative instead of negative is immaterial.—Scott v. Wood, 81 Cal. 403, 404, 22 Pac. 871.

[h] One desiring benefit of statute conferring rights on particular class must show himself belonging to class designated.—Bode v. Trimmer, 82 Cal. 517, 23 Pac. 187.

[i] The burden of proof of a negative averment in a pleading depends upon the circumstances of the case. A negative averment in a complaint requires proof by the party pleading it only where it is an essential part of the original substantive cause of action upon which the plaintiff relies. In other cases, generally, though a negative averment may be necessary, it need not be proved, but the burden of proof rests upon the other party, whose rights depend upon proof of the affirmative.—Dirks v. California Safe Deposit etc. Co., 136 Cal. 84, 68 Pac. 487.

[j] Code of Civil Procedure, section 1869, provides that evidence need not be given in support of a negative allegation except when such allegation is an essential part of the right or the statement on which the cause of action or defense is founded. In a suit to enforce the lien of a street assessment, plaintiff alleged that plans and specifications and estimates of cost had not been required, etc. Held, that affirmative evidence in support of such allegation was not necessary.—Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 932-934; 20 Cent. Dig., cols. 204-209, §§ 116, 117.

§ 79. —— Effect of Presumptions or Prima Facie Case.

[a] Where the party holding the affirmative shows a state of facts raising a presumption

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in his favor, or otherwise makes out a prima facie case, the burden of proof is cast on the opposite party.—Thompson v. Lee, 8 Cal. 275; Ficken v. Jones, 28 Cal. 618.

[b] Burden shifts when party having affirmative of issue establishes it prima facie. Lux v. Haggin, 69 Cal. 298-414, 10 Pac. 674.

[c] Presumption is against party having burden of proof.—Monterey County v. Cushing, 83 Cal. 510, 23 Pac. 700.

[d] While the presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence.—Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547.

[e] The admission of the defendants, in the contract of indemnity given to the street railway company, of the execution of the note by it, are sufficient evidence, prima facie, to sustain a finding that the note of the corporation was duly executed, and to throw the burden upon the defendants to show want of authority on the part of the officers of the corporation to execute it.—Temple Street Cable Ry. v. Hellman, 103 Cal. 634, 37 Pac. 530.

[f] The identity of the person of the deceased declarant, whose declarations were admitted in evidence, with the brother of the deceased testator named in the will, is presumed from the identity of name; and the will itself is sufficient evidence that the brother named in the will was a member of the family of the deceased testator. The presumption arising from the identity of name is rebuttable, but is sufficient to shift the burden of proof of the contrary upon the other side.—Estate of Williams, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670.

§ 80. Matters of Defense.

[a] Pleas setting up affirmative defenses impose the burden of proof as to such defenses on defendant.—Finn v. Wharf Co., 7 Cal. 253.

[b] Burden of proof is on defendant to prove defense that plaintiff is not the real party in interest.—Wilkins v. Stidger, 22 Cal. 231.

[c] Under the statute the affirmative allegations of an answer stand controverted by the plaintiff, and the burden is on the defendant to prove the truth of such allegations.—Bryan v. Maume, 28 Cal. 238.

[d] Where there is evidence tending to show that the defendants were not entirely innocent in their dealings with the employee of the plaintiffs who embezzled the tin bought by the defendants, the burden is thrown upon the defendants to show that the tin thus purchased was not a portion of that for which the plaintiffs proved that they found a shortage in their warehouse, and settled with their bailors.—Bode v. Lee, 102 Cal. 583, 36 Pac. 936.

[e] Affirmative defenses must be established by preponderance of evidence.—Fisk v. Casey, 119 Cal. 644, 51 Pac. 1077.

[f] Where, in a suit to recover land, the complaint alleged that the premises were not agricultural land, and the answer denied it, the land being a little over an acre in a city and having a dwelling-house on it, the burden of showing that it was agricultural land, within the meaning of the code, was on defendant, Code of Civil Procedure, section 1869, providing that every party must prove his own affirmative allegations, and that evidence need not be given in support of a negative allegation.—Holmes v. Warren, 145 Cal. 457, 78 Pac. 954.

[g] Plaintiff asked that an agreement made by her to convey land to defendant for stock in an iron and steel company be canceled, alleging that defendant induced her to make the contract by representing that a new method had been discovered for the cheaper manufacture, at a great profit, of a superior quality of fine steel and iron, for which invention a caveat had been filed, and that this company had been formed for the manufacture of steel under this process, which representations plaintiff alleged to be false, and known by defendant so to be. Held that, as these were negative allegations, but little was necessary to shift the burden of proof to the party having the best opportunities for knowledge of the facts, and that testimony of an expert that the process, as given in the caveat, would not produce steel, was sufficient to place on defendant the burden of proving the truth of the representations made by him.—Kelley v. Owens, 30 Pac. 596, 31 Pac. 14.

[h] A party alleging an affirmative defense has the burden of proving it.—Prince v. Kennedy (Cal. App.), 85 Pac. 859.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 934; 20 Cent. Dig., cols. 210-213, §§ 119-121.

§ 81. Failure to Sustain Burden.

[a] Where there is no evidence introduced on an issue, the finding must be against the party on whom the burden of proof rests.—Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664.

[b] When a party alleges a material fact and offers no evidence in support of it, the court is authorized, if denied, to find its nonexistence.—Miller v. Donovan (Cal. App.), 85 Pac. 159.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 213, 214, § 122.

IV. RELEVANCY, MATERIALITY AND COMPETENCY IN GENERAL.

A. Facts in Issue and Relevant to Issue, §§ 82-114.

B. Res Gestae, §§ 115-129.

C. Similar Facts and Transactions, §§ 130-142.

D. Materiality, §§ 143-149.

E. Competency, §§ 150-157.

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To show abandonment. See Abandonment, § 18.
Relevancy. See Criminal Law, X, B.
Materiality. See Criminal Law, §§ 130, 131.
Competency. See Criminal Law, §§ 132-148.

A. FACTS IN ISSUE AND RELEVANT TO ISSUE.

IN GENERAL, § 82.
MATTERS SHOWING RELEVANCY OF OTHER FACTS, § 83.
MATTERS EXPLANATORY OF FACTS IN EVIDENCE OR INFERENCES THEREFROM, § 84.
EVIDENCE IRRELEVANT UNLESS PRECEDED OR FOLLOWED BY OTHER EVIDENCE, § 85.
TITLE TO AND POSSESSION OF PROPERTY, § 86.
—— EVIDENCE SHOWING PAYMENT, § 87.
EVIDENCE OF COLLATERAL TRANSACTIONS AND TRANSACTIONS BETWEEN THIRD PERSONS, § 88.
IDENTITY OF PROPERTY, § 89.
NATURE, CONDITION AND QUALITIES OF PROPERTY, § 90.
—— REPUTATION OF COMPOUND AS DANGEROUS, § 91.
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—— TO SHOW ACQUISITION AND OWNERSHIP OF PROPERTY, § 95.
MOTIVE AND INTENT IN MAKING CONTRACT IN GENERAL, § 96.
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KNOWLEDGE—IN GENERAL, § 99.
—— OF TITLE TO PROPERTY, § 100.
STATEMENTS AND CONDUCT OF PARTIES, § 101.
—— TO SHOW MENTAL CONDITION, § 102.
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CUSTOMS AND USAGES OF BUSINESS, § 104.
—— OF POLICE DEPARTMENT, § 105.
VALUE OF SERVICES, § 106.
VALUE OR MARKET PRICE OF PROPERTY, § 107.
—— TIME AND PLACE OF VALUATION, § 108.
—— CORPORATE STOCK IN GENERAL, § 109.
—— COST OF REPAIRING OR REPLACING PROPERTY, § 110.
—— VALUE OF RENTS AND PROFITS AS SHOWING VALUE OF PROPERTY, § 111.
—— VALUE OF PROPERTY AS EVIDENCE OF CONTRACT RELATING THERETO, § 112.
—— CIRCUMSTANCES ADDING TO OR DETRACTING FROM VALUE IN GENERAL, § 113.
FACTS RELEVANT TO PARTICULAR ISSUES, § 114.

§ 82. In General.

[a] Evidence of any circumstance which, with other circumstances, tends to prove a fact in issue, is admissible.—Henry v. Southern Pac. R. R. Co., 50 Cal. 184.

[b] Meaning of word "relevant," as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it.—Moran v. Abbey, 58 Cal. 163.

[c] Evidence should be confined to issues made by pleadings.—Gould v. Stafford, 77 Cal. 68, 18 Pac. 879.

[d] Evidence of an independent promise by a vendor, made without consideration, to advance money to a purchaser to enable him to comply with the conditions of his contract of purchase, may properly be excluded as immaterial and irrelevant.—Wallace v. Maples, 79 Cal. 433, 21 Pac. 860.

[e] In determining whether plaintiffs' ancestor executed a deed claimed to have been forged, the jury may properly consider the subsequent conduct of the ancestor, and whether he ever made any claim to the property, or its possession, paid taxes and assessments, or made any other assertion of ownership.—Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897.

[f] Evidence to show the alteration by the plaintiff of a letter written by her son, under whom the defendant claims, to a sister not a party to the action, and the contents of which do not relate to the alleged promise and agreement of the plaintiff to give the property in controversy to the son, nor touch the plaintiff's credibility as a witness, and could not affect the result of the controversy, is properly excluded by the trial court.—Shirley v. Shirley, 92 Cal. 44, 27 Pac. 1097.

[g] Testimony is irrelevant when it does not fit the case or is not proper under issues framed.—Davey v. Southern Pacific Co., 116 Cal. 332, 48 Pac. 117.

[h] Where the complaint charges a single violation of the statute on a day specified, evidence of subsequent purchases of tickets and exclusions of admission, and ejectment from the premises, is wholly without the pleadings, and inadmissible.—Greenberg v. Western Turf. Assn., 140 Cal. 357, 73 Pac. 1050.

[i] Evidence of the request of the defendant, who was carrying an accident insurance policy to indemnify it against accidents to its employees, to the accident insurance company to defend an action brought against it by the plaintiff, is irrelevant, and inadmissible for any purpose, and a general objection thereto is sufficient.—Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147.

§ 83. Matters Showing Relevancy of Other Facts.

[a] S.'s clerk, Y., took an assignment of mortgage from him, foreclosed it, and took the property in his own name. S. having died, Y. contended, as against his widow, that he had bought the mortgage, and foreclosed it for himself. The widow asserted that she had bought it from her husband, and had it assigned to Y. for foreclosure. On direct examination, Mrs. S. was asked whether at the

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time in question Y. was her agent for collecting rents. Y.'s accounts were then put in evidence, showing large credits for rents collected for her, and charges for the notary's fee on the assignment of the mortgage, for taxes on the same, and expenses of foreclosure and sale. Held, that the question was proper as an introduction of the accounts.—Hunt v. Swyney, 33 Pac. 854.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1117, 1118; 20 Cent. Dig., cols. 228-230, § 133; cols. 235-245, § 136.

§ 84. Matters Explanatory of Facts in Evidence or Inferences Therefrom.

[a] Testimony to show the manner in which books were kept, and that they are correct, is admissible where the books themselves are properly in evidence.—West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231, 232.

FOR AUTHORITIES FROM OTHER STATES:

Admission of part of a conversation or transaction and its effect to authorize the admission of the remainder: 82 Am. Dec. 343, note. See, also, 16 Cyc. 1118, 1119; 20 Cent. Dig., cols. 230-235, §§ 134, 135.

§ 85. Evidence Irrelevant Unless Preceded or Followed by Other Evidence.

[a] A power of attorney to sell "lots unsold" is admissible in evidence without first making proof that the lot in controversy was unsold when the power was given.—Gardiner v. Schmaelzle, 47 Cal. 588.

[b] Where, in an action to recover a gift as obtained from one non compos mentis, defendant seeks to show that the gift was made by her father because her brother-in-law had previously stolen a large sum of money from him, evidence that a large sum was carried to her father's house is inadmissible without proof of the time it was taken there.—Ellen v. Lewison, 88 Cal. 253, 26 Pac. 109.

§ 86. Title to and Possession of Property.

[a] In an action against a sheriff for carrying away plaintiff's property as another's, it is competent for plaintiff to introduce evidence showing acts of ownership on his part, and tending to prove his possession of the property.—Fitch v. Brockmon, 3 Cal. 348.

[b] In ejectment for mining land, the plaintiffs, who were a joint stock company, claimed by transfer from the original members of the company, and offered as evidence of such transfer assignments of what, according to the practice of the company, had been issued as certificates of stock, which certificates constituted the only evidence of membership recognized by the company. Held, that these certificates were competent upon the question of possession.—Pennsylvania Min. Co. v. Owens, 15 Cal. 135.

[c] Where the principal issue was as to the existence of an agency of one defendant for the plaintiff in certain mining ground, evidence tending to show the nature of plaintiff's interest or claim in the property was relevant and competent, although it did not tend to establish title to the property in plaintiff.—Hardenbergh v. Bacon, 33 Cal. 356.

[d] Evidence that person acquired possession of and leased land to another tends to show that he is the owner of it.—Hobbs v. Duff, 43 Cal. 485.

[e] Evidence that certain persons controlled or superintended real estate is admissible for the purpose of showing that such persons in equity own it, although the legal title stands in another.—Hobbs v. Duff, 43 Cal. 487.

[f] In an action of ejectment to recover the possession of quartz mining claims, where the answer avers that the premises described in plaintiffs' complaint are public mineral lands of the United States, and the evidence shows that no part of the land in dispute was within section 35 of the government survey, an offer in evidence by the defendants of a patent from the government to the Central Pacific Railroad Company for the whole of section 35, upon which one-third of plaintiffs' claims were located, for the purpose of showing an outstanding title thereto, is not relevant to any material issue, and the defendants could not be injured by its exclusion.—Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637.

§ 87. —— Evidence Showing Payment.

[a] Where the plaintiff claimed that he had acquired an interest in certain company mining claims by purchase, which admission was not withdrawn, evidence that he had acted as a member of the company, that he had paid assessments on his interest, and that he had been received as member of the company, was held incompetent and irrelevant to prove title to such interest.—King v. Randlett, 33 Cal. 318.

§ 88. Evidence of Collateral Transactions and Transactions Between Third Persons.

[a] A question relating to no issue in the case, and tending to prejudice plaintiff by showing his willingness to commit a crime, is incompetent.—Swan v. Thompson, 124 Cal. 193, 56 Pac. 878.

[b] Where plaintiff in ejectment did not claim that a certain judgment affected defendant's title, and the judgment was not introduced in evidence, it was not error to exclude a satisfaction of the judgment, since there was no necessity of showing that the judgment was satisfied.—Baum v. Roper, 132 Cal. 42, 64 Pac. 128.

[c] Drafts and invoices for other carloads drawn after they had been shipped out of the state, and a letter from one bank to another accompanying one of the drafts—all bearing date long subsequent to the delivery of the two carloads sued for (the in-

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voice of which shows a delivery to the purchasers' agent on the day of its date)—are inadmissible and irrelevant to the issue before the court.—J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669.

[d] In an action for the death of a servant by the fall of a derrick, it was the theory of defendant that the fall was occasioned by a latent defect in the pivot, which had been found broken after the accident; but it was the theory of plaintiff that the fall was occasioned because the ties supporting the rails to which the derrick was clamped were decayed. Held, that evidence that no repairs had been made on the platform for more than five years prior to the accident, about which time a hand derrick had fallen over, pulling the rail with it, was not open to objection of being to a collateral matter.—Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

[e] Under Code of Civil Procedure, sections 1868, 1870, 1958, 1960, it is within the discretion of the court to permit inquiry into a collateral fact connected with the fact in dispute, and unless the evidence is without any weight in determining the fact in dispute, the action of the court in receiving it will not be reversed.—Moody v. Peirano (Cal. App.), 88 Pac. 380.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1117, 1118; 20 Cent. Dig., cols. 248-266, §§ 138-143.

§ 89. Identity of Property.

[a] The question was as to the identity of certain lands mentioned in a patent. The map incorporated into the patent showed that there were two streams emptying into Bear river within the calls of the patent, each of which was called "Dry creek," and that below one and above the other the premises in controversy were situated. The description in the patent commenced at an oak tree at the mouth of the lower Dry creek. An inquiry of a witness as to whether the lands occupied by the defendant lay below Dry creek was held improper, unless the question should be first made definite in its application by limiting it to the Dry creek at which the oak tree stood.—Mott v. Smith, 16 Cal. 533.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1130; 20 Cent. Dig., cols. 279-282, §§ 155, 156.

§ 90. Nature, Condition and Qualities of Property.

[a] In an action for damages caused by the breaking of defendant's dam, which was built of wood, and which the evidence tended to show broke away by reason of decayed timbers, testimony of a witness as to his familiarity with earth dams, and as to how earth dams might break, was properly excluded.—Wiedekind v. Tuolumne County Water Co., 83 Cal. 198, 23 Pac. 311.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 267-279, §§ 144-154.

§ 91. —— Reputation of Compound as Dangerous.

[a] The issue being whether E. powder was a reasonably safe powder, and whether the defendant exercised due care in ascertaining its safety, a witness was allowed to be asked, "What was the reputation of E. powder as a safe or dangerous compound?" Held error; it not appearing that the reputation asked for ever came to the knowledge of defendant, or that it existed at any place where defendant was bound to inquire.—Sowden v. Idaho Quartz Min. Co., 55 Cal. 443.

§ 92. Character or Reputation.

[a] Evidence of reputation pertinent to an issue directly tendered is admissible.—Sowden v. Idaho Quartz Min. Co., 55 Cal. 450.

[b] The general rule is that in civil actions evidence of the good character of the defendant is not admissible, and the exceptions consist mostly of cases where the character of some person is the very issue involved; but an action for assault and battery is not one of the exceptions.—Vance v. Richardson, 110 Cal. 414, 42 Pac. 909.

[c] Evidence of the character of the inmates and frequenters of a house is admissible to show that it was being used for prostitution and assignation.—Demartini v. Anderson, 127 Cal. 33, 59 Pac. 207.

FOR AUTHORITIES FROM OTHER STATES:

55 C. C. A. 7, note.

Evidence of character in civil actions, when admissible: 53 Am. Dec. 133, note. See, also, 16 Cyc. 1263-1287; 19 Cyc. 365; 20 Cent. Dig., cols. 297-304, §§ 177-187.

§ 93. —— Reputation for Care and Prudence.

[a] In an action to recover damages done to a person by cattle which the defendant by his servants was driving through a street in a city, evidence is admissible in his favor to show that such servants were safe and prudent men in driving and conducting cattle through the city.—Ficken v. Jones, 28 Cal. 618.

§ 94. Pecuniary Condition.

[a] Evidence of pecuniary condition of plaintiff is inadmissible in suit for breach of entire contract.—Cox v. McLaughlin, 63 Cal. 196.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 304-314, §§ 188-201.

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§ 95. —— To Show Acquisition and Ownership of Property.

[a] Evidence as to the pecuniary standing and ability of the claimant of land was competent on the issue as to whether he was in equity the owner of the property, the title of which was taken in his name.—Hobbs v. Duff, 43 Cal. 485.

§ 96. Motive and Intent in Making Contract in General.

[a] Evidence tending to prove motive for making of deed is admissible under the issue as to whether there was a delivery.—Kidder v. Stevens, 60 Cal. 414.

[b] The testimony of plaintiff in an action for land promised by him to his daughter, as to whether he intended, in his conversations with the daughter, to give more than a life estate, was properly rejected, as it could not be heard to vary the legal effect of the transaction.—Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1184-1188; 20 Cent. Dig., cols. 314-324, §§ 202-212.

§ 97. —— In Failing to Perform Contract.

[a] In an action for damages for breach of contract to convey real estate, it was shown that after the contract was made the defendant persuaded plaintiff to accept other land in lieu of that covered by the contract by representing that he had made a prior contract to convey the land to another. Held, that defendant's knowledge that a railroad was to be located near the land described in the original contract was a circumstance tending to show fraud, as furnishing a motive for defendant's attempting to relieve himself of the contract, though he was under no obligation to disclose the fact to the plaintiff.—Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386.

§ 98. —— Evidence as to Good Faith.

[a] Where the good faith of an assignment of a debt is questioned, a previous agreement to assign, between creditor and assignee, is admissible to show good faith.—McEwen v. Johnson, 7 Cal. 258.

§ 99. Knowledge—In General.

[a] That the party's grantor asked permission of another to erect a building on the premises is evidence of notice to the grantor of that other's claim.—Kneeland v. Wilson, 12 Cal. 241.

[b] In an action to have a party declared a trustee, and to compel him, as such, to convey land alleged to have been acquired by him from a third party as trustee of the party complaining, testimony on behalf of the latter party as to whether he knew that the other was about to make the purchase is irrelevant.—Branson v. Caruthers, 49 Cal. 374.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1176, 1177; 20 Cent. Dig., cols. 324-349, §§ 213-246.

§ 100. —— Of Title to Property.

[a] In an action to establish a trust in lands, a witness testified that after the purchase of the land by defendant the latter said he had paid a certain sum to bind the sale, and asked witness if he and a friend did not wish to take a part in it; that the next day, at plaintiff's room, they heard that plaintiff claimed that the purchase was made for him, and gave up the idea of taking an interest. Held, that it was not error to exclude evidence by such witness that he and his friend went to plaintiff's room on the assumption that he had an interest in the land.—Tuffree v. Brock, 31 Pac. 1134.

§ 101. Statements and Conduct of Parties.

[a] Acts in pais, tending to show adoption of an illegitimate child, at a time when the statute required a written acknowledgment, are admissible, not only to show the purpose and object of the father's subsequent treatment at a time when the statute no longer required the acknowledgment to be formal or in writing, but also because the whole treatment of the child, being continuous in its nature, must be considered in determining whether or not there was an adoption under the later statutes.—Jessup, In re, 81 Cal. 408, 21 Pac. 976, 6 L. R. A. 594.

[b] A paper executed by defendant, authorizing his agent to take possession of certain premises, is admissible to prove defendant's attempt to take possession thereof.—Whitmore v. Ainsworth, 38 Pac. 196.

§ 102. —— To Show Mental Condition.

[a] Where a witness has testified to a business transaction with the testator, a question as to how he conducted the transaction is relevant and material to show his mental condition.—Estate of Wax, 106 Cal. 343, 39 Pac. 624.

§ 103. —— Statements as to Ownership of Property.

[a] Testimony that the defendant had admitted that he held the property in trust is properly received, as tending to show that he did not pay a valuable consideration for it.—Duff v. Duff, 101 Cal. 1, 35 Pac. 437.

§ 104. Customs and Usages of Business.

[a] Authority of superintendent or secretary of mining partnership to execute notes or contracts may be established by proof of general usage.—Jones v. Clark, 42 Cal. 192, 367.

[b] As tending to show that a particular business was conducted by a deceased person ostensibly for himself and in his name, and not for or in the name of another, evidence that the goods used in the business were sold

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to him in his own name and charged to him individually is admissible.—Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467.

[c] On the trial of an action by an architect on a quantum meruit, plaintiff's evidence of the customary charges of architects for similar services is not made incompetent by defendant's showing that the customary charges made by architects originated in and conform to a rule established by an association of architects. (McFarland, J., dissenting.)—Laver v. Hotaling, 115 Cal. 613, 47 Pac. 593.

FOR AUTHORITIES FROM OTHER STATES:
See Cent. Dig., cols. 350-356, §§ 247-253.

§ 105. —— Of Police Department.

[a] To prove defendant's knowledge of custom of police to take property from persons arrested, previous arrest of defendant is admissible, but not a subsequent arrest.—Levy v. Brannan, 39 Cal. 485.

§ 106. Value of Services.

[a] In an action by a suregon for the value of his service in attending on persons wounded in a railroad collision and placed in a private hospital, evidence for defendant of the customary charge in this state for all necessary medical and other attendance on patients in hospitals, received for treatment for wounds, is irrelevant.—Trenor v. Central Pac. R. Co., 50 Cal. 222.

[b] Testimony as to the length of time spent by an architect on certain plans and specifications is admissible on the question of the value of his services in preparing the same, the jury not being limited to a consideration of the expert testimony on that question.—Ehlers v. Wannack, 118 Cal. 310, 50 Pac. 433.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1144; 20 Cent. Dig., cols. 356-361, §§ 254-258.

§ 107. Value or Market Price of Property.

[a] Contract with third party, though not valid under statute of frauds, may be considered in estimating damage for nondelivery of goods sold, which have no market value.—McKay v. Riley, 65 Cal. 623, 4 Pac. 667.

[b] In determining the real value of the land sold the jury are not confined to evidence of what it would have brought at a forced sale for cash, at public auction, and the court may admit evidence showing the terms of credit upon which tracts of land in region of the land in question were usually sold, and what was its fair market value at the time of the private sale, the question before the jury being as to the difference between the amount for which it was sold and its fair market value at that time.—Montgomery v. Sayre, 100 Cal. 182, 30 Am. St. Rep. 271, 34 Pac. 646.

[c] Where materials are furnished at an agreed price, such price is prima facie evidence of their value.—Bringham v. Knox, 127 Cal. 40, 59 Pac. 198.

[d] Where defendants alleged that an absolute deed given plaintiff was a mortgage, a witness cannot testify as to the market value of property in that vicinity, or what would be a reasonable price for the land in controversy, when he was not limited to the market value at the time of the conveyance. Garwood v. Wheaton, 128 Cal. 399, 60 Pac. 961.

[e] In proceedings to condemn a right of way over oil-bearing lands, it is permissible to show, on the issue of value, a progressive decrease in productiveness of the field within which the land in question is situated.—Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961.

[f] In proceedings to condemn a right of way over oil fields, certain expert testimony held incompetent on the issue of market value.—Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 Pac. 961.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1133-1144; 20 Cent. Dig., cols. 362-403, §§ 259-296.

§ 108. —— Time and Place of Valuation.

[a] Where shares of stock were sold under an agreement that the buyer was to keep the shares until a certain date, and, if not then worth a specified sum per share, the seller to make good the difference, evidence that at a time prior to said date the shares were worth the specified sum was inadmissible in an action to recover a deficiency on said date.—Hawley v. Brumagim, 33 Cal. 394.

[b] Where, in an action for breach of contract, the complaint alleges that defendants agreed to deliver to plaintiff, at A., twelve thousand dozen eggs, as soon as they could be transported from O., and that the eggs arrived at A. on July 8th, but were not delivered to plaintiff until July 14th, evidence of the price of eggs on July 18th is inadmissible to show damage.—Ramish v. Kirschbraun, 90 Cal. 581, 27 Pac. 433.

[c] It was error, in an action for breach of a contract whereby defendants were to deliver eggs to plaintiff as soon as they could be transported, and they arrived July 8th, but were not delivered until July 14th, to permit plaintiff to testify that he had contracted to sell the eggs at 21 cents per dozen, but, on account of the failure to deliver them in time, he lost the sale, and was obliged to sell them at 16 cents, as the evidence must be confined to the market value of eggs between July 8th and 14th.—Ramish v. Kirschbraun, 90 Cal. 581, 27 Pac. 433.

[d] The value or amount of the stock in the saloon at any other time than when the sale was made is not relevant to the matter in issue, and evidence thereof is inadmissible.—Meyer v. Parsons, 129 Cal. 653, 42 Pac. 216.

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§ 109. —— Corporate Stock in General.

[a] The market value of stock is not determined by the fact that operators therein were able to induce their neighbors and acquaintances to take it at low and varying rates.—Fitz v. Bynum, 55 Cal. 459.

[b] Upon the question of the value of certain mining stock as the mine was at the time of the sale of such stock, evidence of what the ore might be made to yield by the erection of certain machinery is inadmissible. Fitz v. Bynum, 55 Cal. 459.

§ 110. —— Cost of Repairing or Replacing Property.

[a] In an action to recover the value of buildings destroyed by fire through defendant's negligence, evidence of the cost of new buildings to replace those destroyed is admissible on the question of the value of the latter.—Cleland v. Thornton, 43 Cal. 437.

[b] Where farm implements have been used, the cost of replacing them with new implements furnishes no measure of their value. Slade's Estate, In re, 122 Cal. 434, 55 Pac. 158.

§ 111. —— Value of Rents and Profits as Showing Value of Property.

[a] Rental of property is not an unerring criterion of its value, even in case the title be perfect, and it is less certain if the title be doubtful. It may be considered, for the purpose of ascertaining the value of the property rented, but should not outweigh other and direct evidence to the same point.—Kisling v. Shaw, 33 Cal. 425.

[b] In a proceeding to condemn land for a public use, the fact to be ascertained is the value of the land at the time of the taking; and, to arrive at this value, testimony to prove the annual net profits derived from the land for a particular use is not admissible. Stockton etc. R. Co. v. Galgiani, 49 Cal. 139.

§ 112. —— Value of Property as Evidence of Contract Relating Thereto.

[a] Evidence that the vendee of a mining claim took out large sums of money in gold dust subsequently to the sale is inadmissible in evidence to show inadequacy in the price paid for the claim.—Henry v. Everts, 29 Cal. 610.

§ 113. —— Circumstances Adding to or Detracting from Value in General.

[a] In condemnation proceedings, a question: "For what purpose could that property be used properly?"—is properly disallowed. City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[b] In an action for the detachment and removal of saloon fixtures, it is proper to exclude evidence of the value of the fixtures when removed from their position and considered without reference to their intended uses. Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957.

§ 114. Facts Relevant to Particular Issues.

[a] Plaintiff, in an action for personal injuries, was asked if he had been able to earn any money since the accident. Held that, as it appeared from the testimony of plaintiff that the question referred to his injury, it was relevant and properly admitted.—Roche v. Redington, 125 Cal. 174, 57 Pac. 890.

[b] Evidence that a tenant did not think he was liable to pay for the boring of a well on the premises is not admissible against the landlord to show that he was liable therefor. Bradbury v. McHenry, 125 Cal. xix, 57 Pac. 999.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1121-1133, 1198-1206; 20 Cent. Dig., cols. 223-228, §§ 125-132.

B. RES GESTAE.

NATURE OF DOCTRINE AND RELATION TO ISSUES IN GENERAL, § 115.
ACTS OR STATEMENTS ACCOMPANYING OR CONNECTED WITH TRANSACTION OR EVENT, § 116.
—— WRITINGS, § 117.
—— MOTIVE AND INTENT IN GENERAL, § 118.
—— EXISTENCE OR NATURE OF CONTRACT AND RELATION OF PARTIES, § 119.
—— STATEMENTS ACCOMPANYING SALE OR CONVEYANCE, § 120.
—— VALIDITY OF TRANSFER, § 121.
—— STATEMENTS AS TO PERSONAL INJURIES, § 122.
—— FRAUD AND DURESS, § 123.
—— ACTS OF OTHERS IN SAME DANGEROUS SITUATION, § 124.
ACTS OR STATEMENTS BEFORE TRANSACTION OR EVENT, § 125.
ACTS OR STATEMENTS AFTER TRANSACTION OR EVENT, § 126.
—— STATEMENTS AS TO CAUSE OF ACCIDENT, § 127.
—— EXPRESSIONS OF PAIN OR SUFFERING, § 128.
—— STATEMENTS TO PHYSICIANS, § 129.

Res gestae in criminal cases. See Criminal Law, §§ 111-117.

§ 115. Nature of Doctrine and Relation to Issues in General.

[a] The declaration of a third person made to, and in the presence of, parties engaged in a controversy at the time of the doing of an act by one of them which becomes the subject of an action, is admissible in evidence as a part of the res gestae.—Gillam v. Sigman, 29 Cal. 637.

[b] Declarations to be part of res gestae must be part of a transaction properly in question, and not part of an immaterial transaction.—Bernheimer v. Baldwin, 42 Cal. 34

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[c] A declaration, to be admissible as part of the res gestae, must be an undesigned part or incident of the occurrence in question, and must be the natural and spontaneous outgrowth of the main occurrence. It must exclude the notion of deliberation, or calculation, or design to make evidence for future purposes; and if it be a narrative of past events, it is inadmissible hearsay, and must be excluded. The difficult task is always to apply established principles to the facts of the case in hand.—Heckle v. Southern Pac. Co., 123 Cal. 441, 56 Pac. 56.

[d] Declarations of an insured person tending to show that he contemplated suicide, not accompanying nor explanatory of any act, were not competent evidence in favor of defendant insurance company against the beneficiary and her assignee.—Jenkin v. Pacific Mut. Life Ins. Co. of California, 131 Cal. 121, 63 Pac. 180.

[e] A declaration to be admissible as part of the res gestae, must be an incident, or the natural and spontaneous outgrowth of the main occurrence in question, and must exclude the notion of deliberation, or calculation, or design to make evidence for future purposes.—Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

[f] A statement held not a part of the res gestae.—Murphy v. Board of Police Pension Fund Commrs. (Cal. App.), 83 Pac. 577.

FOR AUTHORITIES FROM OTHER STATES:

19 L. R. A. 733, note. See, also, 16 Cyc. 1148, 1241-1261; 20 Cent. Dig., cols. 403-409, §§ 297-302.

§ 116. Acts or Statements Accompanying or Connected with Transaction or Event.

[a] An entry was made in an alcalde's book of grants, on the margin of a grant, of the words "Not taken," and lines of cancellation were drawn across the grant. Held, in an action by the heirs of the grantee, that it was proper to permit the alcalde to testify as to what was said and done as to the cancellation, although the grantee was not present when the cancellation was made.—Rice v. Cunningham, 29 Cal. 492.

[ab] The statements of a warehouseman as to the ownership of wheat removed from the warehouse and loaded by him upon a barge, identifying the wheat removed, and made at the time of its removal, are admissible in evidence as part of the res gestae.—Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413.

[b] On the issue of the death of the insured in an action on a life policy, where the evidence showed that the insured took passage on a steamer plying between certain ports, and was seen by the officers during the voyage as late as half-past 9 o'clock in the evening, and the evidence tended to show that he was not seen again, and was not seen leaving the steamer at any of the ports, a letter written by the insured, addressed to the captain, indicating an intention to commit suicide by drowning, and found in his room on the steamer, was admissible as a part of the res gestae.—Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348.

[c] In an action on certain notes acquired by plaintiff's intestate against the payee and indorser, evidence of intestate's declarations at the time he obtained the notes are admissible.—Bradley v. Bush (Cal. App.), 82 Pac. 560.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 415-503, §§ 307-368.

§ 117. —— Writings.

[a] Upon trial of a case involving the extent of a water privilege claimed by copartners under an alleged appropriation, their notice of location, shown to have been prepared with the knowledge of some of them, and seen by them as a posted notice, and to have been so posted that it "must have been seen" by the others, was held admissible in evidence, as part of the res gestae.—McKinney v. Smith, 21 Cal. 374.

§ 118. —— Motive and Intent in General.

[a] In order to show work done on a mining claim by a prior locator, declarations made by such locator to others as to his object in beginning work at a point some fifty or one hundred feet from the lode in question, showing that such work was done to drain a tunnel to be constructed into the lode, is admissible as part of the res gestae.—Draper v. Douglass, 23 Cal. 347.

[b] The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence.—Tait v. Hall, 71 Cal. 149, 12 Pac. 391.

[c] The declarations of deceased at or about the time he gave an order to his wife on a bank authorizing it to pay his deposit to her, which was done, is admissible, on the question of his intention to make a gift, in an action for the money between his and her executors.—Sprague v. Walton, 145 Cal. 228, 78 Pac. 645.

§ 119. —— Existence or Nature of Contract and Relation of Parties.

[a] In connection with acts showing a change of ownership, and in explanation of them, the declarations of the parties showing the nature of their agreement were admissible in evidence.—Clark v. Rush, 19 Cal. 393.

[b] In an action to quiet title to lands which are claimed as part of the estate of a decedent, and to cancel a deed thereof made by him to his father just before his death, where the issue arises whether or not the son acquired the land by a previous conveyance from his father without consideration, and as his trustee to reconvey the same when requested to do so, evidence is admis-

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sible of statements made by the son as to the nature of the transaction, and the consideration therefor.—Harris v. Harris, 67 Cal. 455, 8 Pac. 8.

[c] Where limitation is set up, and issue joined thereon, plaintiff relying on a writing signed by defendant waiving the benefit of the statute, parol evidence of the circumstances under which such writing was executed is admissible as part of the res gestae. Cross v. Zellerbach, 8 Pac. 714.

§ 120. —— Statements Accompanying Sale or Conveyance.

[a] Where, to explain what a grantor intended to grant by a deed, it was attempted to introduce declarations of the grantor made at uncertain times before and after the conveyance, held, that the declarations, not being part of the res gestae, were not admissible. Aguirre v. Alexander, 58 Cal. 21.

[b] In an action to quiet title to land, which plaintiff's wife conveyed without consideration to defendant—the contention of plaintiff being that, though D. had procured conveyance to plaintiff's wife, and paid for it, and afterward built houses thereon, it became the community property of plaintiff and his wife, and not her separate property, for the reason that D. was acting as their agent, and used their money, in such purchase and building—declarations of D., made when he purchased the land and constructed the houses, as to the character in which he made the purchase, and the terms and conditions on which he was building, though made in the absence of plaintiff's wife, are admissible as part of the res gestae.—Lewis v. Burns, 106 Cal. 381, 39 Pac. 778.

[c] Where the vendor of personal property is present when the property is moved by his vendees, the declarations of the vendor as to his object in moving the property made before the removal is complete, are admissible in evidence as part of the res gestae, and for the purpose of throwing light upon the character of the transaction, and enable the jury to determine whether the sale was bona fide, or with the express intent to defraud his creditors.—Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

§ 121. —— Validity of Transfer.

[a] In a suit by the creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the land was purchased with the husband's money and that the deed to the wife was a fraud, held, that evidence of conversations at the time of the sale, between the grantor and one who negotiated the sale, was admissible as part of the res gestae.—Tevis v. Hicks, 41 Cal. 123.

§ 122. —— Statements as to Personal Injuries.

[a] In an action against a railroad company for personal injuries sustained by one of its laborers, owing to the fall of an overhanging embankment, an exclamation by defendant's foreman when the accident happened, "My God! I expected that," is admissible as part of the res gestae.—Elledge v. National City etc. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720, 852.

[b] Declarations of a person caught under the wheels of a car, as to the cause of the accident, shortly after the accident, and before he was extricated, are admissible as part of the res gestae.—Heckle v. Southern Pac. Co., 123 Cal. 441, 56 Pac. 56.

FOR AUTHORITIES FROM OTHER STATES:

Res gestae, statement of injured persons, when constitutes parts of: 34 Am. Rep. 479, note. See, also, 13 Cyc. 200; 20 Cent. Dig., cols. 504-527, §§ 369-387.

§ 123. —— Fraud and Duress.

[a] In an action for the conversion of personal property, the defense was that the plaintiff's claim was based on a judgment confessed by J. for the purpose of fraud. On the trial, evidence was admitted of J.'s declarations before sale, while on his way to see one with whom he had made arrangements that he should buy the property. Held, that the declarations were admissible, being a part of the fraudulent transaction.—Davis v. Drew, 58 Cal. 152.

§ 124. —— Acts of Others in Same Dangerous Situation.

[a] Evidence of what other persons in same dangerous situation did is admissible as part of res gestae to show what they deemed prudent conduct.—Mitchell v. Southern Pac. R. R. Co., 87 Cal. 75, 25 Pac. 245.

§ 125. Acts or Statements Before Transaction or Event.

[a] Where there is a question as to whether or not plaintiff transferred his property in contemplation of immediate death, a question calling for the conversation had by the witness with plaintiff just prior to and at the time plaintiff made the conveyance is relevant and material as a part of the res gestae. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 472-484, §§ 339-350.

§ 126. Acts or Statements After Transaction or Event.

[a] The declarations of an agent, when but the bare narration of an act which had already taken place and was fully ended, do not form a part of the res gestae, and are inadmissible in evidence against his principal. Innis v. The Steamer Senator, 1 Cal. 459.

[b] Declarations of vendor in possession after sale are admissible as part of res

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gestae, provided clear and unequivocal possession is shown.—Visher v. Webster, 13 Cal. 58; 25 Cal. 202.

[c] In an action for goods sold, when the issue made is whether the credit was given to the defendant who obtained the goods, or to another person, the declarations of the vendor, made to such other person after the transaction has been completed and some time has elapsed, are not a part of the res gestae, and are not admissible in evidence on behalf of the plaintiff.—Whitney v. Durkin, 48 Cal. 462.

[d] The declaration of an agent of the bank made subsequently to transfer of stock in which he spoke of the transaction as a "purchase" cannot be used as evidence to determine the nature of the transfer.—Borland v. Nevada Bank of San Francisco, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737.

[e] Statement of what occurred made after accident is not part of res gestae.—Lissak v. Crocker Estate Co., 119 Cal. 444, 51 Pac. 688.

[ef] The declarations of the captain of the vessel when examining the broken rope after the accident that "that looks pretty bad" is not admissible as part of the res gestae.—Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687.

[f] Declarations of a deceased person, bound by a contract of adoption, providing that on his death he should give his property to the adopted child, made after the execution of the contract and in the absence of the child, to the effect that the deceased was only guardian of the child, were not a part of the res gestae, but merely self-serving.—Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

[g] A statement by defendant's foreman the day after the burning of plaintiff's field by fire from sparks from defendant's harvesting engine is not a part of the res gestae and inadmissible.—Quint v. Dimond, 147 Cal. 707, 82 Pac. 310.

[h] In an action for ejection of a passenger from a freight train, evidence of statements by the conductor on the succeeding day are inadmissible.—Wieland v. Southern Pac. Co. (Cal. App.), 82 Pac. 226.

[i] In an action against a ship owner for negligent stowage of pelts, a letter written by defendant's agents to plaintiff, purporting to state the manner of stowage, etc., is inadmissible.—Herman Waldeck & Co. v. Pacific Coast S. S. Co. (Cal. App.), 83 Pac. 158.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 484-503, §§ 351-368.

§ 127. —— Statements as to Cause of Accident.

[a] Declarations of a passenger that he was to blame for an accident occurring to him were properly received in evidence, though made some time after the injury.—Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981.

[b] Declarations of engineer in explanation of accident about five minutes thereafter are not part of res gestae.—Durkee v. Central etc. R. R., 69 Cal. 535, 536, 58 Am. Rep. 562, 11 Pac. 130.

[c] In an action to recover damages for injuries caused by a collision, the declarations of the employees of the defendant, made soon after the injury, and not as part of the res gestae, but by way of narrative, and of explanation and accounting for the injury, so as to throw blame upon the defendant for not having furnished proper appliances, is not admissible, and the admission thereof is prejudicial error.—Williams v. Southern Pacific Co., 133 Cal. 550, 65 Pac. 1100.

[d] In an action for injuries sustained by a street-car passenger while attempting to alight, statements of the conductor after he had gone from where the car stopped to where plaintiff lay on the ground, almost half a block away, and back again to the car, formed no part of the res gestae.—Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243.

[e] Declaration made by the brakeman who operated the machinery, and by the mining superintendent, which were no part of the res gestae, but were made after the accident had occurred, as to the cause, were not admissible against the defendant corporation.—Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

[f] In an action of damages for injuries to a child by a railroad train, the declarations of the engineer concerning the accident, made from three to five minutes after the casualty happened are admissible against the principal as part of the res gestae.—Durkee v. Central Pac. R. Co., 9 Pac. 99.

§ 128. —— Expressions of Pain or Suffering.

[a] Involuntary declarations and exclamations of a person's present pain are evidence of his physical condition, though declarations amounting only to statements of his past condition are hearsay.—Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 514-522, §§ 377-382.

§ 129. —— Statements to Physicians.

[a] Where no one was present when an insured person received a mortal wound, his subsequent statements to the physician and others as to the manner in which he was wounded were properly stricken out on motion of defendant insurance company.—Jenkin v. Pacific Mut. Life Ins. Co. of California, 131 Cal. 121, 63 Pac. 180.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 522-527, §§ 383-387.

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C. SIMILAR FACTS AND TRANSACTIONS.

RELATION TO ISSUES, § 130.
—— REMOTENESS, § 131.
—— ASSOCIATED OR EXPLANATORY TRANSACTIONS, § 132.
—— REPRESENTATIONS, § 133.
—— SIMILAR WRONGFUL ACTS, § 134.
—— SIMILAR TRANSACTIONS, § 135.
—— PROOF OF EXPRESS CONTRACT, § 136.
SIMILARITY OF CONDITIONS, § 137.
—— EXPERIMENTS, § 137½.
SHOWING INTENT OR MOTIVE, § 138.
OTHER INJURIES FROM SAME OR SIMILAR CAUSES, § 139.
SHOWING CUSTOM OR COURSE OF BUSINESS, § 140.
SHOWING VALUE BY VALUE OF OTHER PROPERTY, § 140½.
SHOWING VALUE BY SALES OF OTHER PROPERTY, § 141.
—— DISCRETION OF COURT, § 142.

§ 130. Relation to Issues.

[a] In an action for breach of a contract to furnish water for irrigation, whereby a large number of grape cuttings planted by plaintiff died, testimony of a witness for defendants that he (witness) procured fifteen thousand cuttings from the lot from which plaintiff procured his, planted them on similar and yet nearly all of them died, though it land, and watered and cared for them well, relates to a collateral matter, is relevant, as tending to prove a fact from which it could be inferred that the loss of plaintiff's vines was not caused by defendant's failure to furnish water.—Remy v. Olds, 34 Pac. 216.

[b] Evidence as to the number of boxes witness could pack in a given time is not admissible to show how many defendant could pack.—People v. Miller, 145 Cal. xviii, 78 Pac. 227.

[c] Where a land owner sued to abate certain structures erected in a right of way in which he had an easement, held not error to exclude certain testimony in relation to the occupancy by other persons of the right of way in question.—McLean v. Llewellyn Iron Works (Cal. App.), 83 Pac. 1082.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 274; 20 Cent. Dig. cols. 527-553, §§ 388-398.

§ 131. —— Remoteness.

[a] The issue being as to fraud in a sale, evidence of a previous sale between the same parties, of other property, was held to be incompetent; it not being shown that such first sale was fraudulent.—Cohen v. Mulford, 15 Cal. 50.

§ 132. —— Associated or Explanatory Transactions.

[a] In an action for a breach of the purchaser's contract to accept grapes when delivered, a contract between plaintiff and a third person, specifying the weight of the boxes and the grapes to be made in packing, to which reference is made by the contract in suit, is admissible in evidence.—Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

§ 133. Representations.

[a] Upon evidence of fraudulent combination of defendants with a third person to procure goods replevied, proof of similar means to defraud others is admissible.—Bancroft v. Heringhi, 54 Cal. 120.

§ 134. —— Similar Wrongful Acts.

[a] In trespass against a sheriff for levying on plaintiff's goods, where the defense is fraud in the purchase by the plaintiff, the rule allowing distinct frauds to be proven in such cases is limited to frauds which are contemporaneous, or nearly so, and does not embrace dealings at a remote time.—Cohen v. Mulford, 15 Cal. 50.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 284, 288, 289; 20 Cent. Dig. cols. 553-556, §§ 399-402.

§ 135. —— Similar Transactions.

[a] Where, in an action upon the official bond of a wharfinger, the books kept by the secretary of the board of a state harbor commissioners are introduced to prove that certain sums of money received by him had not been paid to the board, it is error to exclude evidence that the secretary had received large amounts from other persons in payment of harbor dues, which were not accounted for in the books, to impeach the accuracy of the books, although Code of Civil Procedure, section 1920, makes official books or records "prima facie evidence of the facts stated therein."—People v. Fairfield, 90 Cal. 186, 27 Pac. 199.

[b] On an issue as to whether plaintiff had bought a note from defendant, where there was evidence that plaintiff bought at a great discount, evidence that at about the same time defendant had sold other notes at a great discount was admissible.—Turner v. Luning, 105 Cal. 124, 38 Pac. 687.

[c] In an action to recover damages for personal injuries sustained by reason of the negligent operation of a passenger elevator, questions as to the conditions surrounding the elevator on days other than that on which the accident occurred, and the customary manner of operating other elevators, are immaterial.—Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

[d] On an issue as to whether defendant had paid to the maker the note sued on, by paying plaintiff's expenses on a European trip, or whether defendant invited plaintiff to accompany her as her guest on the trip and would pay the expenses, evidence that prior to the European trip plaintiff had been

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the guest of defendant at various times, and that defendant had paid all the expenses, was admissible.—Zane v. De Onativia, 139 Cal. 328, 73 Pac. 856.

[e] In a suit to restrain maintenance of an irrigation ditch over plaintiff's land, evidence in respect to the construction of defendant's ditch over other lands is held immaterial.—Vestal v. Young, 147 Cal. 721, 82 Pac. 383.

§ 136. —— —— Proof of Express Contract.

[a] Plaintiff alleged an agreement entered into between him and defendant, whereby plaintiff was to furnish certain laborers at a certain price, etc., and produced a written contract of defendant, reciting that plaintiff had contracted with a third person to supply laborers for certain work, referring specially to said contract, and promising, as part consideration thereof, to pay plaintiff certain costs of transportation. He also produced the contract with a third person referred to, and evidence that defendant at the same time orally promised to pay for the labor, and did in fact pay all that was paid. Held, that the third person's contract was admissible to explain defendant's contract, and was not the basis of the judgment against defendant for the balance due for the labor, the court having found as a fact that he did make the oral agreement.—Chew Farng v. Keefer, 103 Cal. 46, 36 Pac. 1032.

§ 137. Similarity of Conditions.

[a] Testimony to institute a comparison between plaintiff's crop of corn destroyed by defendant's cattle and that on adjoining land is inadmissible, in view of the difference in the land and the kinds of corn planted.—Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692.

§ 137½. —— Experiments.

[a] In an action on a county treasurer's bond for conversion of funds, when the defense is that the treasurer was robbed and locked in the vault, in which he was found twelve hours after the alleged robbery, experimental evidence of the effect of kicking on the vault doors was competent in corroboration or disproof of defendant's assertion that he attempted to attract attention in this way, though neither the atmospheric conditions nor the arrangement of the building were exactly the same.—Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681.

§ 138. Showing Intent or Motive.

[a] In cases of fraud subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. Fraud being proven in reference to the transaction under question, the criminal intent is necessarily a matter of inference for the jury. The dealing with property to-day by the vendor as his property is evidence to show the fraud committed in a sale a month ago. The subsequent acts are illustrative of the intent and character of the first.—Butler v. Collins, 12 Cal. 457.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 561-567, §§ 404, 405.

§ 139. Other Injuries from Same or Similar Causes.

[a] In an action brought by the owners of a water ditch to enjoin defendants from further mining underneath the surface of the earth, across and on top of which plaintiff's ditch extended, evidence of the effect of tunneling and drifting in a similar locality is inadmissible to show its effect in interfering with the ditch.—Clark v. Willett, 35 Cal. 534.

[b] In an action for injuries sustained by plaintiff from falling down a stairway in a lodging-house, charged to have resulted from defendant's failure to properly light the same, whereby it was rendered dangerous, it was error to permit plaintiff to prove, in chief, that another had fallen and sustained injuries in the same passageway when it was in a like darkened condition.—Martinez v. Planel, 36 Cal. 578.

[c] In an action to recover loss sustained by the burning of a building alleged to have been caused by defendant's negligence, evidence on his part that other buildings in the same town were soon after set on fire by incendiaries is irrelevant.—Drake v. Foster, 52 Cal. 225.

[d] Testimony that witness, subsequent to the accident in question, was injured on the same dangerous premises as plaintiff, is not prejudicial to defendant, where plaintiff knew of the danger, since it tends to show that he was guilty of contributory negligence in venturing into such a place.—McGraw v. Friend & Terry Lumber Co., 120 Cal. 574, 52 Pac. 1004.

FOR AUTHORITIES FROM OTHER STATES:

Former accidents, whether admissible as evidence of negligence: 57 Am. Rep. 812, note.

Evidence of other accidents, when admissible: 44 Am. Rep. 694, note. See, also, 16 Cyc. 288, 289; 20 Cent. Dig., cols. 567-575, §§ 406-413.

§ 140. Showing Custom or Course of Business.

[a] On an issue whether cattle purchased by the superintendent of a corporation had been purchased by him individually or for the corporation, evidence that the superintendent had made a similar purchase from other persons on behalf of the corporation was admissible.—Lake Shore Cattle Co. v. Modoc Land etc. Co., 130 Cal. 669, 63 Pac. 72.

[b] In an action for breach of warranty of variety of wheat sold, evidence that the seller sold wheat to third persons and warranted it to be of the variety warranted to plaintiff held admissible as bearing on the fact in dispute.—Moody v. Peirano (Cal. App.), 88 Pac. 380.

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FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 281; 20 Cent. Dig., cols. 577, 577, §§ 415.

§ 140½. Showing Value by Value of Other Property.

[a] In estimating the prospective profits of an apple orchard, a share in which plaintiff was entitled to under his contract, evidence of the value of a similar orchard at the time of the trial, if matured as contemplated by the contract, was admissible.—Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

§ 141. Showing Value by Sales of Other Property.

[a] In an action to condemn land for a reservoir site, it is not proper for defendant to ask one of her witnesses on direct examination how much plaintiff paid for certain other tracts of land, or to inquire as to the amount offered, since such questions are only admissible by way of cross-examination to test the fairness of the witness' opinion in regard to the value of the property involved in the action.—Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

[b] To show the market value of the land condemned, the report of commissioners appointed to assess neighborhood land, reciting the price to be paid for neighboring land and the consideration which determined such report, is irrelevant.—City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 Pac. 1083.

§ 142. —— Discretion of Court.

[a] Evidence of value for short periods, before and after the date in question, may be allowed in the discretion of the court, where such discretion is not abused.—Montgomery v. Sayre, 100 Cal. 182, 30 Am. St. Rep. 271, 34 Pac. 696.

D. MATERIALITY.

IN GENERAL, § 143.
MATTERS ADMITTED, PRESUMED OR ALREADY PROVED, § 144.
TENDENCY TO MISLEAD OR CONFUSE, § 145.
CERTAINTY, § 146.
INTENT OR OPINION, § 147.
REMOTENESS, § 148.
NEGATIVE TESTIMONY, § 149.

In criminal cases. See Criminal Law, §§ 130, 131.

§ 143. In General.

[a] Evidence that railroad company allowed dry herbage to stand between track and fence, is immaterial, unless fire originates there.—Henry v. Southern Pac. R. R. Co., 50 Cal. 176.

[b] Evidence not necessary to establish party's case is immaterial.—Marriner v. Dennison, 78 Cal. 214, 20 Pac. 386.

[c] A husband and wife conveyed by a quitclaim deed land in which they had a homestead estate to plaintiff, who conveyed his right of title and interest in such land to defendant under an agreement that the latter should protect plaintiff's title, perfect it if necessary, and sell the land for plaintiff. Thereafter defendant procured a grant, bargain, and sale deed of the land to himself from plaintiff's grantors, and then sold the land. Held that, in an action to recover the proceeds of the sale in the hands of defendant, where defendant claimed that he took nothing by the deed from plaintiff, testimony by the grantees of defendant that they relied on the deed to defendant from plaintiff's grantors was immaterial.—Faivre v. Daley, 93 Cal. 664, 29 Pac. 256.

[d] In an action involving the validity of the assessment of the particular property, evidence as to the manner and character of the assessment of other property situated within the district is immaterial.—Cooper v. Miller, 113 Cal. 238, 45 Pac. 325.

[e] Evidence of a witness for the defendant as to what work he was doing when he first went to the mill, or what machine he had been working at before he took charge of the machine upon which plaintiff was injured is immaterial.—Verdelli v. Gray's Harbor Com. Co., 115 Cal. 517, 47 Pac. 364.

[f] A question asked of one of the plaintiffs, as to why they could not sell certain mining property in controversy, as stated in a written contract, is immaterial.—Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324.

§ 144. Matters Admitted, Presumed or Already Proved.

[a] Where the court finds all relevant facts which the judgment-roll in a previous action sought to be introduced in evidence would have proved, such judgment-roll will be excluded.—Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98.

[b] Evidence of facts admitted in pleadings is properly excluded.—Silcox v. Lang, 78 Cal. 125, 20 Pac. 297.

[c] In an action for conversion where defendant claims possession of the property as receiver, and a disposition thereof by order of the court, defendant may introduce the petition for a receiver, the petition for permission to sell, the order of sale, the report of the sale, and the order approving the sale, even though plaintiff admits the receivership.—Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

[d] Where the written authority and instructions from the vice-president and general managing agent of the corporation to a local agent to put the sign of the corporation on his place of business, and to designate himself as its agent upon such signs, are in evidence, proof of his declarations that he was putting up the signs by direction of the vice-president are of no moment.—Bergtholdt v. Porter Bros., 114 Cal. 681, 46 Pac. 738.

[e] Where the evidence clearly proves that both of the defendants assumed to pay the

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debts for which the plaintiff was liable in consideration of the sale to them of his interest in the saloon, evidence of any subsequent agreement or assumption of liability as between the defendants, upon a sale from one of them to the other, is immaterial, and is properly rejected.—Meyer v. Parsons, 129 Cal. 653, 42 Pac. 216.

§ 145. Tendency to Mislead or Confuse.

[a] In an action against a sheriff to recover personal property levied on in plaintiff's hands as having been fraudulently conveyed to him by a defendant in divorce proceedings to evade the payment of a judgment therein, evidence of ill-treatment and abuse of his wife, which was the ground of the divorce, is inadmissible, as irrelevant and as having a tendency to prejudice plaintiff's case.—Thomas v. Black, 84 Cal. 221, 23 Pac. 1037.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 601-604, § 429.

§ 146. Certainty.

[a] When a witness who has testified to a conversation is not positive that the person with whom he had such conversation was the party, but gives it as his opinion that she was, his testimony cannot be stricken out on the ground that he has not identified the person. Whether he has or not goes to the weight to be given to the evidence, and not to its competency or relevancy.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 604-609, §§ 430-433.

§ 147. Intent or Opinion.

[a] Intention of husband in directing deed to be made to his wife is to be gathered from his acts and conduct, and a question to him as to what his intentions were was properly ruled out as immaterial.—Woods v. Whitney, 42 Cal. 358.

[b] A witness may be asked as to intent with which he did certain act, where that intent is a material thing in the action.—Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50.

[c] Evidence as to understanding of parties at time contract was executed is inadmissible. Swift v. Occidental etc. Co., 141 Cal. 174, 74 Pac. 700.

[d] Under Political Code, section 3344, in an action for damages for negligence setting out fires, etc., permitting a witness to testify that he had no wish or desire to have the fire extend from his hand to plaintiff's is error.—Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 609-616, § 434.

§ 148. Remoteness.

[a] Upon issue as to whether sale of sheep was accompanied by change of possession, evidence that grantee gave deed to a third party to land upon which sheep were driven is immaterial.—Chester v. Bower, 55 Cal. 46.

[b] The damage to an abutting lot caused by the occupation of a street by a railroad cannot be shown by proving what its value would have been if the road had been constructed along some other street, as evidence of damages must be on actual facts, and not a speculative theory.—Muller v. Southern Pac. B. Ry. Co., 83 Cal. 240, 23 Pac. 265.

[c] Where the plaintiff in an action to replevy property taken from his custody under attachment against a third person who had pledged it to the plaintiff testified in chief that it did not belong to the attachment debtor, and that he had other security for the money due to him from the attachment debtor, a question, upon cross-examination, whether such additional security was not in value twice or three times as much as the money loaned is not subject to the objection of immateriality.—Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50.

[d] In an action against an administrator for compensation for services performed for testator, evidence that testator had expressed himself as not wishing to go away owing any man anything is immaterial.—Watson v. Miller, 125 Cal. xix, 58 Pac. 135.

[e] Where defendants had lowered the bed of a creek where it flowed out of a river, and complainants put in a dam across the creek at its head, as they claimed, to restore the natural conditions, and the question was whether the dam was of the same height as the former bank of the river, evidence as to alleged diversions of water from the river below the head of the creek by one of the defendants was immaterial.—Wallace v. Farmers' Ditch Co., 130 Cal. 578, 62 Pac. 1078.

[f] Evidence that the bed of the river had filled up at points three miles above and a mile and a quarter below the head of the creek was properly rejected, as immaterial.—Wallace v. Farmers' Ditch Co., 130 Cal. 578, 62 Pac. 1078.

[g] In an action for the death of a servant by the fall of a derrick, it was the theory of defendant that the fall was occasioned by a latent defect in the pivot, which had been found broken after the accident; but it was the theory of plaintiff that the fall was occasioned because the ties supporting the rails to which the derrick was clamped were decayed. Held, that evidence that no repairs had been made on the platform for more than five years prior to the accident, about which time a hand derrick had fallen over, pulling the rail with it, was not open to objection of being remote.—Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

§ 149. Negative Testimony.

[a] One of the defendants having identified their ledger showing their account with plain-

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tiffs, and having stated that it showed the true state of the account between them, and that the items had been entered by him at the time of the several transactions, and it being admitted by plaintiffs that the entries were original entries, it was error to exclude it though it did not contain the item sued for by plaintiffs.—Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403.

[b] Testimony of a city clerk that after search he was unable to find among the city records any orders for the publication of certain ordinances is admissible to show the nonexistence of those orders.—Santa Rosa City R. Co. v. Central St. Ry. Co., 38 Pac. 986.

E. COMPETENCY.

SOURCE OF EVIDENCE, § 150.
EVIDENCE ADMISSIBLE BY REASON OF ADMISSION OF SIMILAR EVIDENCE BY ADVERSE PARTY, § 151.
—— REBUTTAL IN GENERAL, § 152.
—— EVIDENCE OF CHARACTER, § 153.
—— TITLE OR OWNERSHIP OF PROPERTY, § 154.
—— ADMISSION OF SIMILAR EVIDENCE WHEN FIRST EVIDENCE WAS INADMISSIBLE, § 155.
—— EVIDENCE OF FRAUD OR OTHER WRONGDOING, § 156.
—— DOCUMENTARY EVIDENCE, § 157.

In criminal cases. See Criminal Law, §§ 132-148.

§ 150. Source of Evidence.

[a] An original judgment-roll of another county, offered to impeach a witness, is not rendered incompetent by reason of the fact that it was illegally taken from the clerk's office of such county without an order of court allowing its removal; nor does its competency as evidence in any way depend upon the means by which it is brought to the court where it is offered in evidence.—People v. Alden, 113 Cal. 264, 45 Pac. 327.

FOR AUTHORITIES FROM OTHER STATES:

17 L. R. A. 440, note; 20 Cent. Dig., cols. 626, 627, § 438; cols. 636, 637, § 444.

§ 151. Evidence Admissible by Reason of Admission of Similar Evidence by Adverse Party.

[a] If plaintiff, during trial, draws out of one of his witnesses part of conversation between the plaintiff and another person, the defendant is entitled to prove by his witnesses the whole conversation.—Gillam v. Sigman, 29 Cal. 637.

[b] Admission of part of conversation does not entitle opponent to introduce remainder of entire conversation, but only such other part as explains or qualifies part introduced. Granite G. M. Co. v. Maginness, 118 Cal. 135, 50 Pac. 269.

[c] Admission of part of pleading does not entitle opponent to introduce entire pleading but only such other part as explains or qualifies part introduced.—Granite G. M. Co. v. Maginness, 118 Cal. 135, 136, 50 Pac. 269.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 638-670, §§ 445-458.

§ 152. —— Rebuttal in General.

[a] Suit on a note. The defendant offered certain receipts in support of a plea of payment. The plaintiff offered evidence to show that these payments were made on an open account. Defendant then offered to show that no such account existed, which evidence was held to have been improperly refused, and the judgment was reversed.—Lisman v. Early, 15 Cal. 199.

[b] In an action to recover land, where there is a dispute between adjoining proprietors as to the true boundary line, and the defendant, having placed a fence on what the plaintiff claims to be his land, has introduced evidence to show acquiescence by the plaintiff for so long a time as to estop him from questioning his right, evidence of acts and declarations of the plaintiff and his grantors is admissible to rebut any such inference of acquiescence.—Sneed v. Woodward, 30 Cal. 430.

[c] If the plaintiff introduces testimony tending to show that a company is a corporation de facto he cannot object to defendant's testimony as to the strict corporate character of the company.—Rondell v. Fay, 32 Cal. 354.

[d] Where defendant testified that he had executed a mortgage without consideration, evidence that he had executed such mortgage at the request of another mortgagor in order to enable the latter to make an exchange of that portion of his mortgaged premises, which the mortgagee released in consideration of the new mortgage, and that such release and mortgage were deposited together in escrow, and then recorded at the same time, was admissible to rebut defendant's testimony.—Security Loan etc. Co. v. Mattern, 131 Cal. 326, 63 Pac. 482.

[e] Under Code of Civil Procedure, section 1854, defendant may introduce plaintiff's by-laws where plaintiff introduced an agreement between its stockholders and plaintiff which stated that, "being desirous of having my oranges handled in the manner set forth in the by-laws" of plaintiff, they individually appointed plaintiff their agent.—Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. 693.

§ 153. —— Evidence of Character.

[a] In an action for personal injuries, plaintiff having adduced mortuary tables to prove his probable expectation of life, excluding evidence of his habits as to sobriety is error.—Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., col. 634, § 441.

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§ 154. —— Title or Ownership of Property.

[a] Where one party introduces evidence showing that a redemptioner redeemed from sheriff's sale, the other party may introduce a sheriff's deed to the redemptioner, without also showing that the papers required by the statute to entitle one to redeem were properly produced.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

§ 155. —— Admission of Similar Evidence When First Evidence was Inadmissible.

[a] Introduction of irrelevant evidence by one side does not justify similar evidence by the other.—People v. Dye, 75 Cal. 105, 16 Pac. 537.

[b] Where the dispute was as to whether a third person, in dealing with plaintiff, acted as principal or as broker for defendant, and plaintiff had given evidence that, in a transaction with others, the third person acted as a broker, and that he was doing a general brokerage business, evidence that in the latter transaction the third person acted as principal is admissible in rebuttal.—Comptoir D'Escompte De Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28.

[c] Introduction of irrelevant evidence on one side without objection does not justify introduction of similar evidence on the other side.—San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372; 88 Cal. 63, 25 Pac. 977.

§ 156. —— Evidence of Fraud or Other Wrongdoing.

[a] When the record of an alleged alcalde grant, containing the words "Not taken" on the margin and cross lines of cancellation, is introduced in evidence to prove the grant, by a party who claims that said words and lines were put on the record to defraud him, evidence in rebuttal is admissible, after it is shown that no grant was made, and to explain how the record came to be made and subsequently canceled; and a resolution of a city government authorizing the alcalde's grants to be transcribed and certified by the alcalde, and the book made in pursuance thereof, from which all grants were omitted which were canceled in the same manner as the grant in question, are admissible in evidence as tending to show that said marks of cancellation existed as early as the making of said book.—Rice v. Cunningham, 29 Cal. 492.

§ 157. —— Documentary Evidence.

[a] When witness reads extract of his testimony given at former trial, adverse party may introduce whole of such testimony, under Code of Civil Procedure, section 1854.—Hobart v. Tyrell, 68 Cal. 13, 14, 8 Pac. 525.

[b] In ejectment, where defendant claims that plaintiff agreed to convey him the land in exchange for other land, the judgment-roll in a creditor's action against defendant to have a deed by him of his land declared void is admissible to show that defendant is unable to convey his land.—Royal v. Dennison, 38 Pac. 39.

V. BEST AND SECONDARY EVIDENCE.

A. Necessity and Admissibility of Best Evidence, §§ 158-163.

B. Transactions Evidenced by Writing and Contents of Writing, §§ 164-177.

C. Grounds for Admission of Secondary Evidence and Preliminaries to Admission, §§ 178-195.

A. NECESSITY AND ADMISSIBILITY OF BEST EVIDENCE.

IN GENERAL, § 158.
EXISTENCE OF BETTER EVIDENCE, § 159.
MATTERS NOT REQUIRED TO BE IN WRITING, § 160.
MATTERS REQUIRED TO BE IN WRITING OR RECORDED, § 161.
MATTERS MADE BEST EVIDENCE BY STATUTE, § 162.
EXCLUSION OF DOCUMENTARY EVIDENCE AS INFERIOR TO ORAL EVIDENCE, § 163.

§ 158. In General.

[a] The highest degree of proof of which the case is susceptible must be produced, if accessible.—Norris v. Russell, 5 Cal. 249.

[b] There is no attempt by section 21 of the act of March, 1851, to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit.—Macy v. Goodwin, 6 Cal. 579.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 466; 20 Cent. Dig., cols. 678-708, §§ 460-470.

§ 159. Existence of Better Evidence.

[a] In an action for damages for the diversion of water from plaintiff's ditch, defendants denied the diversion, and alleged that the water used by them was used under an agreement between a certain water company and themselves, and that the water came from the reservoir of such company. After plaintiff had introduced in evidence a judgment wherein the right to the use of the water had been adjudged between him and such company, he offered to prove by parol testimony that the water used by defendants was the same water that was in controversy in that suit. Held, that such evidence was admissible, as there was no other means than by parol of establishing this fact.—Walsh v. Harris, 10 Cal. 391.

[b] A book wherein mining claims are recorded according to mining rules is admissible as evidence of compliance with the rules of the mining district, and a particular entry of a transfer is admissible to show compliance with the miners' rules requiring the recording of transfers, but not as primary evi-

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dence of the fact of such transfer.—Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567.

[c] To establish an allegation that at the time a certain quartz claim was located it was a custom for persons desiring to appropriate mining claims in that district to measure off and designate the boundaries of such claims by stakes on the ground, enter upon them, and cause a record thereof to be made in the county recorder's office, and that the plaintiffs have made such entry of their claim, the contents of such book, kept in such recorder's office, consisting of the records of the numbers of such locations, one of which is that of the plaintiffs, are admissible in evidence. Such custom sought to be established by this book would make this entry the original notice, not a copy or record of an original.—Pralus v. Pacific Gold etc. Min. Co., 35 Cal. 30.

[d] Stenographer's notes of testimony of a witness taken at a former trial are not subject to the objection that they are secondary evidence.—Hicks v. Lovell, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942.

§ 160. Matters not Required to be in Writing.

[a] In an action against a private corporation on a contract made by a person, in its behalf, purporting to act as its agent, parol testimony is admissible to show that such person was authorized to act as its agent, where the corporation is not compelled by its charter to appoint its agents by deed or resolution.—Carey v. Philadelphia etc. Petroleum Co., 33 Cal. 694.

[b] Where there was in fact no written evidence upon the question of residence of the defendant in a judgment rendered in a justice's court, and no entry in writing upon the subject was by law required to be made, parol evidence was admissible on the subject to sustain such judgment.—Jolley v. Foltz, 34 Cal. 321.

[c] Actions of trustees of reclamation district may be proved by parol evidence, the law not requiring a record.—Reclamation Dist. No. 3 v. Goldman, 65 Cal. 639, 4 Pac. 676.

§ 161. Matters Required to be in Writing or Recorded.

[a] The acts of the board of directors of a corporation, ordered to be entered of record, but which the secretary, by neglect or mistake, does not enter, may be proved by parol testimony.—Bay View Assn. v. Williams, 50 Cal. 353.

[b] Since the naturalization of an adult alien is a judicial proceeding which must be entered of record (2 Story's Laws U. S., p. 851), an applicant for the purchase of state school land cannot prove his naturalization, by parol.—Bode v. Trimmer, 82 Cal. 513, 23 Pac. 187; Prentice v. Miller, 82 Cal. 570, 23 Pac. 189.

§ 162. Matters Made Best Evidence by Statute.

[a] By the county surveyor's act, surveys by others are excluded, unless to explain or rebut his, and this applies to a survey detailed from memory as well as to one illustrated by a diagram.—Vines v. Whitten, 4 Cal. 230.

§ 163. Exclusion of Documentary Evidence as Inferior to Oral Evidence.

[a] The certificate of a tax collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence, where the tax collector himself can be called as a witness.—Powell's Heirs v. Hendricks, 3 Cal. 427.

[b] Receipts executed by third party, acknowledging payment of money, are but secondary evidence, as the party executing them is a competent witness to prove the payments, or any other person who saw the payments made.—Ford v. Smith, 5 Cal. 314.

B. TRANSACTIONS EVIDENCED BY WRITING AND CONTENTS OF WRITINGS.

IN GENERAL, § 164.
PAYMENT OR RELEASE, § 165.
JUDICIAL PROCEEDINGS AND RECORDS, § 166.
—— CLAIM IN INSOLVENCY PROCEEDINGS, § 166½.
OFFICIAL ACTS, PROCEEDINGS AND RECORDS, § 167.
CORPORATE ACTS, PROCEEDINGS AND RECORDS, § 168.
AFFIDAVITS, § 169.
CONVEYANCES, CONTRACTS AND OTHER INSTRUMENTS, § 170.
—— ASSIGNMENTS, § 171.
—— SEALED INSTRUMENTS, § 172.
—— POWER OF ATTORNEY, § 173.
BOOKS OF ACCOUNT, PRIVATE MEMORANDA AND CORRESPONDENCE, § 174.
—— TELEGRAMS, § 175.
NOTICES, § 176.
ORIGINAL WRITING AS BEST EVIDENCE, § 177.

§ 164. In General.

[a] Under Code of Civil Procedure, section 1855, subdivision 5, providing that "there can be no evidence of the contents of writings other than the writing itself, except .... when the original consists of numerous documents, ... and the evidence sought from them is only the general result of the whole," it would not be necessary, in order to prove the character and value of the services rendered by an attorney in an action, to produce the record.—Cahill v. Baird, 70 Pac. 1061, judgment reversed, 72 Pac. 342.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 475; 20 Cent. Dig., cols. 790-798, §§ 527-535.

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§ 165. Payment or Release.

[a] Oral evidence of the payment of taxes by an administrator is competent, especially if the loss of the tax receipts is first shown. In re Moore, 72 Cal. 335, 13 Pac. 880.

§ 166. Judicial Proceedings and Records.

[a] Records of a court are the best and only evidence to determine what orders have been made in an action.—Clark v. Crane, 57 Cal. 629.

[b] Judicial determination, being a matter of record, must be proved by record itself, and the oral statement of a witness as to what the determination was is inadmissible.—Moran v. Abbey, 63 Cal. 56.

[c] Matters of record must be proved by record itself.—Leviston v. Henninger, 77 Cal. 463, 19 Pac. 834.

[d] Best evidence of judgment is judgment itself.—Leviston v. Henninger, 77 Cal. 462, 19 Pac. 834.

[e] In an action for libel the question asked plaintiff whether he did not commence the suit the day the cause was about to outlaw was improper, the record being the best evidence, if the fact was admissible in evidence.—Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067.

[f] Oral proof of time of bringing action is properly rejected.—Mullenary v. Burton (Cal. App.), 84 Pac. 159.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 500-504; 20 Cent. Dig., cols. 799-806, §§ 536-545.

§ 166½. —— Claim in Insolvency Proceedings.

[a] A question calling for the amount of a creditor's claim against an insolvent, in an action to set aside a fraudulent conveyance, held not objectionable as not the best evidence.—Nixon v. Goodwin (Cal. App.), 85 Pac. 169.

§ 167. Official Acts, Proceedings and Records.

[a] Copy of Mexican grant, taken from United States surveyor general's office, is not admissible in evidence without accounting for the nonproduction of the original grant, where the party offering the copy does not rely upon a certified copy of the grant, under the act of 1857, but upon proof aliunde that the copy was correct.—Soto v. Kroder, 19 Cal. 87.

[b] The fact that a tract of land is within the limits of a city may be shown by oral testimony.—Colton Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

[c] In a suit to foreclose a lien for street work, a certificate of a city engineer "that a record in this office of certificate No. 597" shows that the work of grading was examined, etc., was inadmissible, as not the best evidence of what the record referred to contained.—Obermeyer v. Patterson, 130 Cal. 531, 62 Pac. 926.

[d] The assessment-roll, as certified by the assessor to the board of supervisors, constitutes the sole and conclusive evidence of the date of the assessment, and parol evidence showing the date of the assessment of any particular property therein is inadmissible.—Allen v. McKay & Co., 139 Cal. 94, 72 Pac. 713.

[e] In proceedings by a county to condemn land for widening a highway, the original petition to the board of supervisors, praying for the alteration of the highway, and the report thereon, is admissible as primary evidence, within Code of Civil Procedure, section 1829.—Mendocino County v. Peters (Cal. App.), 82 Pac. 1122.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 497-499, 508; 20 Cent. Dig., cols. 799-806, §§ 536-545.

§ 168. Corporate Acts, Proceedings and Records.

[a] A witness may be asked whether he is an officer and stockholder in a corporation for the purpose of showing his familiarity with certain facts, and the records of the corporation need not be resorted to to show his connection therewith.—Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22.

[b] Where the owner of land is a corporation it is not necessary that its intention to dedicate a road over the same road to public use should be shown by the records of its proceedings, but such intention may be shown by its acts and the testimony of its directors.—People v. Eel River etc. R. Co., 98 Cal. 665, 33 Pac. 728.

[c] Where it appeared that the directors of a corporation adopted a resolution authorizing the president "to make arrangements for paying off a debt by giving a mortgage or any other means," and that at a subsequent meeting the directors ratified the action of its officers in executing such mortgage, but no entry of either resolution was made in the record book of the corporation, though minutes of the proceedings were made on slips of paper which were afterward lost, parol evidence is admissible, in an action against the corporation to foreclose the mortgage, to show the proceedings of the board authorizing and ratifying the execution of said mortgage, and it was not limited to showing merely the contents of the lost memoranda.—Boggs v. Lakeport Agricultural Park Assn., 111 Cal. 354, 43 Pac. 1106.

[d] Recitals of the minutes of a meeting of a corporate board of directors cannot be proved by parol.—Nixon v. Goodwin (Cal. App.), 85 Pac. 169.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 505-508; 20 Cent. Dig., cols. 806-808, §§ 546, 547.

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§ 169. Affidavits.

[a] Affidavits are not best evidence; they rank as hearsay.—Lacrebere v. Wise, 141 Cal. 556, 75 Pac. 185.

§ 170. Conveyances, Contracts and Other Instruments.

[a] Copy of a mortgage is not admissible as evidence, where the absence of the original is not accounted for.—Ord v. McKee, 5 Cal. 515.

[b] In an action on a contract to pay a note in consideration of a conveyance, recognized by defendant writing his name on the back of the note, parol evidence of the conveyance is admissible, if needed at all.—Palmer v. Tripp, 8 Cal. 95.

[c] In an action in which a homestead right is asserted, and in which an issue of fact as to the marriage is made, it is admissible to show the fact that an agreement by the parties to live together without marriage was made, but the contents of it cannot be shown. Poole v. Gerrard, 9 Cal. 593.

[d] It having appeared that there was agreement in writing respecting transfer of certain goods from witness to K., counsel proposed to ask witness "how K. got the goods." Held, that the question was improper, writing being the best evidence.—Towdy v. Ellis, 22 Cal. 650.

[e] Where a mining claim is conveyed by a written bill of sale, the bill of sale is the best evidence of the transfer, and parol evidence of the conveyance is inadmissible.—Crary v. Campbell, 24 Cal. 634.

[f] If sale of mining claim is made in writing, proof of sale must be made by producing the writing, or its loss must be established, after which oral testimony can be offered of the contents of the written instrument.—Patterson v. Keystone Min. Co., 30 Cal. 360.

[g] Parol evidence cannot be admitted against objection to show a written encumbrance on real estate.—Racouillat v. Requena, 36 Cal. 651.

[h] Parol evidence of a trust is inadmissible when answer pleads a written trust.—Donohue v. Mariposa L. & M. Co., 66 Cal. 328, 5 Pac. 495.

[i] Where question whether contract has been made or not comes collaterally in issue, it may be proved by parol.—Marriner v. Dennison, 78 Cal. 213, 20 Pac. 386.

[j] Where the written offer to sell was before the council at the time of the approval of the contract of which it was a part, and was shown to be in possession of the clerk, but was subsequently lost, it was proper to prove its contents by oral evidence.—Goodyear Rubber Co. v. Eureka, 135 Cal. 613, 67 Pac. 1043.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 475-489; 20 Cent. Dig., cols. 808-816, §§ 548-555.

§ 171. —— Assignments.

[a] Parol proof of a written contract and assignment thereof in writing is not admissible, so as to charge the assignee, without notice to produce the original or accounting for its loss.—Grimes v. Fall, 15 Cal. 63.

[b] Written assignment is the best known evidence of what was intended to be transferred.—Ladd v. Samuels, 57 Cal. 360.

§ 172. —— Sealed Instruments.

[a] Parol evidence of the contents of a sealed instrument cannot be given, until its loss has been proved.—Poorman v. Miller, 44 Cal. 269.

§ 173. —— Power of Attorney.

[a] Power of attorney is the best evidence of agency.—Rohrbough v. Johnson, 107 Cal. 144, 40 Pac. 37.

§ 174. Books of Account, Private Memoranda and Correspondence.

[a] Upon proof being first made of the loss of the book of original entries, the ledger, containing charges for advertising made against an attorney, was held admissible, in connection with copies of the newspapers containing the advertisements, to show what items were for the benefit of the attorney personally and what were for his clients.—Caulfield v. Sanders, 17 Cal. 569.

[b] A press copy of a letter is not admissible as evidence until the loss or nonproduction of the original has been accounted for. Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381.

[c] Account-books are not only evidence as to profits of business; anyone knowing about them may be allowed to testify.—Schurtz v. Kerkow, 85 Cal. 279, 24 Pac. 609.

[d] Parol evidence of the contents of a letter, which is not produced or accounted for, is not admissible.—Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536.

[e] Since parties to suit have been allowed to testify in their own behalf, private account-books are secondary evidence admissible in corroboration of oral testimony or as secondary evidence.—Bushnell v. Simpson, 119 Cal. 662, 51 Pac. 1080.

[f] The oral testimony of persons having personal knowledge of the transactions involved in the items of an account is the best evidence of such items, if they do not result from a written contract, and is primary evidence thereof, notwithstanding the existence of books of account showing them. Such books of account are only secondary and supplemental proof of the items.—Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221.

FOR AUTHORITIES FROM OTHER STATES:

Account-books, when admissible as books of original entry: 11 Am. Dec. 733, note. See also, 17 Cyc. 480; 20 Cent. Dig., cols. 816-822, §§ 556, 557.

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§ 175. —— Telegrams.

[a] The offer of a copy of a telegram sent by plaintiffs to persons who were in court, in the absence of a demand for the production of the original, is inadmissible as secondary evidence.—Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324.

FOR AUTHORITIES FROM OTHER STATES:

Best and secondary evidence of telegraph messages: 39 Am. Rep. 359, note. See, also, 17 Cyc. 478, 479; 20 Cent. Dig., cols. 822-824, § 558.

§ 176. Notices.

[a] Copy of notice posted on mining claim to show its extent is not admissible in evidence if the notice itself be attainable. Such evidence is secondary, and is admissible only upon the terms which control its introduction in other cases.—Lombardo v. Ferguson, 15 Cal. 372.

[b] Where the location of mining grounds was established both by posting notices and by the location of trees and certain ditches, witnesses may properly testify, not only as to the contents of the notices, but as to whether the location included the ground in dispute, as the notices were not the only means by which the grounds were established.—Kelly v. Taylor, 23 Cal. 11.

[c] Parol evidence is admissible to prove the contents of a notice, and it is not necessary to notify the opposite party, on whom it was served, to produce it.—Gethin v. Walker, 59 Cal. 502.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 479; 20 Cent. Dig., cols. 824-826, § 559.

§ 177. Original Writing as Best Evidence.

[a] The highest evidence of the fact is, of course, the writing itself; but, in case of its loss or destruction, the fact may be established by parol. The destruction of notes, then, only impairs the evidence of the liability of the maker.—Bagley v. Eaton, 10 Cal. 126.

[b] It must be shown that originals are not under control of party to authorize certified copies of recorded instruments to be read in evidence, unless the proof of that fact be waived by the adverse party.—Mayo v. Mazeaux, 38 Cal. 442.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 512-517; 20 Cent. Dig., cols. 828-829, §§ 561-569.

C. GROUNDS FOR ADMISSION OF SECONDARY EVIDENCE AND PRELIMINARIES TO ADMISSION.

IN GENERAL, § 178.
DESTRUCTION OR LOSS OF PRIMARY EVIDENCE, § 179.
—— INSTRUMENTS IN GENERAL, § 180.
—— RECORDS, § 181.
POSSESSION OR CONTROL OF PRIMARY EVIDENCE, § 182.
—— PRESUMPTIONS AS TO POSSESSION, § 183.
PRELIMINARIES TO ADMISSION OF SECONDARY EVIDENCE—IN GENERAL, § 184.
—— PROOF AS TO DESTRUCTION OR LOSS OF AND SEARCH FOR PRIMARY EVIDENCE, § 185.
—— PROOF OF POSSESSION OR CONTROL OF PRIMARY EVIDENCE, § 186.
—— NOTICE TO PRODUCE PRIMARY EVIDENCE, § 187.
CHARACTER AND DEGREES OF SECONDARY EVIDENCE IN GENERAL, § 188.
—— ORAL EVIDENCE, § 189.
—— EXCLUSION OF PAROL EVIDENCE AS SECONDARY TO COPY OR OTHER DOCUMENTS, § 190.
COPIES AND COUNTERPARTS, § 191.
—— SUFFICIENCY IN GENERAL, § 192.
—— DEGREE AND PARTICULARITY OF PROOF REQUISITE, § 193.
—— ACTS AND DECLARATIONS, § 194.
DETERMINATION OF QUESTION OF ADMISSIBILITY, § 195.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 518-535; 20 Cent. Dig., cols. 840-884, §§ 570-599.

§ 178. In General.

[a] Secondary evidence must always be received with caution, and then not until every means is shown to be exhausted in the effort to procure that which is superior. Norris v. Russell, 5 Cal. 249.

[b] Secondary evidence of contents of deed or grant is admissible where the possession of the original is traced to the possession of a party not in the state.—Gordon v. Searing, 8 Cal. 49; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

[c] When the records of a corporation are excluded from evidence on the ground that the corporation was not legally organized, oral evidence is admissible to show who are the acting officers.—People v. Leonard, 106 Cal. 302, 39 Pac. 617.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 840-849, §§ 570-579.

§ 179. Destruction or Loss of Primary Evidence.

[a] Where the plaintiff was the assignee of a claim, the written contract upon which it is founded having been destroyed by the assignor before the assignment, held, that it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him.—Smith v. Truebody, 2 Cal. 341.

[b] Naked fact of voluntary destruction, without explanation, is held such presumptive

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evidence of fraudulent design as to preclude all secondary evidence.—Bagley v. McMickle, 9 Cal. 430.

[c] The facts and circumstances of the destruction must be shown, in the first instance, to the court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. The same principle which allows the parties to prove by their own testimony the destruction must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence.—Bagley v. McMickle, 9 Cal. 430.

[d] After proof of loss of written contract of sale oral evidence can be offered of its contents.—Patterson v. Keystone Min. Co., 30 Cal. 360.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 518-526; 20 Cent. Dig., cols. 850-873, §§ 580-594.

§ 180. —— Instruments in General.

[a] It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made by the owner, or with his assent, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction.—Bagley v. McMickle, 9 Cal. 430.

§ 181. —— Records.

[a] Where original records of mining claims of certain mining district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be re-recorded in a new book, such book may be admitted in evidence in the trial of an ejectment case for a mining claim, to show that the rules of vicinage had been complied with.—McGarrity v. Byington, 12 Cal. 426.

[b] Existence and contents of record or other document to show the regularity of legal proceedings may, if the original be lost or destroyed, be shown by secondary evidence, the same as of any other lost instrument.—Matter of Will of Warfield, 22 Cal. 51, 83 Am. Dec. 49.

§ 182. Possession or Control of Primary Evidence.

[a] Where the primary evidence is in the possession, or under control, of the adverse party, who fails or refuses to produce it, secondary evidence is admissible.—(Cal. 1859) Burke v. Table etc. Water Co., 12 Cal. 403.

[b] Secondary evidence of contents of written instrument may be given when the party offering it is not entitled to the custody of the original, and the opposite party, to whose custody it rightfully belongs, upon being notified to produce it, disclaims all knowledge of it.—Jones v. Jones, 38 Cal. 584.

[c] In an action for specific performance, and to reform a deed, a witness, in his deposition before the trial, testified, without objection, to the contents of the written agreement between the parties. But at the trial defendant objected to the deposition on the ground that secondary evidence of its contents could not be introduced without proof of the loss or destruction of the original. Thereupon plaintiff showed that the contract was executed in duplicate, one copy of which was delivered to him, and the other retained by defendant, and that when the deed was executed, his copy of the contract was delivered to defendant, who destroyed it. The copy retained was not accounted for, nor did it appear that any notice had been given for its production in court. Held, that defendant had a right to have the original contract introduced in evidence, if in existence and capable of being produced; but, as defendant had the copy in his possession, and it could have been introduced, thus obviating the necessity for secondary evidence, the objection would not be entertained.—Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778.

[d] The lease being in defendant's possession, and he having failed to produce it when called on to do so, and not claiming that he had not had reasonable notice to produce it, it was proper to admit a copy of it in evidence, under Code of Civil Procedure, section 1938.—Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 527-535; 20 Cent. Dig., cols. 873-884, §§ 595-599.

§ 183. —— Presumptions as to Possession.

[a] In absence of registry law, it will be presumed that each party keeps all muniments of title in his own control, and gives copy to purchaser of part.—Sill v. Reese, 47 Cal. 294.

§ 184. Preliminaries to Admission of Secondary Evidence in General.

[a] The proof of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents.—Reynolds v. Jourdan, 6 Cal. 108.

[b] To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the court.—Smith v. Brannan, 13 Cal. 107.

[c] Where it is shown that there was a judgment of a proper date on which an ex-

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ecution might have been issued, a charge by the clerk for issuing an execution, a sale by the sheriff, and a certificate of sale purporting to have been made pursuant to an execution, and after six months from the sale the sheriff has executed a deed in which the judgment and execution are recited, these are facts sufficient to raise the presumption of the existence of an execution after the lapse of sixteen years, though none could be found among the records of the court.—Russell v. Harris, 38 Cal. 426, 99 Am. Dec. 421.

[d] An instrument purporting to be a copy of the articles of association of a company is not admissible in evidence when there is no proof that the original of such articles ever existed.—Reynolds v. Lincoln, 71 Cal. 183, 12 Pac. 449.

[e] One of the plaintiffs having stated that he had no personal knowledge that certain communications addressed to defendants were mailed except that copies thereof appeared in plaintiffs' copy-book, and that it was a general custom of their firm to place letters in a box in the store from which they were taken to the postoffice, there was no foundation laid for the introduction of secondary evidence as to the contents.—Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403.

[f] Plaintiff testified that he had written certain letters to defendants; that the postage was prepaid, and the letters put in the mail box at his store; that said box was emptied daily; that it was the business of W., an employee to take the letters, and mail them in the postoffice. W. testified that he was such employee at the time in question; that it was his duty to take the mail to the office, and that he did so; that if any letter was addressed, and put in the box, he took and mailed it. Held sufficient proof of mailing to support secondary evidence of the contents of the letters.—Sanborn v. Cunningham, 33 Pac. 894.

[g] Where a ledger had been destroyed, it was proper as preliminary to proof of its contents to ask a witness who had kept it whether or not it contained an account with a certain person.—Luty v. Cresta (Cal. App.), 88 Pac. 642.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 536-564; 20 Cent. Dig., cols. 884-980, §§ 600-660.

§ 185. —— Proof as to Destruction or Loss of, and Search for Primary Evidence.

[a] Preliminary proof of the loss of an instrument, in order to permit the introduction of secondary evidence as to its contents, may be made by the evidence of the party in whose possession it last was.—McCann v. Beach, 2 Cal. 25.

[b] The defendant attempted to show an ordinance of the city of Sacramento, but offered only a newspaper copy of it. In support of this, as secondary evidence, the counsel for the defendant swore to a search for the original, which he himself had made in a book of ordinances handed him by the keeper of the city archives. Held, that the evidence was properly excluded, because this was an insufficient predicate.—Norris v. Russell, 5 Cal. 249.

[c] To entitle one to introduce secondary evidence of an ordinance, the search for the original should have been made and testified to by the keeper of the records, or he should have been subpoenaed to bring into court with him the original ordinance, and then, upon his failure to find it after diligent search, the copy, if established to be correct, would have been admissible.—Norris v. Russell, 5 Cal. 249.

[d] In quo warranto the person who claimed the office held by the defendant testified that his certificate of election was lost or destroyed, and the county clerk swore that there was not in his office, or, so far as he knew, in the county, any record or written evidence of the persons who were elected to the different county offices. Sufficient foundation was laid to let in secondary evidence of the election and certificate.—People v. Clingan, 5 Cal. 389.

[e] Positive testimony by the officer having charge of the records that they were not in his office raises the legal presumption that he had searched for them, unless it should be made to appear from his testimony that such was not the case.—People v. Clingan, 5 Cal. 389, 390.

[f] Where a witness testified that he was the notary public before whom a certain deed was acknowledged, and that he had seen a power of attorney authorizing the execution of such deed, and that such power was made out in the usual form, and that it had been destroyed in a fire, parol evidence was admissible to show its contents.—Posten v. Rassette, 5 Cal. 467.

[g] The admission of secondary evidence of a paper alleged to have been lost is only allowable on proof of a bona fide, diligent search, unsuccessfully made for it in the place where it was most likely to be found, and that the party has exhausted in a reasonable degree all the sources of information and means of discovery naturally suggested by the nature of the case and accessible to the party.—Folsom v. Scott, 6 Cal. 460.

[h] Mere evidence of search for paper alleged to have been lost is not sufficient to admit secondary evidence of its contents, for the search may not have been diligent.—Folsom v. Scott, 6 Cal. 460.

[i] Evidence that the library and papers of the party were destroyed by fire, except a few papers unaccompanied by evidence of search for the particular paper among those saved, is insufficient to admit secondary evidence of its contents.—Folsom v. Scott, 6 Cal. 460.

[j] Proof of a loss of an account book of original entries, not showing who last had

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possession of the book, or any bona fide and diligent search for it, is insufficient to authorize secondary evidence of its contents, though, if no objection be taken on this ground, such secondary evidence may be allowed.—Caulfield v. Sanders, 17 Cal. 569.

[k] Ejectment was brought on an alcalde grant, issued in January, 1847. One of plaintiff's witnesses swore that he was alcalde in October, 1847, and that he copied the grant into the proper book of records, that he knew his predecessor's handwriting, that the signature of the grant was in such handwriting, that at the time of the issue thereof his predecessor was alcalde, and that the record was a true copy of the grant. Plaintiff's affidavit stated that he had not the original grant, and had searched everywhere where it could be expected to be found, in vain. The widow of the grantee testified that it was not among his papers. Held that, upon this showing, the record should be admitted in evidence.—Pierce v. Wallace, 18 Cal. 165.

[l] A witness for plaintiff in ejectment testified that he had once had the deed, under which plaintiff claimed, in his possession; that he had thought that the grantee now had it, but, the grantee having written to him stating the contrary, he now believed it destroyed. Held that, since the grantee's testimony was hearsay, and not sworn to, the grounds were sufficient to admit secondary evidence.—Lawrence v. Fulton, 19 Cal. 683.

[m] Where there is evidence that a written bill of sale has been in the possession of one or the other of two persons, oral testimony as to its contents is not admissible, without first proving that both of them have searched for it and been unable to find it. Patterson v. Keystone Min. Co., 30 Cal. 360.

[n] The plaintiff claimed title to certain premises by purchase, which purchase was evidenced by a bill of sale. Held, that he was bound to produce this bill of sale, or deed, to prove his title, and that evidence that the bill of sale had been left at the plaintiff's store, at the time he sold the store and contents, and that he had made an unsuccessful search in such store for it—the purchaser at the time of the trial being within the reach of the process of the court, but not called as a witness as to what had become of the instrument—was not sufficient to lay a foundation for introducing secondary evidence of its contents.—King v. Randlett, 33 Cal. 318.

[o] Before parol evidence can be introduced of the contents of a deed which is claimed to be lost, it must be shown that an unsuccessful search has been made for it in the place where it was last known to have been. Taylor v. Clark, 49 Cal. 671.

[p] Where it is necessary for a patentee to prove the loss of the original patent before introducing a certified copy in evidence, his testimony that he never received the original, and did not know what had become of it, is sufficient.—Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647.

[q] Secondary evidence of the contents of a missing document, not in possession of the adverse party, cannot be given when the proof shows that there is a person who might probably have it, of whom no inquiry has been made, but the preliminary proof should show that inquiry has been made, without result, of every person who, according to the evidence, would be likely to have the document or to know of its whereabouts.—Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27.

[r] Testimony of the recipient of a letter that he had lost it, that he had looked for it a great deal, and that he thought at one time he had left it at the office of his buyer, but had looked for it there, and been unable to find it, is sufficient to allow proof of the contents.—Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337.

[s] A notary's record showing the acknowledgment before him of a deed by a husband to his wife is inadmissible as secondary evidence without showing that the deed, if delivered, had been lost.—Lewis v. Burns, 122 Cal. 358, 55 Pac. 132.

[t] Plaintiff testified that he indorsed a note and mortgage which he held against defendant "Canceled and paid," after which satisfaction of the mortgage was entered on the books of the recorder; and that he put the instruments in his pocket, intending to give them to the defendant, and thought he had done so, as he had since looked everywhere among his papers, but could not find them. Held, that his testimony as to the indorsement was properly admitted, as the balance of his testimony to the effect that he looked in all places where his papers were likely to be was sufficient to show that the instruments could not be found, though he did not testify that he had looked "in his pocket."—Woods v. Jansen, 130 Cal. 200, 62 Pac. 473.

[u] In a suit to establish a lost deed, evidence that plaintiff had searched for the deed in the last known place of its deposit, and made inquiry of the only person who had access to it, in an endeavor to find it, without success, was sufficient to raise a presumption of its loss and authorize secondary evidence of its contents.—Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 540-555; 20 Cent. Dig., cols. 895-959, §§ 605-637.

§ 186. —— Proof of Possession or Control of Primary Evidence.

[a] In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he deraigns title, in order to lay the foundation for secondary evidence, the

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proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence, his affidavit should have been offered.—Fallon v. Dougherty, 12 Cal. 104.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 959-963, §§ 638-641.

§ 187. —— Notice to Produce Primary Evidence.

[a] Where a notice to the adverse party to produce a written lease in his possession was slightly erroneous with regard to the names of the parties to the lease, and did not describe the contents of the lease, but was such as to apprise a man of ordinary intelligence as to what paper was required, the notice was sufficient, since a party cannot be expected to minutely describe a paper in the possession of an adversary.—Burke v. Table Mountain Water Co., 12 Cal. 403.

[b] Parol evidence is admissible to show the contents of a writing without proof of demand and a refusal to deliver such writing. Womble v. Wilbur (Cal. App.), 86 Pac. 916.

§ 188. Character and Degrees of Secondary Evidence—In General.

[a] When records have been destroyed but judgment book preserved, parol evidence of pleading and issues is inadmissible, unless accompanied by certified copy of judgment. Nims v. Johnson, 7 Cal. 110.

[b] Where the ballots cast at an election had been destroyed before trial of an action to oust certain persons from office, evidence of the election officers that nearly all of the ballots were marked for two candidates was the best in degree that existed.—People v. Davidson (Cal. App.), 83 Pac. 161.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 565; 20 Cent. Dig., cols. 980-1004, §§ 661-673.

§ 189. —— Oral Evidence.

[a] It is proper to ask county clerk if he knew who had been elected to an office in controversy, it having been shown that proper search was made for the certificate of election, and that it had been destroyed.—People v. Clingan, 5 Cal. 389.

[b] Testimony of county judge, who stated that he saw certificate of election, is admissible to prove its contents, it having been shown that a proper search was made for it, and that it had been destroyed.—People v. Clingan, 5 Cal. 389.

[c] On an issue as to whether defendant had an account with a certain bank, at a time specified, testimony of an employee of such bank that he had made an examination for such purpose, and ascertained that he had not, was competent, under Code of Civil Procedure, section 1855, subdivision 5, authorizing parol proof of the general result of an examination of numerous books and accounts, where they cannot be examined in court without great loss of time. Judgment (1898) 51 Pac. 945, reversed.—People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[d] Under Code of Civil Procedure, section 1855, subdivision 5, allowing secondary evidence of the contents of a writing when the original consists of numerous documents which cannot be examined in a court without a great loss of time, and the evidence sought is only the general result of the whole, the deputy clerk of a city council may testify that no resolution of intention by a city council to make a street improvement, other than that which was introduced in evidence, was passed.—Pacific Pav. Co. v. Gallett, 137 Cal. 174, 69 Pac. 985.

§ 190. —— Exclusion of Parol Evidence as Secondary to Copy or Other Documents.

[a] Where original instrument proved to be lost has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. Brotherton v. Mart, 6 Cal. 488.

§ 191. Copies and Counterparts.

[a] A copy of a certified copy of a lost writing is not admissible to prove the contents of the original.—Dyer v. Hudson, 65 Cal. 372, 4 Pac. 235.

[b] Press copies of letters are best evidence next to originals and oral evidence of their contents is inadmissible.—Ford v. Cunningham, 87 Cal. 210, 25 Pac. 403.

§ 192. —— Sufficiency in General.

[a] Secondary evidence being admitted, it becomes the province of the jury to judge of its credit and weight. It takes the place of the primary evidence, the absence of which has been explained to the satisfaction of the court, and is entitled to the same consideration.—Bagley v. Administrator of McMickle, 9 Cal. 430.

§ 193. —— —— Degree and Particularity of Proof Requisite.

[a] In the case of a lost instrument, where no copy has been preserved, it is not to be expected that witnesses can recite its contents, word for word. It is sufficient if intelligent witnesses, who had read the paper, understood its object, and can state it with precision.—Posten v. Rassette, 5 Cal. 467.

§ 194. —— Acts and Declarations.

[a] Though the written contract on which plaintiff sues may be lost or otherwise in-

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accessible to him, so that parol evidence is necessary to prove its contents, evidence of conversations between the parties pending the negotiations which resulted in the contract, which conversations were had before its execution, is incompetent.—Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101.

§ 195. Determination of Question of Admissibility.

[a] Preliminary proof is addressed to court, and of its sufficiency the court is the sole judge.—Bagley v. Administrator of McMickle, 9 Cal. 430.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 1005-1008, §§ 674, 675.

VI. DEMONSTRATIVE EVIDENCE.

§ 196. Exhibition of Object or Person.

[a] Boxes of prunes dried by the plaintiff being a finished and separable part of the manufactured product, the character of which was in question, may be properly received in evidence for the defendants and the question whether they were fair samples or not goes only to the weight of the evidence and not to its admissibility.—Thomas Fruit Co. v. Start, 107 Cal. 206, 40 Pac. 336.

[b] In an action for injuries in operating a stamping machine, the preserved hand of plaintiff, showing a streak of ink along it, was admissible as showing that it had in fact passed under the stencil.—Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521.

FOR AUTHORITIES FROM OTHER STATES:

Physical examination, compelling parties to submit to for purposes of evidence: 68 Am. St. Rep. 242, note. See, also, 17 Cyc. 290; 20 Cent. Dig., cols. 1008, 1009, § 676.

§ 197. Writings Submitted for Comparison.

[a] It is error to permit a party to write his signature in the presence of the jury, to enable them, by comparison of handwritings, to appreciate his nervous condition at the time of signing a release of all claims for damages for injuries received by him through the negligence of a common carrier.—Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 293, 294; 20 Cent. Dig., cols. 1013-1022, §§ 681, 682.

VII. ADMISSIONS.

A. Nature, Form, and Incidents in General, §§ 198-217.
B. By Grantors, Mortgagors, Former Owners or Privies, §§ 218-225.
C. By Agents or Other Representatives or Persons Interested, §§ 226-240.
D. Proof and Effect, §§ 241-251.

A. NATURE, FORM AND INCIDENTS IN GENERAL.

NATURE OF ADMISSION AND SUBJECT MATTER IN GENERAL, § 198.
MODE OF MAKING AND FORM IN GENERAL, § 199.
JUDICIAL ADMISSIONS, § 200.
—— BY COUNSEL, § 201.
—— PLEADING, § 202.
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—— PETITIONS AND APPLICATIONS, § 204.
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—— COPARTIES, § 208.
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OFFERS OF COMPROMISE OR SETTLEMENT, § 210.
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—— LETTERS, § 213.
—— VALUATION OF PROPERTY FOR PURPOSES OF TAXATION, § 214.
ACTS OR CONDUCT, § 215.
ACQUIESCENCE OR SILENCE, § 216.
—— FAILURE TO DENY ORAL STATEMENTS MADE IN COURT, § 217.

§ 198. Nature of Admission and Subject Matter in General.

[a] Evidence of statement by defendant to witness held proper, the purpose being merely to show an admission that his cattle did the damage to plaintiff's crop.—Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692.

[b] Negotiations between pledgor of water stock and officer of water company, whom the pledgee had directed not to deliver water to the pledgor, held admissible on the issue of the pledgor's conduct with respect to her obligation to repay the pledgee for assessments paid by him.—Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

[c] Where a contract appointing plaintiff defendant's exclusive broker was extended by a written indorsement, evidence as to a conversation between defendant and witness relating to defendant's understanding of the extension is inadmissible.—Clark v. Dakiel (Cal. App.), 84 Pac. 429.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 938; 20 Cent. Dig., cols. 1024, 1025, §§ 684-686.

§ 199. Mode of Making and Form in General.

[a] Admissions made for the purpose of submitting to arbitration matters of difference between certain parties, in order to dispense with proof of the facts admitted, cannot be received in evidence in a collateral action between the same parties.—Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

[b] Corporate books kept by or under supervision of corporate manager are admissible

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against him though not correct but proved to have been falsified.—San Pedro etc. Co. v. Reynolds, 121 Cal. 83-85, 53 Pac. 410.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 939-964; 20 Cent. Dig., cols. 1031-1038, §§ 699-706.

§ 200. Judicial Admissions.

[a] Facts admitted to avoid continuance become evidence, but not conclusive proof. Hart v. Burnett, 15 Cal. 645.

[b] The record of a court in an action to recover possession of personal property when there is no judgment, the property being delivered up voluntarily, is not admissible as evidence of the plaintiff's ownership of the property in another action.—Miller v. Van Tassel, 24 Cal. 458.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 964-976; 20 Cent. Dig., cols. 1038-1075, §§ 707-744.

§ 201. —— By Counsel.

[a] Admissions of fact made by counsel in one suit are not admissible, to the prejudice of the party against whom they are made, in another.—Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64.

[b] Admissions of attorney are irrelevant and immaterial evidence, and objections upon that ground are sufficient.—Wilson v. Southern Pacific R. R. Co., 53 Cal. 735.

[c] Statement by counsel that he supposed court would find against him on certain issue in view of previous rulings is not admission. Jessup, In re, 81 Cal. 416, 22 Pac. 742.

[d] In an action for malicious prosecution for perjury, where it appears that the attorney for defendant advised him that there was "probable cause" for believing that plaintiff had perjured himself in a certain suit, defendant's attorney cannot testify as to what plaintiff's attorney said in such suit without showing that plaintiff was present or assented.—Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

§ 202. —— Pleadings.

[a] Express admission in an answer, whether material or not, is evidence of fact admitted.—Powell v. Oullahan, 14 Cal. 115.

[ab] The plaintiff in ejectment claimed under the deed of one M. The defendants set up that M's title had been devested by a sale for taxes, and offered in evidence a complaint filed by M. against his agent, in which he alleged that, through the neglect of his agent, the premises had been sold, no redemption had been made. the sale had become absolute, and he had suffered damages, etc. Held, that these statements did not amount to an admission of title in the purchaser at the tax sale, and, even if they did, the admission could not operate to transfer such title.—Keane v. Cannovan, 21 Cal. 291.

[b] Admissions in a pleading are admissible against the party making them in a subsequent action between the same parties. Greer v. Tripp, 56 Cal. 209.

[c] Pleading verified by attorney in fact is admissible against his principal to show fact that action was brought and its nature. Kamm v. Bank of California, 74 Cal. 197, 198, 15 Pac. 765.

[d] An admission or averment in a verified answer, in a separate and distinct defense, as to the fact that the defendant was a consolidated corporation, is not evidence against the defendant upon issues tendered in other defenses contained in the same answer, consisting of denials only.—McDonald v. Southern C. Ry. Co., 101 Cal. 206, 35 Pac. 643, 646.

[e] In ejectment, tried to the court, portions of the answer, averring the execution of deeds conveying the legal title in the premises to plaintiff, were admitted in his behalf, and at defendant's request the whole answer was then read, which showed legal and equitable title in defendant. Held, that only those allegations explaining or qualifying the averments admitted as evidence for plaintiff were admissible in behalf of defendant, and that while it might have been proper to allow the entire answer to be read, to determine whether it contained such qualifying statements, such entire answer did not thereby become conclusive evidence. Granite Gold Min. Co. v. Maginness, 118 Cal. 131, 50 Pac. 269.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 967-971; 20 Cent. Dig., cols. 1046-1062, §§ 713-725.

§ 203. —— —— Pleadings Superseded.

[a] Where there are several answers, an admission made in one is not available in proof of issues raised by others.—Nudd v. Thompson, 34 Cal. 39.

[b] If an answer has been superseded by an amended answer the answer thus superseded is not admissible in evidence as an admission on the trial.—Mecham v. McKay, 37 Cal. 154.

[c] Pleadings superseded by amendment are not admissible as evidence.—Mecham v. McKay, 37 Cal. 154.

[d] Material allegations of complaint in former suit must be taken as admissions of the truth of the matters alleged in a subsequent action, for the same cause of action, and will be binding and conclusive upon pleader in the absence of any evidence tending to establish that such allegations were made by mistake or under a misapprehension of the real facts.—Geary v. Simmons, 39 Cal. 224.

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[e] Where an original pleading has been superseded by an amended pleading, the allegations of the former are not admissible as evidence in the same action.—Ponce v. McElvy, 51 Cal. 222; Wheeler v. West, 71 Cal. 126, 11 Pac. 871; Stern v. Loewenthal, 77 Cal. 340, 19 Pac. 579.

[f] If an amended complaint is filed, the original ceases to be a pleading, and its averments cannot be used to disprove those of the amended pleading. But when a plaintiff is a witness at the trial, the averments of the original complaint, inconsistent with his testimony, may be introduced upon cross-examination, for the purpose of impeachment. Johnson v. Powers, 65 Cal. 179.

[g] Original complaint is admissible to show offer to pay money into court, embodied in it, though superseded by amendment.—Pfister v. Wade, 69 Cal. 139, 10 Pac. 369.

[h] Pleading filed in another action although superseded by amendment is admissible as an admission.—Coward v. Clanton, 79 Cal. 28, 29, 21 Pac. 359.

[hi] An amended pleading supersedes the original, and admissions made in the original pleading cannot thereafter properly be introduced in evidence against the party who made them.—Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360.

[i] Admissions contained in a pleading, which has been superseded by another in amended form, may nevertheless be used for impeachment purposes when relevant.—O'Connor's Estate, In re, 118 Cal. 69, 50 Pac. 4.

[j] A withdrawn cross-complaint is not admissible in evidence.—Ruddock Co. v. Johnson, 135 Cal. xix, 67 Pac. 680.

[k] A superseded claim filed by plaintiffs against the estate of defendant's testator held admissible against plaintiffs as an admission against interest.—Pollitz v. Wickersham (Cal. Sup.), 88 Pac. 911.

§ 204. —— Petitions and Applications.

[a] A statement in a petition for letters of administration, to the effect that certain real property therein particularly described belonged to the deceased, cannot be received in evidence against the petitioner as an admission by him of such fact, unless the petition was signed by him personally, or by an attorney who acted within the scope of his authority in making the statement.—Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 974-976; 20 Cent. Dig., cols. 1064-1070, §§ 729-737.

§ 205. —— Affidavits.

[a] Affidavit in a former suit acknowledging the debt sued upon is admissible.—Whitney v. Buckman, 13 Cal. 536.

[b] The affidavit of the defendant, made in a former action in which he was plaintiff, as to the value of the premises during a certain time, is evidence against him as to the value of the premises during a subsequent time, provided it be connected with evidence that the value of the premises was the same during the two periods.—Shafter v. Richards, 14 Cal. 125.

§ 206. —— Testimony.

[a] The testimony of a party to an action, given on a former trial, may be introduced against him on a second trial, though he is present in court, and may be called as a witness.—Lorenzana v. Camarillo, 45 Cal. 125.

[b] The testimony of a party to the suit, proved by the evidence of a stenographer testifying to a transcript from his notes, is admissible to show an admission made by such party in the testimony thus proved.—Macomber v. Bigelow, 126 Cal. 19, 58 Pac. 312.

[c] Where the declarations made by a party to the suit examined by the opposite party were proved by the stenographer who took his deposition, which was not introduced, declarations were not testimony, but merely declarations against interest.—Arnold's Estate, In re, 147 Cal. 583, 82 Pac. 252.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 976; 20 Cent. Dig., cols. 1071-1075, §§ 738-744.

§ 207. By Parties of Record or Others Interested in Event.

[a] Statements, made by a defendant to a third party, about having executed a deed of the premises in dispute to P., are admissible to show that the deed under which the plaintiff claims (from defendant to H.) was in fact executed by him, and that he was mistaken as to the name of the grantee, in connection with the proof that P. acted for the grantee in regard to the conveyance.—Wright v. Carillo, 22 Cal. 595.

[b] A witness who had stated that plaintiff, on several occasions, said that decedent owed no debts was properly allowed to state that in those conversations plaintiff made no exception in favor of himself.—Robinson v. Dugan, 35 Pac. 902.

[c] Evidence that plaintiff had told a witness that he had given the property in controversy to his daughter, though the statement was not made in her presence, was competent, as showing an admission of the gift by plaintiff.—Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

[d] Admission after former trial resulting in large verdict that verdict was just and right is competent against defendant at subsequent trial.—White v. Merrill, 82 Cal. 17, 18, 22 Pac. 1129.

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[e] Where a complaint in intervention alleged that plaintiff's assignors were indebted to the defendant corporation for an assessment levied on the stock, and the only evidence to sustain the same was the admissions in defendant's answer, which were verified by one of the assignors, a finding that such assignors were so indebted, and a conclusion of law that plaintiff take nothing by his suit, cannot be sustained, since the admissions of the answer were not evidence against the plaintiff.—Shively v. Eureka T. G. M. Co., 129 Cal. 293, 61 Pac. 939.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 977-984; 20 Cent. Dig., cols. 1133-1162, §§ 786-812.

§ 208. —— Coparties.

[a] A joint answer of two defendants, signed by their attorney, and verified by only one of them, is not admissible in evidence for the purpose of proving the allegations therein contained, in an action brought against the defendant who did not sign or verify.—McDermott v. Mitchell, 47 Cal. 249.

[b] Admissions of a party named defendant in the complaint, but not served, are inadmissible against the other defendants.—Derby v. Rounds, 53 Cal. 659.

[c] Evidence as to the declarations of one defendant are not admissible against a codefendant, where they are not joint defendants in a sense which would make the declarations of one binding upon the other.—Dean v. Ross, 105 Cal. 227, 38 Pac. 912.

§ 209. —— Interest in Suit of Persons not Parties.

[a] The declarations of third persons, not parties to the record, cannot be admitted in evidence, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation exists. They may be admissible if made at a time after the joint interest existed, and not admissible if made before.—Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 984; 20 Cent. Dig., cols. 1162-1165, §§ 813, 814.

§ 210. Offers of Compromise or Settlement.

[a] In an action for damages for breach of a contract, where a counterclaim for a breach of the same contract is set up, evidence of an attempt to arbitrate and settle the matters at issue is not admissible.—Dennis v. Belt, 30 Cal. 247.

[b] Where a party admits a particular fact, meaning to make the admission as being true, it is admissible as evidence against him, though the object was to compromise an existing controversy. Hence, in an action for divorce, the paper signed by defendant, offering to divide the property, and describing it as community property, was admissible on the issue as to the character of the property.—Rose v. Rose, 112 Cal. 341, 44 Pac. 568.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 946-952; 20 Cent. Dig., cols. 1075-1090, §§ 745-753.

§ 211. —— What Constitutes Offer.

[a] The statement of a party against whom a claim is made that he is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest. The rule which excludes offers of compromise does not apply to statements made by a party which are in no wise connected with any attempt at a compromise, whether made to a stranger or to a codefendant.—Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

§ 212. Statements in Writing in General.

[a] In an action on a contract made by a party to pay all sums advanced to a third person, a written statement, signed by the defendant, of the advances made to such person, is admissible in evidence against him, but he may introduce evidence to show error in the statement.—Gradwohl v. Harris, 29 Cal. 150.

[b] Statements from assessor's office not signed by the party against whom they are offered, nor shown to have been made under his direction, or with his knowledge, are not competent evidence against him or parties claiming under him.—Feliz v. Feliz, 105 Cal. 1, 38 Pac. 521.

[c] In an action to recover royalties upon machines manufactured and sold by the defendant, a statement of sales made by the corporation defendant to the plaintiff, to which was added a statement of dates taken from the books of the defendant, in the presence and with the consent of its secretary, was properly admitted in evidence against the corporation.—Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598.

[d] The report of an accident to an employee, made by the employer to an insurance company insuring the employer against accidents to its employees, was admissible in an action against the employer for the injuries sustained, so far as it contained admissions of the employer as to matters material and relevant to the controversy.—Roche v. Llewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 943-946; 20 Cent. Dig., cols. 1091-1101, §§ 754-759.

§ 213. —— Letters.

[a] In an action for damages for breach of contract, letters written by plaintiff be-

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tween the time of the alleged breach and the commencement of the action, tending to show that nothing was then claimed by him as due from defendant, are relevant and admissible. Moore v. Campbell, 72 Cal. 251, 13 Pac. 689.

§ 214. —— Valuation of Property for Purposes of Taxation.

[a] Written statements describing property for the purpose of assessment for taxation (Pol. Code, secs. 3629-3633), signed by the owner, but in which the value is fixed by the assessor's clerk, are inadmissible on the question of value in condemnation proceedings.—San Jose etc. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522.

§ 215. Acts or Conduct.

[a] In an action against S. for goods sold and delivered, and used in a stable business conducted by I., it was competent, upon the issue whether the goods had been sold to I. or S., to give in evidence an assessment list, prepared by I., of the personal property used in the business, and to show that S. had appeared before the board of equalization to procure its reduction.—Arnold v. Skaggs, 35 Cal. 684.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 952-954; 20 Cent. Dig.. cols. 1104-1111, §§ 762-770.

§ 216. Acquiescence or Silence.

[a] When an agent's letters have been adopted or acted upon by the principal, they are admissible against him.—Neely v. Naglee, 23 Cal. 152.

[b] Where defendants claim that, because of representations made by plaintiff's predecessor as to his right to use certain waters, plaintiff is estopped to claim the right to such use, testimony that prior thereto, in a conversation with plaintiff's predecessor concerning such water rights, defendants made no such claim, is competent.—Williams v. Harter, 121 Cal. 47, 53 Pac. 405.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 956-962; 20 Cent. Dig., cols. 1112-1132, §§ 771-785.

§ 217. —— Failure to Deny Oral Statements Made in Court.

[a] A party to a suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial, because he does not deny or contradict them at the time; and statements of a plaintiff's witness, that plaintiff owed him a certain sum, which was an element of the damages claimed in the suit, although not denied at the time, can be controverted in a suit by the witness to recover said sum.—Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64.

B. BY GRANTORS, MORTGAGORS, FORMER OWNERS OR PRIVIES.

IN GENERAL, § 218.
STATEMENTS MADE BEFORE CONVEYANCE OR TRANSFER, § 219.
—— STATEMENTS AS TO BOUNDARIES, § 220.
STATEMENTS MADE AFTER CONVEYANCE OR TRANSFER OF TITLE, § 221.
—— STATEMENTS MADE AFTER CONVEYANCE BUT BEFORE TRANSFER OF POSSESSION, § 222.
—— SHOWING FRAUD, § 223.
STATEMENTS AS TO NATURE OR VALIDITY OF CONVEYANCE, § 224.
STATEMENTS OF PERSONS SINCE DECEASED, § 225.

§ 218. In General.

[a] Section 1849, Code of Civil Procedure, does not enlarge class of cases in which declarations, acts or omissions of holder of legal title were admissible against himself at common law.—Frink v. Roe, 70 Cal. 315, 11 Pac. 820.

§ 219. Statements Made Before Conveyance or Transfer.

[a] Declarations of vendor while in possession are admissible against those claiming under him.—Landecker v. Houghtaling, 7 Cal. 391.

[b] The declarations and acts of a vendor before sale are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud.—Visher v. Webster, 8 Cal. 109.

[c] Declarations or admissions by an owner, affecting his rights, have the same effect on the rights of his subsequent grantees.—Stanley v. Green, 12 Cal. 148.

[cd] Statement by alleged grantor to notary who certified to acknowledgment that the signature is his is good evidence of the execution, and may be proved by the officer.—Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84.

[d] Admissions made by the grantor of the plaintiff in her lifetime, while living on the demanded premises, that it belonged to, or was in possession of, the defendant, held admissible in evidence against the plaintiff on the trial of the issue of title.—Bollo v. Navarro, 33 Cal. 459.

[e] Upon an issue that plaintiff's grantor had taken title for the joint benefit of himself and defendants, and that plaintiff took title from him with notice of defendants' rights, it is competent to show the circumstances of the purchase by such grantor, and his declarations at that time, as tending to show defendants' interest.—Lord v. Thomas, 36 Pac. 372.

[f] Declarations of a party are always admissible against himself, or those claiming under him by conveyance made subsequent

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to the declarations, without reference to the time when or place where they were made.—McFadden v. Wallace, 38 Cal. 51.

[g] When one derives title to land from another, the declarations of the grantor in relation to his right, made while holding the title which he transferred, are admissible in evidence against the grantee.—McFadden v. Ellmaker, 52 Cal. 348.

[gh] Declarations of grantor while holding title may be introduced against his grantee. Frink v. Roe, 70 Cal. 315, 316, 11 Pac. 820.

[gi] Acts and declarations of grantor are competent to show that vendee took land under parol agreement to convey when paid for and that price was paid.—Bryan v. Tormey, 84 Cal. 130, 24 Pac. 319.

[h] Evidence of the declarations and acts of plaintiff's grantor in relation to the land in controversy before he conveyed to the plaintiff is admissible against the plaintiff.—Seegelken v. Corey, 93 Cal. 92, 28 Pac. 849.

[i] Declarations of grantor are admissible against him and those claiming under him, if their purport is to restrict his premises or lessen his title.—Williams v. Harter, 121 Cal. 52, 53 Pac. 405.

[j] In an action to quiet title to the right to use the waters of a ditch, where defendant claimed through her husband as grantor, and plaintiffs conceded that defendant's husband had used water from the ditch up to a certain time, when they claimed that he abandoned the right to the ditch and water, evidence that he made a verbal sale to one of the plaintiffs of all his interest in the ditch, and that thereafter he made frequent declarations that he had no interest in the water or ditch, all occurring long before he conveyed to defendant, such declarations continuing up to the time of his death, is admissible to prove the abandonment claimed.—Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034.

[k] In an action against the grantee of the owner to abate a nuisance, declarations of the owner of the land, while in possession, and at the time he was having the survey made, to the effect that the same was being made merely for convenience of reference in making conveyances, were admissible.—Smith v. Glenn, 129 Cal. xviii, 62 Pac. 180.

§ 220. —— Statements as to Boundaries.

[a] Declarations by the owner of land to a purchaser, at the time he sold, as to the boundary lines claimed by him, are admissible against one claiming title from such purchaser.—Austin v. Andrews, 71 Cal. 98, 16 Pac. 546.

§ 221. Statements Made After Conveyance or Transfer of Title.

[a] Declarations of vendor after sale are admissible against vendee, if evidence shows collusion.—Howe v. Scannell, 8 Cal. 325.

[ab] The declarations of vendor made after the sale of the wheat are not admissible for the purpose of proving that the sale was not bona fide.—Paige v. O'Neal, 12 Cal. 483.

[b] The declarations of a vendor, made after the sale, that it was colorable only, and that he was still interested, are inadmissible. Visher v. Webster, 13 Cal. 58.

[c] The declarations of a person who has parted with property under a bill of sale are not admissible, as against the title of the buyer, as part of the res gestae, such property being claimed by another under an attachment, where a clear and unequivocal possession of the property by the seller is not shown.—Visher v. Webster, 13 Cal. 58.

[d] Where property levied on under an attachment is claimed by another as his property under a prior sale, admissions of the seller made after the time of such sale are not admissible as against claimant.—Visher v. Webster, 13 Cal. 58.

[e] Declarations of vendor after sale are inadmissible against vendee.—Cohn v. Mulford, 15 Cal. 50.

[f] The acknowledgment of the payment of purchase money by a grantor in a subsequent deed is no evidence of the fact of payment as against those holding under a prior deed, and is not admissible to defeat their rights under their prior deed.—Colton v. Seavey, 22 Cal. 496.

[g] Declarations of the vendor of personal property made after the sale are not admissible in evidence for the purpose of showing a fraudulent intent on his part in making the sale. Such declarations made before the sale are admissible.—Jones v. Morse, 36 Cal. 205.

[gh] The declarations of the grantor, in a conveyance charged to be fraudulent, made subsequent to its execution, and while the grantee was in the possession of the property conveyed and out of his presence, is not admissible in evidence to establish fraud on the part of the grantee or his vendee.—Spanagel v. Dellinger, 38 Cal. 278.

[h] Intent of parties to a sale of goods to defraud the creditors of the seller cannot be proved by declarations of the seller made after the transaction, nor by declarations of an agent of the buyer whose agency was limited to the care and custody of the goods after they were delivered to the buyer.—Hutchings v. Castle, 48 Cal. 152.

[i] Under the provisions of section 1849 of the Code of Civil Procedure, permitting the declarations of a former owner to be given in evidence against one claiming under h a deed of such former owner of a large tract of land, excepting from its provisions the demanded premises, with the declaration therein that such demanded premises had been previously sold to a third party, cannot be received in evidence in ejectment to show the title of such third party. The declara-

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tions, to be receivable in evidence, must be made concerning the property conveyed, and while the declarant still owned it.—Tompkins v. Crane, 50 Cal. 478.

[j] The declarations of a vendor, made after the sale, are not admissible in evidence against his vendee.—Briswalter v. Palomares, 66 Cal. 259, 5 Pac. 226; Taylor v. Central Pac. R. Co., 67 Cal. 615, 8 Pac. 436; Thomas v. Black, 84 Cal. 225, 23 Pac. 1037; Packard v. Johnson, 4 Pac. 632; Packard v. Moss, 4 Pac. 638.

[k] In an action against a sheriff, for wrongfully taking cattle donated to plaintiff by his father, a statement alleged to have been made by the father after he had parted with the possession of the cattle is inadmissible, either to prove the fraudulent character of the gift or for any other purpose.—Walden v. Purvis, 73 Cal. 518, 15 Pac. 91.

[l] In an action against the maker by a bank that had discounted a note drawn for accommodation, it was error to allow evidence of a conversation between the maker and payee, after it had been acquired by the bank, and in the absence of the bank's representative.—First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

[m] Rights of mortgagee cannot be prejudicially affected by ex parte statements or admissions of mortgagor made after execution of mortgage.—Silva v. Serpa, 86 Cal. 245, 24 Pac. 1013.

[n] Declarations of a grantor in his own favor, made after he had parted with his interest in land, are inadmissible to affect the title of the grantee.—Ord v. Ord, 99 Cal. 523, 34 Pac. 83.

[o] Statements tending to prove that the conveyance was made to hinder, delay and defraud creditors, made by the debtor after he has parted with the title to the property, are not admissible in evidence to impeach the title of his grantee.—Ross v. Wellman, 102 Cal. 1, 36 Pac. 402.

[p] After the execution of a deed in form absolute, the grantor's declarations are inadmissible to show it a mortgage.—Hyde v. Buckner, 108 Cal. 522, 41 Pac. 416.

[pq] Declarations of grantor cannot be received to impeach his title conveyed two years before.—Cook v. Cockins, 117 Cal. 156, 48 Pac. 1025.

[q] Declarations of a seller concerning the sale are inadmissible against the buyer, where made after the sale, when not in possession of the property, and when the buyer was not present.—Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110.

[r] In a suit for specific performance of a land contract, involving the reformation of the description in a lost deed, its contents cannot be shown by declarations of the grantor made after execution, as to what land he had conveyed.—Nicholson v. Tarpey, 124 Cal. 442, 57 Pac. 457.

[s] Declarations of an owner of land in disparagement of his title are admissible in evidence against him and his grantees while the legal title remains in him, but are inadmissible where made after he has parted with his title.—Frink v. Roe, 7 Pac. 481.

§ 222. —— Statements Made After Conveyance but Before Transfer of Possession.

[a] Declarations of a vendor concerning the transaction after the sale was made and the property delivered so as to pass the title is, as a general rule, inadmissible, and is never to be received, unless it appears that the vendor's declarations were made while in possession of the property with the knowledge or consent, express or implied, of the vendee.—Cahoon v. Marshall, 25 Cal. 197.

[b] Declarations of a grantor of land, being admissible against the grantee only when made "while holding the title" (Code Civ. Proc., sec. 1849), are not admissible when made after the grant, though the grantor be still in possession of the property.—Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

§ 223. —— —— Showing Fraud.

[a] Where, in an action between a creditor and the purchaser of property alleged to have been fraudulently conveyed, it appeared that there was no immediate delivery after the sale, statements of the vendor both before and after the sale were competent to show his fraud.—Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114.

[b] In an action by a creditor of the grantor in a secret, unrecorded deed, conveying realty to the grantor's wife, to set aside such deed as fraudulent, evidence tending to show that the grantor was allowed to retain possession of such property, and of his acts and declarations as to the character of such possession, made after the execution of such deed, but while still in possession of such property, is admissible, as to the res gestae of the fraud may be considered to be in progress so long as the grantor retains such possession.—Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 Pac. 967.

§ 224. Statements as to Nature or Validity of Conveyance.

[a] Evidence of declarations of a seller that he had made the sale to protect his property against creditors is not admissible against the buyer.—Banning v. Marleau, 121 Cal. 240, 53 Pac. 692.

§ 225. Statements of Persons Since Deceased.

[a] Under Code of Civil Procedure, section 1853, providing that the declarations of a

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decedent, having sufficient knowledge of the subject, against his pecuniary interest, are also admissible against his successor in interest, declarations of a deceased father to the effect that a conveyance made to him by one of his sons was intended as security are admissible against the father's administrator.—Harp v. Harp, 136 Cal. 421, 69 Pac. 28.

[b] In an action against the estate of a deceased person to enforce specific performance of a contract made by the decedent in his lifetime, to adopt the son of another person, and to accept him as sole heir of his property, the declarations of the decedent against his interest are admissible in favor of the plaintiff in support of the alleged contract.—Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

[c] Under Code of Civil Procedure, section 1853, certain declarations by decedent, made against his interest, held admissible against his administratrix.—Stoddard v. Newhall, 1 Cal. App. 111, 81 Pac. 666.

C. BY AGENTS OR OTHER REPRESENTATIVES OR PERSONS INTERESTED.

STATEMENTS BY THIRD PERSONS IN GENERAL, § 226.
BY ADJOINING OWNERS AS TO BOUNDARIES, § 226½.
COMPETENCY OF ADMISSIONS OF AGENTS OR EMPLOYEES IN GENERAL, § 227.
—— AUTHORITY IN PARTICULAR INSTANCES, § 228.
—— STATEMENTS MADE AFTER TRANSACTION OR EVENT, § 229.
—— TO SHOW EXISTENCE OR TERMS OF CONTRACT, § 230.
ADMISSIONS BY CORPORATE OFFICERS OR AGENTS, § 231.
ATTORNEYS, § 232.
HUSBAND AND WIFE, § 233.
—— STATEMENTS MADE AFTER TRANSACTION OR EVENT, § 234
PARTNERS, § 235.
—— STATEMENTS MADE AFTER DISSOLUTION, § 236.
TENANTS IN COMMON, § 236½.
CONSPIRATORS AND PERSONS ACTING TOGETHER, § 237.
—— NECESSITY THAT STATEMENT BE MADE IN PURSUANCE OF AND DURING PENDENCY OF CONSPIRACY, § 238.
—— FRAUDULENT CONVEYANCE, § 239.
GUARDIANS, § 240.

§ 226. Statements by Third Persons in General.

[a] Declarations of third persons are inadmissible unless they have a joint interest with the parties or some legal relation exists between them.—Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

[b] Where a note is sent by an indorsee to a bank for collection, statements by another bank, to which the note was sent by the first bank are inadmissible against the indorsee to defeat his title.—Bank of California v. J. L. Mott Iron Works, 113 Cal. 409, 45 Pac. 674.

[c] On the issue of an alleged fraudulent motive for the order of the board of harbor commissioners for the removal of a vessel from a certain wharf, it was error to admit testimony that one K. represented to plaintiff's officers that for two thousand dollars he could obtain from the board a rescission of the order of removal; it not appearing that K. was in any way connected with the board, or that any one of them authorized or knew of his proposal.—Union Transp. Co. v. Bassett, 118 Cal. 604, 50 Pac. 754.

§ 226½. By Adjoining Land Owners as to Boundaries.

[a] Evidence of the declarations of adjoining owners made long prior to the commencement of the action, some of which were made by deceased persons, for the purpose of showing that it was understood between the adjoining owners that a fence between them was not upon the true partition line is admissible, although it is a just caution addressed to the trial court that there is danger of relying upon the declarations of deceased persons when it becomes impossible of contradiction; but the credibility of such evidence is for the consideration of the judge of the court who saw and heard the witnesses.—Peters v. Gracia, 110 Cal. 89, 42 Pac. 455.

§ 227. Competency of Admissions of Agents or Employees in General.

[a] Admissions of an agent, to bind the principal, must constitute part of the res gestae.—Garfield v. Knight's Ferry Water Co., 14 Cal. 35.

[b] Declarations of an agent, while engaged in performing an act within the scope of his authority are evidence against his principal.—Neely v. Naglee, 23 Cal. 152; Ward v. Preston, 23 Cal. 468.

[bc] The declarations of any agent are not admissible in evidence against his principal until the fact of his agency is first proven. Grigsby v. Clear Lake Water Co., 40 Cal. 396.

[c] Where an agent is not acting within the scope of his apparent authority his declarations, or any agreement which he assumes to make for his own benefit, are not admissible in evidence against his principal. Hubback v. Ross, 96 Cal. 426, 31 Pac. 353.

[d] Although the declarations of an agent are not admissible to prove the fact of agency, or the extent of his authority, yet his declarations, at the time of employment of the services of counsel, are admissible to show that counsel were employed on behalf of the principal, and not for himself in his individual capacity.—Swinnerton v. Argo-

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naut Land and Development Co., 112 Cal. 375, 44 Pac. 719.

[e] Admissions of an agent are inadmissible against his principal unless made in regard to a transaction in the course of his agency pending at the time of the declarations.—Herman Waldeck & Co. v. Pacific Coast S. S. Co. (Cal. App.), 83 Pac. 158.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1003-1037; 20 Cent. Dig., cols. 1266-1303, §§ 887-915.

§ 228. —— Authority in Particular Instances.

[a] In an action against an innkeeper to recover for the loss of a valuable package, declarations of the barkeeper of the inn are not admissible, as against defendant, where such declarations are not made in any way in the discharge of his duties as barkeeper.—Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303.

[b] Admission of master binds steamer with same effect as those of owner, when record of vessel discloses no other owner.—Bailey v. The New World, 2 Cal. 370.

[c] The declarations of the master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, are admissible to establish the liability of the owners, in an action against them to recover damages for the destruction of the crops.—Gerke v. California Steam Nav. Co., 9 Cal. 251, 70 Am. Dec. 650.

[d] Declarations of agent whose agency is limited to custody of goods not admissible as to rights of parties.—Hutchings v. Castle, 48 Cal. 153.

[e] In an action for slander for charging plaintiff with being associated with one S. in the theft of cattle, held, that testimony as to conversations between plaintiff's driver and S. were admissible, it appearing that plaintiff had told S. he would report to him through the driver.—Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.

[f] Evidence of what an agent of plaintiff said to the wife of his copartner, on being sent to have the latter sign a notice of dissolution, was inadmissible to contradict plaintiff.—Jepsen v. Beck, 78 Cal. 540, 21 Pac. 184.

[g] Where a lessee agrees to pay the same rent as an adjoining lessee, and the lease of the latter provides for a rent of three hundred dollars per month, but there is a contemporaneous agreement for a rebate, statements made by the lessors' agent on leasing the adjoining store, as to his reason for drawing the lease for three hundred dollars per month, are competent evidence against the lessors.—Corson v. Berson, 86 Cal. 433, 25 Pac. 7.

[h] In an action by a contractor to recover for putting an elevator in defendant's building, in which defendant claimed damages for improper construction of certain pipes, it is error to permit plaintiff to testify that defendant's architect admitted that he gave "instructions to put up the pipes in that manner," where it did not appear that such architect was defendant's agent when the admission was made, nor that it related to a transaction then depending.—Birch v. Hale, 99 Cal. 299, 33 Pac. 1088.

[i] Where, at the instance of the insurer, a member of the board of underwriters, a telegram is sent to the board's agent at the port where an insured cargo was sold, such agent's letter to the board in answer thereto, in regard to the loss and sale, is admissible against the insurer, though it is not entirely responsive to the telegram; it being in the nature of a report to his principal by an agent, and therefore equivalent to admissions by the principal.—Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82.

[j] A letter written by the general agent of a life insurance company to its home office, announcing the death of insured, referring to failure of insured to pay a premium, and stating, "In response to three visits of our collector, he promised to pay the renewal in a few days," is admissible in an action on the policy as a declaration of the general agent in the line of duty.—Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740.

[k] Under Civil Code, section 2295, defining an agent as one who represents another in dealing with third persons, the superintendent of a prune ranch, whose duties are to prepare the prunes for market and to manage the ranch generally, but who is neither the actual nor ostensible agent in the matter of sales, cannot bind his employer by admissions as to the condition of goods sold, notwithstanding Code of Civil Procedure, section 1870, subdivision 5, providing that after proof of agency the act or declaration of the agent within the scope of his agency may be given in evidence.—Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

[l] Where the president of a bank who was also a director acted as its agent in discounting certain notes, declarations by him as to the application of certain payments held admissible as against the bank.—National Bank of Commerce of San Diego v. Schirm (Cal. App.), 86 Pac. 981.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1010; 20 Cent. Dig., cols 1261-1265, § 883.

§ 229. —— Statements Made After Transaction or Event.

[a] Admissions made by an agent after the fact or transaction to which they relate, and

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unconnected with any act of agency, are inadmissible as evidence against the principal. Innis v. The Senator, 1 Cal. 459, 54 Am. Dec. 305.

[b] In an action by a servant against his master for injury caused by the negligence of a fellow-servant, a declaration by defendant's foreman, made after the alleged injury, to the effect that the culpable servant "was a careless man before that, and they knew it, and that the company ought not to have kept him as long as it did," is not admissible to prove defendant's negligence.—Beasley v. San Jose Fruit-Packing Co., 92 Cal. 388, 28 Pac. 485.

[c] Admissions by an alleged agent, relating to a past transaction, are inadmissible in evidence as against the principal, in the absence of any showing of authority in the agent to make them.—Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

[d] Where plaintiff was injured by the breaking of a rope on defendant's schooner, a statement made by the captain, directly after the accident, to the effect that the rope "looked pretty bad," was not admissible as a remark made by a servant or agent within the scope of his employment, since the servant had no authority to make an admission of culpability for such owners after such event.—Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687.

[e] Statements made by a mining superintendent, and also by the fellow-servant of an injured miner, several minutes after the occurrence of the accident, and in response to the injured man's inquiry as to its cause, in which it is attributed to defective machinery, cannot be received as admissions to bind the defendant company.—Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

[f] Where the defense in an action for cutting wood was that plaintiff agreed to pile it for measurement, but failed to do so, and defendant's foreman testified that the wood was not in condition to be measured, it was error to permit a witness called in rebuttal to testify that he had a conversation with said foreman after the suit had commenced, and that said foreman told the witness that the wood could be easily measured, since the declaration of an agent under such circumstances cannot bind his principal.—Mutter v. I. X. L. Lime Co., 42 Pac. 1068.

§ 230. —— —— To Show Existence or Terms of Contract.

[a] In an action for the specific performance of a parol contract made by an agent on behalf of his principal, declarations of such agent, a year or two afterward, with respect to its terms, are inadmissible against his principal.—Clunie v. Sacramento Lumber Co., 67 Cal. 313, 7 Pac. 708.

§ 231. Admissions by Corporate Officers or Agents.

[a] The declarations of the president of a corporation may be received in evidence to show that at the time the corporation purchased land it had actual notice of a mortgage on the same.—Christy v. Dana, 42 Cal. 174.

[b] Where the president of a mining corporation is selected on behalf of his company to point out the mining ground claimed by it, and in pointing it out states that certain ground in view is not claimed by the corporation, his declarations may be offered in evidence against the corporation.—Green v. Ophir Copper etc. Min. Co., 45 Cal. 522.

[c] Where all business relative to the lease and sale of lands is left to the secretary of a corporation, the lessor, his statements to a lessee respecting the lease and the option to buy are admissible in an action by the lessee to compel a conveyance according to the terms of the option.—Abbott v. Seventy-six Land etc. Water Co., 87 Cal. 323, 25 Pac. 693; Tyner v. Seventy-six Land etc. Co., 25 Pac. 694; Shipe v. Seventy-six Land etc. Co., 25 Pac. 694; Abbott v. Seventy-six Land etc. Co., 25 Pac. 694.

[d] In an action by a bank against a corporation for money loaned, the acts and admissions of the latter's financial managers are admissible against it, though such persons are also officers of the bank.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[e] In a suit for foreclosure of a mortgage, which purported to have been given by a certain person and a corporation, statements of such person to the plaintiff, designed to convince the latter that the mortgage was regularly executed by the corporation, and would bind it, are not competent, as against the corporation, to estop it from denying the validity of the mortgage, where there was no evidence that the party making the representations was the sole owner of all the stock of the corporation, as alleged in the complaint.—Relley v. Campbell, 134 Cal. 175, 66 Pac. 220.

[f] Where, in an action against a corporation for services in selling land rendered under a written contract, the corporation's president testifies that there was no contract, and it is alleged that the president had no authority to make such contract, letters by such president to plaintiff long after the contract is alleged to have been made are admissible to rebut the president's testimony and to disprove the allegation.—Pettibone v. Lake View Town Co., 134 Cal. 227, 66 Pac. 218.

[g] Declarations of agents of corporations made in line of duty as such, to principal, are always admissible whether part of res gestae or not.—Knarston v. Manhattan Ins. Co., 140 Cal. 68, 73 Pac. 740.

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FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1016, 1019-1024; 20 Cent. Dig., cols. 1304-1340, §§ 916-936.

§ 232. Attorneys.

[a] A depositary under code, section 1838, is not bound by the admissions of his attorney as to how the loss of the deposit occurred.—Wilson v. Southern Pac. R. R. Co., 53 Cal. 735.

[b] Defendant's attorney, to whom defendant had previously directed plaintiff, made a proposition to plaintiff regarding defendant's making a certain contract, which contract was afterward made between plaintiff and defendant. Held, that evidence as to the conversation had between plaintiff and the attorney was not objectionable on the ground that it tended to show a contract made by the attorney for defendant without latter's authority, since the proposition made in the conversation was merely preliminary to making the contract.—Woods v. Jansen, 130 Cal. 200, 62 Pac. 473.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1024; 20 Cent. Dig., cols. 1344-1348, §§ 945-949.

§ 233. Husband or Wife.

[a] In an action for a homestead, the declarations of the alleged wife are competent to prove that the plaintiffs are not married. Poole v. Gerrard, 9 Cal. 593.

[b] In an action against a husband and wife, where issue is joined on the question of an abandonment of a homestead by the defendants, declarations of the husband in regard to an abandonment are admissible, as part of the res gestae, and as showing an intent to abandon.—Brennan v. Wallace, 25 Cal. 108.

[c] The admissions of a wife made in the presence of her husband, and not denied by him in a conversation relating to her separate property, are competent evidence in an action by the devisees of the husband involving her title to the property.—Ingersoll v. Truebody, 40 Cal. 603.

[d] Declarations of husband after deed of gift are admissible against wife.—Wormouth v. Johnson, 58 Cal. 621.

[e] What the wife says about the ownership of realty, in the absence of her husband, does not bind him in a suit by another to quiet title to the property.—Svetinich v. Sheean, 124 Cal. 216, 71 Am. St. Rep. 50, 56 Pac. 1028.

[f] Declarations of a wife made during her husband's life impeaching his title held not admissible against her claim to title based on his having had title.—Hoyt v. Zumwalt (Cal. Sup.), 86 Pac. 600.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1028; 20 Cent. Dig., cols. 1351-1365, §§ 953-964.

§ 234. —— Statements Made After Transaction or Event.

[a] Where a husband bought land and caused a deed of gift to be made by vendor to his wife, held that his declarations, made after the execution of the deed, to the effect that the title was held for the benefit of a third person, who furnished the purchase money, were admissible.—Wormouth v. Johnson, 58 Cal. 621.

§ 235. Partners.

[a] A sued a sheriff for attaching goods claimed by him as his own, and the sheriff defended by alleging a conveyance of these goods from the defendant in the attachment to A, which was fraudulent and void as to creditors. Held, that the declarations, and acts of one M, appearing by the plaintiff's admissions to be a general partner of A, and proved to have been a party to this transfer, could be given in evidence to prove the character of the transaction.—Mamlock v. White, 20 Cal. 598.

[b] On an issue in an action against a firm as to whether an intervener owned the proceeds of a note and mortgage attached as the property of a defendant, who denied that he was a member, and which note and mortgage she claimed he had assigned to her, declarations made by the other defendants as to the partnership affairs, who composed the firm, the amount of the investments of each in the business, and the object of the member in question in disposing of the note and mortgage to intervener, were admissible. Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

[c] After a prima facie case as to partnership is made, the admissions and conduct of the several partners, in the course of the partnership business are admissible against the others.—Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

[d] Declarations made by one of firm of plaintiffs are admissible against the firm.—Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

[e] Under Code of Civil Procedure, section 1870, subdivision 5, certain evidence as to transactions of one of the members of a firm held admissible as against the heirs of the other.—Dondero v. O'Hara (Cal. App.), 86 Pac. 985.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1031-1034; 20 Cent. Dig., cols. 1365-1380, §§ 965-975.

§ 236. —— Statements Made After Dissolution.

[a] Admissions made by a partner after the dissolution of the partnership concerning the partnership business are not admissible as evidence to charge the remaining partners. Burns v. McKenzie, 23 Cal. 101.

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§ 236½. Tenants in Common.

[a] Declaration of a tenant in common is admissible to show a claim of title and to rebut abandonment.—Lick v. Diaz, 37 Cal. 445.

[b] The acts and declarations of one cotenant in the presence and hearing of the other, as to their relative rights, is competent evidence against the one claiming under the other.—Estate of Bauer, 79 Cal. 304, 21 Pac. 833.

§ 237. Conspirators and Persons Acting Together.

[a] After competent evidence of conspiracy, declaration of one conspirator accompanying act in furtherance of common design, while conspiracy is rife, is competent against confederate.—Barkly v. Copeland, 86 Cal. 492, 25 Pac. 1.

[b] In action for malicious prosecution, where it appears that plaintiff was not only a member of the association of jumpers, but was actively participating in what was being done, the admission of testimony showing the acts and declarations of members and employees of the association, of the intention of the association to take possession of the land in which defendant was interested, is proper, although the declarations were made without the plaintiff's hearing.—Lacey v. Porter, 103 Cal. 597, 37 Pac. 635.

[c] Where there has been a colorable transfer of personal property, with no visible change of possession, and there is satisfactory proof of a conspiracy to defraud the creditors of the vendor, his declarations, both antecedent and subsequent to the transfer, are competent to establish the fraud.—Banning v. Marleau, 133 Cal. 485, 65 Pac. 964.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1025-1028; 20 Cent. Dig., cols. 1396-1407, §§ 994-1002.

§ 238. —— Necessity that Statement be Made in Pursuance of and During Pendency of Conspiracy.

[a] In an action for slander in charging plaintiff with associating with another in a theft of certain cattle, declarations made by such other after the alleged transaction was completed are inadmissible to show that plaintiff was associated with him.—Barkly v. Copeland, 25 Pac. 405, reversing (1890) 86 Cal. 483, 25 Pac. 1.

§ 239. —— Fraudulent Conveyances.

[a] Where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the declarations of the vendor are admissible, and a fortiori his sworn statement.—Howe v. Scannell, 8 Cal. 325.

§ 240. Guardians.

[a] Where in a suit to terminate a trust created by will the defendants were minors and appeared by guardian, the minors were not bound by admissions of their guardian to their prejudice.—Kidwell v. Ketler, 146 Cal. 12, 79 Pac. 514.

D. PROOF AND EFFECT.

PRELIMINARY EVIDENCE IN GENERAL, § 241.
DETERMINATION OF QUESTION OF ADMISSIBILITY, § 242.
MODE AND REQUISITES OF PROOF OF ADMISSIONS, § 243.
EXPLANATION OR LIMITATION, § 244.
—— PLEADINGS, § 245.
CONSTRUCTION, CONCLUSIVENESS AND EFFECT IN GENERAL, § 246.
—— ADMISSIONS AS TO VALUE, § 247.
—— JUDICIAL ADMISSIONS, § 248.
—— AFFIDAVITS, § 249.
—— ADMISSIONS MADE THROUGH IGNORANCE OR MISTAKE, § 250.
—— WEIGHT AND CREDIBILITY, § 251.

§ 241. Preliminary Evidence in General.

[a] Before the declarations of an agent are admissible to bind his principal the fact of the agency must be established. Evidence of the declarations of the person claimed to be such agent are inadmissible to establish the agency.—Smith v. L. & L. & G. Ins. Co., 107 Cal. 432, 40 Pac. 540.

[b] Evidence held to establish a prima facie case of the existence of a partnership warranting admission of declarations of one of the partners as such.—Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1037; 20 Cent. Dig., cols. 1408-1422, §§ 1003-1012.

§ 242. Determination of Question of Admissibility.

[a] Whether a prima facie case as to partnership has been made, so as to justify admission of the declarations of partners, is for the court to determine in a trial before a jury.—Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 1422-1424, §§ 1013-1018.

§ 243. Mode and Requisites of Proof of Admissions.

[a] An admission of the defendant, made in his testimony given at the preliminary examination of the plaintiffs after their arrest by him, may be proved by the evidence of anyone who heard the testimony, and need not be proved by the shorthand notes of the examination.—Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380.

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[b] In an action to foreclose a mechanic's lien, a witness testified that he was a stenographer, and that the writing handed him was a transcript from his shorthand notes, which he took at a certain date, of defendant's testimony, and that it was correct, to the best of his recollection. The declarations of defendant contained in said transcript were then offered in evidence "as an admission in the case." Held, that the evidence, being offered, not as a deposition, but as an admission of a party to the suit, was admissible.—Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312.

[c] Where in a will contest a witness testified to a conversation between himself and testatrix, it was error to refuse to allow him to give the statements made by him, and to confine him to what was said by testatrix.—Arnold's Estate, In re, 147 Cal. 583, 82 Pac. 252.

[d] Where the stenographer who took a deposition was called to testify to deponent's statements, it was error to refuse to allow her to testify to the questions in answer to which the statements of deponent were made. Arnold's Estate, In re, 147 Cal. 583, 82 Pac. 252.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1037; 20 Cent. Dig., cols. 1424-1426, §§ 1019-1021.

§ 244. Explanation or Limitation.

[a] Whole conversation must be taken together, but the jury are not bound to give the same weight to all parts of it; where the declarations of a party in a conversation are given in evidence they are at liberty to consider how much, under the circumstances, is entitled to credit.—Thrall v. Smiley, 9 Cal. 529.

[b] A defendant in an action on a promissory note, the genuineness of which is denied, may testify concerning a conversation about the note between himself and another person, though no representative of the payee was present, if such person has testified about the same conversation as a witness for the payee, the plaintiff in the action.—First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

[c] Entire admission must be taken together.—Granite G. M. Co. v. Maginniss, 118 Cal. 134, 50 Pac. 269.

[d] One's plea of guilty on a prosecution for assault and battery can be received in a civil action therefor only as an admission; and, the justice of the peace before whom the prosecution was had having testified thereto for plaintiff, though as he had written it down in his docket, defendant may cross-examine him to prove the entire statement made in connection therewith, to show that it was not an unqualified admission.—Risdon v. Yates, 145 Cal. 210, 78 Pac. 641.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 1426-1446, §§ 1022-1027.

§ 245. —— Pleadings.

[a] On plaintiff's cross-examination as to the value of certain mining stock, a paragraph of a complaint verified by him in another suit was admitted, because it contained an averment as to such value, and plaintiff was allowed to explain fully what he meant by the averment. On redirect examination, plaintiff's counsel offered the entire complaint, which offer was refused, though the court consented to receive any other portion of the complaint which would explain or modify the part admitted. Held no error.—Loftus v. Fischer, 113 Cal. 131, 45 Pac. 1058.

§ 246. Construction, Conclusiveness and Effect in General.

[a] The admission of the genuineness and due execution of a contract, a copy of which is annexed to an answer, by a failure to file an affidavit denying it, is an admission that the contract is what it purports on its face to be, and that the matters recited in it are true, and that it was executed and delivered by the parties who signed it, and in the capacity in which they appear to have acted. Sloan v. Diggins, 49 Cal. 38.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1042; 20 Cent. Dig., cols. 1447-1450, § 1028.

§ 247. —— Admissions as to Value.

[a] Where a party in an action for the use of property has made admissions as to the value of the use for which recovery is sought, such admissions will be conclusive against him unless satisfactorily explained.—Harrison v. Peabody, 34 Cal. 178.

[b] Evidence of admissions by deceased that in a settlement with one who owned property jointly with him he had allowed such person a certain sum to be paid plaintiff for services rendered by him in trying to effect a sale of the property, is insufficient to establish the value of services rendered by plaintiff for decedent himself.—Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541.

§ 248. —— Judicial Admissions.

[a] A fact admitted on the hearing, and acted on by the court, cannot thereafter be denied.—Hearne v. De Young, 111 Cal. 373, 43 Pac. 1108.

§ 249. —— Affidavits.

[a] The declaration of a deceased grantor in an affidavit in an action against him by a third person, that a deed was not sham or without consideration or in fraud of creditors, was not conclusive in an action by the grantor's heir to set aside the deed because fraudulently obtained by the grantees, where the affidavit was made in the presence of the grantees, and alluded to contemporaneous

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writing executed by them, of which they said nothing in their testimony.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

§ 250. —— Admissions Made Through Ignorance or Mistake.

[a] In an action for personal injuries resulting from the overturning of defendant's stage-coach, defendant put in evidence a writing signed by plaintiff after the accident, in which she stated that she did not blame defendant or his driver for the injury. Plaintiff testified that the paper was signed at a time when she was unable to comprehend its meaning. Held, that the statement was admissible to enable the jury to weigh plaintiff's evidence, and determine her credibility, and not in mitigation of damages.—Bush v. Barnett, 96 Cal. 202, 31 Pac. 2.

§ 251. —— Weight and Credibility.

[a] Where plaintiff's case depends entirely on oral testimony as to transactions with his deceased principal, defendant's intestate, and the testimony is such as to make direct contradictions impossible, a proper occasion does not exist for charging that plaintiff's oral admissions inconsistent with his cause of action should be received with caution by the jury, within the meaning of Code of Civil Procedure, section 2061, subdivision 4, requiring this charge to be given on "proper occasions."—Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

[b] Written admissions of a party before any controversy, as to what a contract was, outweigh his oral testimony in contradiction thereof, given after the controversy arose.—Moore v. Grayson, 132 Cal. 602, 64 Pac. 1074.

[c] Under the express provisions of Code of Civil Procedure, section 2061, evidence of oral admissions of a party is to be viewed with caution.—Humphrey v. Pope (Cal. App.), 82 Pac. 223.

VIII. DECLARATIONS.

A. Nature, Form and Incidents in General, §§ 252-265.

B. As to Pedigree, Birth and Matters of General Public Interest, §§ 266-271.

C. Proof and Effect, §§ 272, 273.

A. NATURE, FORM, AND INCIDENTS IN GENERAL.

NATURE AND GROUNDS FOR ADMISSION—IN GENERAL, § 252.
STATEMENTS SHOWING INTENT, MOTIVE OR NATURE OF ACT, § 253.
—— DECLARATIONS BY PERSONS SINCE DECEASED, § 254.
SELF-SERVING DECLARATIONS IN GENERAL, § 255.
—— STATEMENTS TO ATTORNEYS, §§ 256, 257.
—— STATEMENTS AS TO INTENT, MOTIVE OR NATURE OF ACT, § 258.
—— BY THIRD PERSONS IN GENERAL, § 259.
—— BY PERSONS SINCE DECEASED, § 260.
DECLARATIONS, AGAINST INTEREST, § 261.
DECLARATIONS OF PERSON IN POSSESSION OR CONTROL AS TO TITLE OR POSSESSION, § 262.
—— REAL PROPERTY, § 263.
DECLARATIONS AS TO BOUNDARIES, § 264.
BY PERSONS SINCE DECEASED, § 265.

§ 252. Nature and Grounds for Admission—In General.

[a] B made a deed of land to the defendant, but misdescribed the premises, and his grantee went into possession. Afterward his heirs conveyed the same land to the plaintiff. Held, that evidence of B's declaration and conduct was admissible to show the mistake alleged by the defendant.—Lestrade v. Barth, 19 Cal. 660.

[b] Identity of person making declarations, must appear to make them admissible.—White v. Moses, 21 Cal. 43.

[c] Declarations made by one not proved to be plaintiff's agent and made out of plaintiff's presence are not admissible.—Bell v. Staacke, 141 Cal. 202, 203, 74 Pac. 774.

[d] In an action for rent, conversations between plaintiff and the person who had formerly rented the premises to defendant, and between them and third persons, relative to rental thereof, are not admissible against defendant, who was not present at such conversations, and knew nothing about them.—Ambrose v. Hyde, 145 Cal. 555, 79 Pac. 64.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1146; 20 Cent. Dig., cols. 1482-1490, §§ 1051-1060.

§ 253. Statements Showing Intent, Motive or Nature of Act.

[a] Where plaintiff sought to enjoin the enforcement of a deficiency judgment entered by default, alleging that he had been assured by the mortgagee that no deficiency judgment would be taken, a conversation between plaintiff and another was admissible, though the mortgagee was not present, as it explained the plaintiff's failure to appear.—Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139.

[b] Conversations, in the absence of plaintiff, between defendant and others, as to the purpose of a deed of plaintiff's land to defendant, were incompetent. Judgment (1902) 70 Pac. 472, reversed on rehearing. Bell. v. Staacke, 141 Cal. 186, 74 Pac. 774.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1175, 1184-1188; 20 Cent. Dig., cols. 1492-1500, §§ 1063-1067.

§ 254. —— Declarations by Persons Since Deceased.

[a] Under a petition to remove an administrator upon the ground that the deceased had, at the time of his death, a large sum

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of money, which came into the possession of the administrator, or of which he had knowledge, which he failed to include in his inventory, evidence of declarations made by the deceased in respect to the value of his estate, and that he had a large sum of money in his house, is not admissible against the administrator, to prove the ownership, or possession of the money.—Estate of Welch, 110 Cal. 605, 42 Pac. 1089.

§ 255. Self-serving Declarations in General.

[a] In an action by a railroad superintendent against the company to recover the value of his services as superintendent, where the company claimed that plaintiff's salary had been fixed at a stated sum, a conversation between plaintiff and directors of the company is admissible to show that he dissented from the amount of salary proposed by the directors, and did not consider his salary as fixed at such sum.—Bee v. San Francisco etc. R. Co., 46 Cal. 248.

[b] Declarations of a party to an action, in his own behalf, made in the absence of the other party, and forming no part of the res gestae, are not admissible.—Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778.

[c] Declarations of party cannot be used in his own favor.—Hausman v. Hausling, 78 Cal. 286, 20 Pac. 570.

[d] On an issue as to the amount of wages to be paid for services rendered, testimony of a partner of defendant as to what was told him by defendant as to the amount of wages paid is inadmissible, under Code of Civil Procedure, section 1832.—Gardner v. Dennison, 106 Cal. 190, 39 Pac. 526.

[e] On an issue as to whether a tenant sued in unlawful detainer gave oral notice of his intention to renew the term for another year, as provided in the lease, a communication, written by him to the lessor after the end of the first term, stating that the lessor is thereby notified, "as you have been informed," of the lessee's intention to remain is inadmissible, as being a declaration of the lessee in his own interest.—Shamp v. White, 106 Cal. 220, 39 Pac. 537.

[f] The statements of a party, made without the hearing or knowledge of his adversary, are not competent evidence in his own behalf to prove the facts stated.—Rogers v. Schulenberg, 111 Cal. 281, 43 Pac. 899.

[g] Where the issue in an action on a note is as to the execution of, and consideration for, the note, and it is shown that defendant took the money and walked away without saying anything, a statement made at the time by plaintiff, and in the presence of defendant, that he was loaning defendant the money which he was counting out to him, is admissible, under Code of Civil Procedure, section 1870, which provides that evidence may be given of an act or declaration of another in the presence and within the observation of a party, and the conduct of the party in relation thereto.—Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160.

[h] A private letter, of which plaintiff had no knowledge, was inadmissible in evidence against him as to the purpose of a deed of his land. Judgment (1902) 70 Pac. 472, reversed on rehearing.—Bell v. Staacke, 141 Cal. 186, 74 Pac. 774.

[i] The statement of a wife that land was hers was inadmissible in evidence in an action by her husband against her administrator to quiet title to the land, the declaration not being against her interest.—Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108.

[j] In an action by the first mortgagee of crops to recover the amount of his lien from a second mortgagee, who has sold them, a statement by plaintiff that it was understood that the crops should be sent to defendant subject to plaintiff's lien is competent to rebut an allegation that plaintiff has surrendered his lien.—Fette v. Lane, 37 Pac. 914.

[jk] In an action by the assignee of a note given by a corporation to its president, declarations of the president as to the amount due at the time of the transfer are no admissible against the corporation.—Love v. Anchor Raisin Vineyard Co., 45 Pac. 1044.

[k] Code of Civil Procedure, section 1845, provides that a witness can testify to those facts only which he knows of his own knowledge. Held that, in an action for breach of marriage promise, the admission of plaintiff's declarations to third parties, who were not invited to attend the wedding, and before any wedding day had been set, that plaintiff and defendant intended to marry, constituted prejudicial error.—Liebbrandt v. Sorg, 65 Pac. 318.

[l] In an action against a corporation for salary as secretary, defended on the ground that the claim therefor had been waived by special agreement, a statement prepared by a bookkeeper of defendant at plaintiff's request containing entries of amounts of salary due on the debit side of the ledger in favor of plaintiff was a self-serving declaration, whose admission was prejudicial error. Ryan v. Pacific Axle Co., 136 Cal. xx, 68 Pac. 498.

FOR AUTHORITIES FROM OTHER STATES:

Declarations of a party, when admissible in his favor: 93 Am. Dec. 279, note. See, also, 16 Cyc. 1040, 1202-1206; 20 Cent. Dig., cols. 1501-1546, §§ 1068-1104.

§§ 256, 257. —— Statements to Attorneys.

[a] Declaration of party to his attorney in absence of adverse party is inadmissible. Schultz v. McLean, 76 Cal. 609, 18 Pac. 775.

[b] The attorney of the defendant cannot be permitted to testify to statements made

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to him by the defendant in the absence of the plaintiffs. Such declarations are self-serving and inadmissible.—Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380.

§ 258. —— Statements as to Intent, Motive or Nature of Act.

[a] In an action to compel defendant to convey to plaintiff an interest in a mining claim which defendant had bought under foreclosure of his lien on said claim, plaintiff's evidence was that defendant had agreed to buy an interest in the claim, and a deed of such interest had been given by plaintiff to defendant, and that the latter had tried to borrow money on it. Defendant testified that the deed was given as a further security for a debt due him, and the court found that the deed was made to enable defendant to borrow money on the mine. Letters from defendant to a third person were introduced to explain why he attempted to mortgage the claim. Held, that their admission was prejudicial error, as, under Code of Civil Procedure, section 1870, subdivision 2, a party cannot strengthen his case by his own declarations. They may be used against him, but not for him.—Hausman v. Hauslin, 78 Cal. 283, 20 Pac. 570.

[b] Where defendants authorized plaintiff to sell certain real estate for them at any time within a year, and agreed, for a valuable consideration, to pay a commission if the sale should be effected in any way during that time, testimony as to conversations between defendants as to their intentions in regard to erasing that part of the contract referring to commissions being paid if the land was sold in any way is incompetent, as hearsay, it not being shown that plaintiff was present at the time of the conversations.—Crane v. McCormick, 92 Cal. 176, 28 Pac. 222.

§ 259. —— By Third Persons in General.

[a] In an action on a contract whereby defendant agreed to take charge of plaintiff's sheep, and plaintiff was to furnish herders, who were under defendant's supervision, the declarations of one of the herders was inadmissible in defendant's favor, on account of the declarant being his servant.—Dennis v. Belt, 30 Cal. 247.

§ 260. —— By Persons Since Deceased.

[a] The declarations of a claimant of land which is in the possession of an adverse holder, made to a third party in his own favor, are inadmissible in an action brought by his heirs to recover the land.—Rice v. Cunningham, 29 Cal. 492.

[b] Declarations of one, since deceased, not against, but in support of his own interest, are not admissible in favor of those claiming rights which the declarations would maintain. Poorman v. Miller, 44 Cal. 269.

[c] The administrator of an estate, who brings an action against one claiming land adversely to the estate, to quiet the title thereto, and to obtain a conveyance thereof to the estate, cannot introduce in evidence the declarations of his intestate, made during his lifetime, to strengthen his own claim of title.—Fischer v. Bergson, 49 Cal. 294.

[d] In an action to cancel a release of mortgage, executed by plaintiff's intestate, on the ground of fraud and mistake, evidence of declarations made by such intestate after the execution of such release is inadmissible. Stephenson v. Hawkins, 67 Cal. 106, 7 Pac. 198.

[e] The self-serving declarations by the decedent, made outside of the presence of the plaintiff, that he was only the guardian of the plaintiff, are not admissible as evidence for the defendants.—Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

[f] Declarations of decedent, not against interest, relative to a transaction with defendant, are not, in an action by her administrator, admissible in his favor.—Bedell v. Scoggins, 40 Pac. 954.

[g] In an action against an administrator to recover money alleged to have been deposited with the intestate it is incompetent to prove by intestate's clerk the contents of a lost book in which witness entered, at intestate's dictation, memoranda of amounts lost by the latter to plaintiff at poker; such memoranda being declarations in intestate's interest, the effect of which would be to avoid the debt.—Frank v. Pennie, 117 Cal. 254, 49 Pac. 208.

§ 261. Declarations Against Interest.

[a] Declaration of grantor, against interest, is admissible.—Byrne v. Reed, 75 Cal. 281, 17 Pac. 201; Burlingame v. Rowland, 77 Cal. 318, 19 Pac. 526.

[b] Though an absolute deed, intended as such, cannot be changed into a mortgage by the subsequent oral declarations of the grantee, his subsequent declarations are admissible to show that at the time the deed was made it was intended merely as security.—Harp v. Harp, 136 Cal. 421, 69 Pac. 28.

[c] In a suit to cancel a land contract, evidence that the vendee stated that he gave his assignee a duplicate of the contract when he assigned his interests therein, held inadmissible as a declaration against interest under Code of Civil Procedure, section 1870. Womble v. Wilbur (Cal. App.), 86 Pac. 916.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1217-1222; 20 Cent. Dig., cols. 1546-1550, §§ 1105-1107.

§ 262. Declarations of Person in Possession or Control as to Title or Possession.

[a] Declarations of a purchaser are admissible to show for whose benefit it was made. Tracy v. Colby, 55 Cal. 67.

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[b] In an action to enforce a trust, declarations of the alleged trustee as to the character in which she held the property are admissible in corroboration of the testimony of plaintiff's witnesses.—Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171.

[c] Upon the issue of whether money deposited by a deceased married woman in her own name is separate or community property, declarations made in her will without the knowledge of her husband are not admissible. Rowe v. Hibernia Savings etc. Soc., 134 Cal. 403, 66 Pac. 569.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1166-1174; 20 Cent. Dig., cols. 1551-1579, §§ 1108-1120.

§ 263. —— Real Property.

[a] In ejectment, acts and declarations of defendants, claiming by adverse possession, respecting his claim, at any time while in possession, before commencement of the action, whether within or after five years after the commencement of his possession, are admissible, as tending to show the character in which he claimed during the whole time. Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

[b] The declarations of a party while in possession of land, stating the nature, character, or extent of the possession which he claims, and the person under whom he holds, may be given in evidence as a part of the res gestae, accompanying the act of possession and explanatory of it.—Phelps v. McGloan, 42 Cal. 298.

[c] On the trial of an action to have certain premises declared a public street the relator offered to prove certain declarations by predecessors in title of the defendant (before any conveyance by them) to the effect that the premises in controversy were a public street, but the evidence was excluded by the court. Held, the evidence was admissible.—People ex rel. Harris v. Blake, 60 Cal. 497.

[d] Declarations of one in actual possession of land, showing that he claims to be sole owner, are admissible on an issue of adverse possession, as tending to show the character of the possession.—Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936.

[e] Where, in an action to recover real estate between parties claiming under different deeds from a common source, plaintiff claimed that defendants' claim was, in legal effect, a mere mortgage to secure a debt, declarations made by the grantor of such deed at the time of the transaction and subsequent thereto were admissible on such issue. Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957.

§ 264. Declarations as to Boundaries.

[a] Evidence of the declarations of an owner of land, not in possession, is not admissible to prove its boundary line.—Sneed v. Osborn, 25 Cal. 619.

[b] In ejectment, involving the boundary of lands of coterminus owners, it is error to exclude the declarations of the common grantor, made while the owner of both tracts, as to the location of the line between them. Sharp v. Blankenship, 79 Cal. 411, 21 Pac. 842.

[c] Declarations of a grantor as to the boundaries of the land are not admissible in favor of the grantee as against persons not claiming under the grantor.—Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159.

[d] Declarations made by a party to a boundary agreement, subsequent thereto, that the location was subject to future correction, were not against his interest, and, not being shown to have been uttered in the presence of the other party or his successors in title, were properly excluded in an action concerning the boundary.—Thaxter v. Inglis, 121 Cal. 593, 54 Pac. 86.

[e] Statements of a former owner of land, and his acts in putting in stakes on an alleged boundary line, are unavailing to establish the boundary, where the adjoining owner was not present, nor had any knowledge of such acts.—Borchard v. Eastwood, 133 Cal. xix, 65 Pac. 1047.

[f] In an action between a lessee and the owner of adjoining land, involving boundary, declarations of the lessor in his own favor are not admissible for the lessee.—Western Union Oil Co. v. Newlove, 145 Cal. 772, 79 Pac. 542.

FOR AUTHORITIES FROM OTHER STATES:

Proof of boundaries by declarations and other hearsay testimony: 60 Am. Rep. 589, note.

Declarations admissible to prove boundaries: 36 Am. Rep. 749, note. See, also, 16 Cyc. 1172, 1236; 20 Cent. Dig., cols. 1580-1595, §§ 1121-1134.

§ 265. —— By Persons Since Deceased.

[a] Hearsay from qualified and disinterested persons since deceased is admissible upon questions of ancient boundary, public or private.—Morton v. Folger, 15 Cal. 279; Comwell v. Culver, 16 Cal. 423.

[b] The rule that hearsay evidence as to questions of ancient boundaries is admissible applied, so as to render admissible in one action the deposition of a deceased surveyor who surveyed the land and made a map thereof, which deposition was taken in another action, and contained the surveyor's declarations as to the boundaries of the land. Morton v. Folger, 15 Cal. 275.

B. AS TO PEDIGREE, BIRTH AND MATTERS OF GENERAL PUBLIC INTEREST.

PEDIGREE AND RELATIONSHIP—IN GENERAL, § 266.
AGE, § 266½.

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ENTRY IN FAMILY BIBLE AS EVIDENCE OF AGE, § 267.
MODE AND FORM OF DECLARATION, § 268.
PUBLIC BOUNDARIES, § 269.
—— GENERAL REPUTATION, § 270.
—— KNOWLEDGE AS TO SUBJECT MATTER AND INTEREST OF DECLARANT THEREIN, § 271.

§ 266. Pedigree and Relationship—In General.

[a] A case where age is the issue is not a case of pedigree within Code of Civil Procedure, part 4, section 13, allowing entries in family Bibles as evidence of pedigree. People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

[b] Under Code of Civil Procedure, section 1852, providing that the declaration of a member of a family who is a decedent is admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible, where it was shown that a child was a member of a decedent's family, the declarations of the decedent were admissible to show that he was the father of such child.—Heaton's Estate, In re, 135 Cal. 385, 67 Pac. 321.

[c] Code of Civil Procedure, section 1870, subdivision 11, providing that common reputation existing previous to the controversy is admissible in cases of pedigree, construed in connection with section 1852, providing that the declaration, act, or omissions of a member of a family who is dead or out of the jurisdiction is admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible, does not broaden the common-law rule upon the admissibility of common reputation in matters of pedigree, and hence makes admissible only the common reputation in the family of the party whose pedigree is in controversy. Heaton's Estate, In re, 135 Cal. 385, 67 Pac. 321.

[d] Declarations of a deceased person, bound by a contract of adoption providing that on his death he should give his property to the adopted child, made after the execution of the contract, to the effect that deceased was merely the guardian of the child, are not admissible as tending to prove relationship between the deceased and the child. Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

§ 266½. Age.

[a] A person may testify to his age, though his knowledge is derived from statements of his parents or from family reputation.—People v. Ratz, 115 Cal. 132, 46 Pac. 915.

§ 267. Entry in Family Bible as Evidence of Age.

[a] The family Bible record is admissible in evidence to show a child's age, when it is proved that the book is the family Bible and the handwriting or authorship of the entries need not be proved.—People v. Ratz, 115 Cal. 132, 46 Pac. 915.

[ab] An entry in a family Bible, made by a mother, is not competent evidence to prove the age of her child, when the mother is living, in view of Code of Civil Procedure, part 4, section 4, making the written declaration of a deceased person admissible to prove the date of birth.—People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

[b] On the question of age, record in family Bible is admissible.—People v. Slater, 119 Cal. 620, 51 Pac. 957.

§ 268. Mode and Form of Declaration.

[a] Declarations made by the testator in his will are competent evidence, after his death, tending to prove his marriage and the legitimacy of his children, where the wife and children are devisees, and, in the absence of contradictory evidence, prove such marriage and legitimacy.—Pearson v. Pearson, 46 Cal. 609.

[b] Testator's will was competent evidence to show his family relationship.—Russell v. Langford, 135 Cal. 356, 67 Pac. 331.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1234; 20 Cent. Dig., cols. 1616, 1617, § 1154.

§ 269. Public Boundaries.

[a] The location of the boundary line between two counties, being a matter of common interest, may be proved by hearsay evidence.—People v. Velarde, 59 Cal. 457.

§ 270. —— General Reputation.

[a] The boundary line of a county cannot be proved by evidence showing where it was reputed to run by persons living near, unless it is an ancient boundary, or cannot be proved except by parol.—Lay v. Neville, 25 Cal. 545.

§ 271. —— Knowledge as to Subject Matter and Interest of Declarant Therein.

[a] Where a question of boundaries is involved, the declarations of a person deceased, who was in a situation to be acquainted with the matter and was free from interest therein, are admissible, whether the boundary was of general or public interest, or one between the estates of private proprietors.—Morton v. Folger, 15 Cal. 275.

[b] A party offering in evidence reputation to prove an ancient boundary line of a county must confine his proof to declarations of persons having competent knowledge thereof, and who are since deceased.—Lay v. Neville, 25 Cal. 545.

FOR AUTHORITIES FROM OTHER STATES:
See 16 Cyc. 1238; 20 Cent. Dig., col. 1619, § 1161.

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C. PROOF AND EFFECT.

§ 272. In General.

[a] A party calling a witness cannot get the naked declarations of the witness before the jury as independent evidence.—Kennedy, Estate of, 104 Cal. 429, 38 Pac. 93.

[b] The marriage certificate and the record of the baptism of her two sons were sufficient evidence of the relationship between testator and plaintiff's husband to admit in evidence the declarations of the latter that he was the brother of the testator.—Woolsey v. Williams, 128 Cal. 552, 61 Pac. 670.

[c] Where, in an action to quiet title to Monterey pueblo lands conveyed by trustees of the city under a deed dated February 8, 1859, two of the trustees were dead and the third was mentally and physically incapacitated, evidence that the persons who signed the deed as such trustees were commonly reputed to be the trustees of the city at the time was admissible.—City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436.

§ 273. Evidence Preliminary to Admission.

[a] The party offering the declarations of third persons must show their admissibility, by showing the time and circumstances under which they were made; and unless this appears in the record the appellate court will presume they were properly excluded.—Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

[b] A party must be proved to have been in possession before his declarations made at the time are admissible as part of the res gestae, and as explanatory of the possession. Ellis v. Janes, 10 Cal. 456.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 1619, 1620, § 1162.

IX. HEARSAY.

IN GENERAL, § 274.
WHAT CONSTITUTES HEARSAY, § 275.
—— STATEMENTS THROUGH INTERPRETERS, § 276.
—— WRITINGS, § 277.
ADMISSIBILITY IN GENERAL, § 278.
EVIDENCE FOUNDED ON HEARSAY, § 279.
—— AS TO REPUTATION, § 280.
VALUE SHOWN BY OFFERS TO PURCHASE, § 281.
REPUTE AS TO FACTS, § 282.

In criminal cases. See Criminal Law, §§ 187-192.

§ 274. In General.

[a] Hearsay evidence is incompetent.—Morris v. Lachman, 68 Cal. 112, 8 Pac. 799.

[b] Hearsay evidence is properly stricken out.—Morris v. Lachman, 68 Cal. 112, 8 Pac. 799.

[c] No weaker kind of testimony can be produced than the unsupported testimony of a single person, as to a conversation between himself and a deceased person.—Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

§ 275. What Constitutes Hearsay.

[a] In an action for an undivided interest in land alleged to have been purchased on joint account of plaintiff and defendant, and partly with money borrowed by plaintiff's wife and handed to her by defendant, the statements of plaintiff's wife to a third person to the effect that she was borrowing money to pay defendant were mere hearsay. Bornheimer v. Baldwin, 42 Cal. 27.

[b] On the trial of an action in which the plaintiff sues two defendants as partners, and one of them denies the partnership, the plaintiff cannot, for the purpose of proving the partnership, introduce in evidence affidavits of the defendant who admits the partnership, and of other persons made for the purpose of dissolving an attachment in another action between the two defendants, it not appearing but what the persons who made the affidavits were living and within the jurisdiction of the court, and competent witnesses.—Etchemende v. Stearns, 44 Cal. 582.

[b] Declarations made to a witness by a third person, which tend to discredit the testimony of an adverse witness, are hearsay and inadmissible.—Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381.

[c] What witness heard that defendant said is hearsay.—Morris v. Lachman, 68 Cal. 112, 8 Pac. 799.

[d] In an action by a wife against a judgment creditor of her husband to obtain a judgment decreeing her to be the owner of land bid in by the judgment creditor at sheriff's sale, evidence of a witness as to declarations made to him by the wife as to her ownership of such land was properly refused, where it was not offered for the purpose of showing defendant's knowledge of such declarations.—Riley v. Martinelli, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579, 21 L. R. A. 33.

[e] In an action upon a policy of insurance, brought by the beneficiaries, after the death of the insured person, any declarations of the deceased, not made at the time of procuring the policy, or as part of the res gestae, are hearsay and incompetent evidence.—Yore v. Booth, 110 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808.

[f] Testimony that a third person would not have purchased certain lands unless plaintiff's predecessor made certain representations as to his right to waters thereon is hearsay and inadmissible.—Williams v. Harter, 121 Cal. 47, 53 Pac. 405.

[g] Evidence of statements as to whether a deed to a wife was intended as her separate property, made out of the presence of the husband, is inadmissible against him.—Lewis v. Burns, 122 Cal. 358, 55 Pac. 132.

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[h] Where a witness, asked to state how a conversation between himself and one F. began, and who spoke first, etc., answered that he could not say who spoke first, but the matter came up while they were discussing circumstances attending a request by F.'s father to pay a certain sum to plaintiff's intestate, at which the witness was not present, and that he then incidentally asked her if she had paid such sum, the granting of a motion to strike out evidence of the event narrated, as hearsay, was proper.—Cauhape v. Security Sav. Bank, 127 Cal. 197, 59 Pac. 589.

[i] In a proceeding for the probate of a will by which testatrix left all her property to her attending physician, evidence as to an order a witness stated she knew such physician had left regarding admission of visitors to see testatrix was properly stricken out as hearsay, where she testified that she could not say positively that she heard the physician give any orders on the subject, and did not remember receiving any orders concerning testatrix from anyone.—Wickes' Estate, In re, 139 Cal. 195, 72 Pac. 902.

[j] Where plaintiff's testator sold a certain mining claim sued for, and the vendee assigned his contract to the defendant, a mining corporation, its evidence that during the negotiations the vendee reported to the corporation representations made by testator's agent to him, touching the character of the mine, was inadmissible as hearsay.—Williams v. Long, 139 Cal. 186, 72 Pac. 911.

[jk] The report of a grand jury as to the unsafe condition of a theater is hearsay, and not admissible in an action to rescind a lease of the theater.—Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899.

[k] In an action by the pledgor of water stock to recover damages caused by the act of the pledgee in directing the water company to turn off the water, evidence of certain threats made against plaintiff, not brought home to defendant, held incompetent.—Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

[l] Declarations of maker to indorser of note are hearsay and inadmissible in action on note.—Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

[m] Conversation between mortgagor and purchaser, in the absence of mortgagee, held not competent evidence against the mortgagee.—Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

[n] Plaintiff's testimony that, in answer to his inquiry at the bank for a check which he wished to use as evidence, the cashier told him that he did not think plaintiff could get it, was not hearsay.—Sanborn v. Cunningham, 33 Pac. 894.

[o] In an action for alienation of affections, certain testimony held hearsay.—Humphrey v. Pope (Cal. App.), 82 Pac. 223.

[p] On an issue of insanity, a statement made by witness to her daughter held inadmissible as hearsay.—Dolbeer's Estate (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

§ 276. —— Statements Through Interpreters.

[a] Statements made by either party to an interview through an interpreter are not objectionable as hearsay.—Kelly v. Ning Yung Benev. Assn. (Cal. App.), 84 Pac. 321.

§ 277. —— Writings.

[a] Where a deed was given of a tract of land, reserving a certain portion which had been conveyed to a third party, evidence of the declaration of the grantor and grantee of such portion that a second deed given by the grantor to the grantee of the same premises, but subsequent to the conveyance of a tract, was given in lieu of the first deed, was inadmissible, as being mere hearsay, the declarants not being parties in interest.—Poorman v. Miller, 44 Cal. 269.

[b] In an action by a married woman to recover property as belonging to her, the assessment roll of the county, showing that no separate property has been assessed to her, and that part of the property described in the complaint was assessed to her husband as his own, is inadmissible to prove property in her husband, unless it is shown that she gave in the property as that of her husband, or had some knowledge that it was so assessed.—Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12.

[c] Letter of recommendation is inadmissible to prove good character.—Jones v. Duchow, 87 Cal. 113, 23 Pac. 371, 25 Pac. 256.

FOR AUTHORITIES FROM OTHER STATES:

See Cent. Dig., cols. 1678-1689, §§ 1193-1200.

§ 278. Admissibility in General.

[a] Incompetency cannot be proved by hearsay.—Kidder v. Stevens, 60 Cal. 414.

[b] Declarations of third persons are not admissible in evidence.—Amann v. Lowell, 66 Cal. 306, 5 Pac. 363.

[c] Hearsay evidence is not competent to establish specific fact susceptible of proof by witnesses speaking from their own knowledge.—Pfister v. Dascey, 68 Cal. 574, 10 Pac. 117.

[d] Where fact in controversy is, whether certain things were said or done, and not whether true or false, words and acts are admissible not as hearsay but as original evidence.—Pfister v. Dascey, 68 Cal. 574, 10 Pac. 117.

[e] Hearsay is admissible to prove names of persons.—Berniaud v. Beecher, 71 Cal. 42, 11 Pac. 802.

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[f] Where fact sought to be established is, that certain words were spoken, without reference to the truth or falsity of the words, whether by a party to the action as an admission of fact, or to him as a notice, or under such circumstances as to require action or reply from him, the testimony of any person who heard the statement is original evidence, and not hearsay.—Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

[g] In an action by an attorney to recover fees, conversations between defendant and another attorney, who was associated with plaintiff in the case in which the services were rendered, are inadmissible against plaintiff, such conversations having taken place in the absence of and without the knowledge of plaintiff.—Chapman v. Neary, 115 Cal. 79, 46 Pac. 867.

[h] Declarations of a witness out of court, contradicting his testimony, are admissible only for the purpose of impeachment, and not to prove the truth of the facts stated in said declarations.—Thiele v. Newman, 116 Cal. 571, 48 Pac. 713.

[i] The verdict of the coroner's jury is not admissible to prove that the death of the plaintiff's testator was caused by the negligence of the defendant. The verdict could not bind the defendant, who was not a party to it, and upon the question of negligence the opinion of the coroner's jury was inadmissible hearsay.—Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

§ 279. Evidence Founded on Hearsay.

[a] The court properly ruled out the following question: "Do you know what the general belief was with reference to those mines, as to whether they were abandoned or not?"—Phenix etc. Co. v. Lawrence, 55 Cal. 143.

[b] On the question of the insanity of the testator a witness was asked as to whether the testator was ever treated for softening of the brain, and replied: "I have no means of knowing; he had every indication, so others said." Held, that the part of the answer as to what others said should have been stricken out as hearsay.—Sexton v. Sexton, 56 Cal. 426.

[c] The testimony of a witness as to her age is admissible, though her knowledge is derived from statements by her family, being considered as declarations of members of the family.—Morrell v. Morgan, 65 Cal. 575, 4 Pac. 580.

[d] A person who can neither read nor write cannot testify to the contents of a lost instrument, as his evidence is necessarily hearsay.—Russell v. Brosseau, 65 Cal. 605, 4 Pac. 643.

[e] Where witness sent another person on an errand, statements by such person to witness as to the result of such errand are hearsay and inadmissible.—More's Estate, In re, 121 Cal. 609, 54 Pac. 97.

[f] Where, in partition, a witness for defendant is not a party to the suit, and it is not claimed that there was any lien of record in his favor, his testimony that the conveyance to defendant was intended as a mortgage from his grantor to witness is hearsay and inadmissible.—Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594.

[g] Where a witness testified that the death of the insured made quite a sensation, owing to the question whether it was murder or suicide, such evidence was hearsay, and incompetent.—Jenkin v. Pacific Mut. Life Ins. Co. of California, 131 Cal. 121, 63 Pac. 180.

[h] Any recital of contents of medical books is inadmissible as hearsay.—Baily v. Kreutzmann, 141 Cal. 522, 75 Pac. 104.

[i] Testimony as to the market price of fruit is not incompetent because witness has derived his knowledge from the information of others.—Betts v. Southern California Fruit Exch., 144 Cal. 402, 77 Pac. 993.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1213; 20 Cent. Dig., cols. 1690-1711, §§ 1201-1229.

§ 280. —— As to Reputation.

[a] Hearsay evidence as to the general reputation of a person for sobriety is not admissible.—Stevens v. San Francisco etc. R. R. Co., 35 Pac. 165.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 1692-1700, §§ 1203-1213.

§ 281. Value Shown by Offers to Purchase.

[a] In an action to recover damages for land taken by a railroad company under the right of eminent domain, evidence as to offers made for the purchase of the land is admissible to prove its value; the weight of such evidence, and the bona fides of the offers being for the jury.—Muller v. Southern Pac. B. Ry. Co., 83 Cal. 240, 23 Pac. 265.

[b] Evidence of an offer made for land is inadmissible to show its value.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 1700-1703, §§ 1214-1217.

§ 282. Repute as to Facts.

[a] Ownership cannot be proved by reputation.—Berniaud v. Beecher, 76 Cal. 394, 18 Pac. 398.

FOR AUTHORITIES FROM OTHER STATES:

See 5 Cyc. 956, 957; 20 Cent. Dig., cols. 1704-1711, §§ 1218-1229.

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X. DOCUMENTARY EVIDENCE.

A. Public or Official Acts, Proceedings, Records and Certificates, §§ 283-299.
B. Exemplification, Transcripts and Certified Copies, §§ 300-320.
C. Private Writings and Publications, §§ 321-346.
D. Production, Authentication and Effect, §§ 347-369.

Use of affidavits in evidence. See Affidavits, §§ 12-14.
Altered instrument as evidence. See Alteration of Instruments, § 21.
In criminal cases. See Criminal Law, §§ 205-217.
Recitals in deeds as evidence. See Deeds, § 91.
Admissibility of depositions in evidence. See Depositions, §§ 33-39.
Judgment as evidence. See Judgment, §§ 485-487.
Proof of foreign judgment of justice of the peace. See Justices of the Peace.
Tax deed as evidence. See Taxation, §§ 192-195.
Mode of introducing documents in evidence. See Trial, § 13.
Production of documents by witnesses. See Witnesses, I.

A. PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS AND CERTIFICATES.

LAWS IN GENERAL, § 283.
JUDICIAL ACTS AND RECORDS, § 284.
—— MATTERS INCLUDED IN RECORD IN GENERAL, § 285.
—— PLEADINGS, § 286.
—— RECORDS OF JUSTICE OF THE PEACE, § 287.
—— RECORDS IN PROBATE PROCEEDINGS, § 288.
OFFICIAL RECORDS AND REPORTS, § 289.
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MUNICIPAL RECORDS, § 291.
—— RECORDS NOT REQUIRED BY LAW TO BE KEPT, § 292.
—— FORM AND AUTHENTICITY, § 293.
GRANTS AND PATENTS FOR LAND AND PROCEEDINGS ON LAND OFFICE, § 294.
—— SURVEYS AND MAPS, § 295.
—— AUTHORITY OF SURVEYOR, § 296.
—— CERTIFICATES OF OFFICERS, § 297.
RECORDS OF CONVEYANCES AND OTHER PRIVATE WRITINGS, § 298.
—— INSTRUMENTS IMPROPERLY ADMITTED TO RECORD, § 299.

§ 283. Laws in General.

[a] The volume of statutes continued in force, published by the code commissioners, has not received the legislative sanction, and is not, therefore, authority.—Needham v. Thresher, 49 Cal. 392.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 298; 20 Cent. Dig., cols. 1714-1724, §§ 1232-1236.

§ 284. Judicial Acts and Records.

[a] A paper which purports to be the opinion of the judge in a former action between the same parties, but is not signed by the judge, or authenticated in any way, is not admissible in evidence in connection with the judgment-roll in that action.—Wixson v. Devine, 67 Cal. 341, 7 Pac. 776.

FOR AUTHORITIES FROM OTHER STATES:

Stenographers' notes as evidence, and the right to read them to the jury: 81 Am. St. Rep. 358, note. See, also, 17 Cyc. 299-305; 20 Cent. Dig., cols. 1724-1738, §§ 1237-1246.

§ 285. —— Matters Included in Record in General.

[a] When all the necessary papers to constitute the judgment-roll in a foreclosure action existed, but were never attached together in the form of a roll, held, that they were admissible in evidence in support of a title to property acquired under a sale thereof as directed by the judgment therein.—Sharp v. Lumley, 34 Cal. 611.

[b] Judgment-roll is admissible to prove status of parties established by it.—Lucas v. Richardson, 68 Cal. 621, 622, 10 Pac. 183.

[c] Where a judgment-roll offered in evidence contains two judgments, the last in point of time will be treated as the true and final judgment, and the prior judgment will not be considered as forming part of the roll so as to affect its admissibility.—Colton Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

[d] Judgment-book is judicial record and competent evidence of matters considered and passed upon by court.—Simmons v. Threshour, 118 Cal. 101, 50 Pac. 312.

[e] Entry in judgment-book of a judgment reciting facts showing that the court had jurisdiction is admissible in evidence, though the judgment-roll cannot be found.—Simmons v. Threshour, 118 Cal. 100, 50 Pac. 312.

[f] Defendant was liable for a part of the necessary expenses of maintaining and keeping an irrigation canal in repair. Plaintiff was tenant in possession, and as part of the expenses charged the expense of defending suits brought to restrain him from making changes in the canal. Held, that the judgment-rolls in these suits were admissible to show whether or not their defense was necessary, since the matter in issue could not be determined by the complaint alone.—Rogers v. Riverside Land etc. Co., 132 Cal. 9, 64 Pac. 95.

§ 286. —— Pleadings.

[a] After amendment original pleading is no longer admissible in evidence.—Osment v. McElrath, 68 Cal. 470, 58 Am. Rep. 17, 9 Pac. 731; Pfister v. Wade, 69 Cal. 138, 139, 10 Pac. 369.

[ab] Date of filing original pleading may be proved by it, though superseded by amend-

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ment.—Pfister v. Wade, 69 Cal. 139, 10 Pac. 369.

[b] Whether pleading signed by attorney is admissible without first proving authority of attorney is not clearly decided.—Coward v. Clanton, 79 Cal. 29, 21 Pac. 359.

[c] Statements of fact contained in superseded pleading are admissible the same as statements in any other document.—O'Connor's Estate, 118 Cal. 71, 50 Pac. 4.

§ 287. —— Records of Justices of the Peace.

[a] Under Code of Civil Procedure, sections 911, 912, a justice's docket containing a minute of a judgment is sufficient proof of the judgment to justify the action of the constable in taking property under execution thereon, where such docket is introduced in an action on the constable's bond for damages for the seizure.—Beardsley v. Frame, 85 Cal. 134, 24 Pac. 721.

§ 288. —— Records in Probate Proceedings.

[a] The record of a probate court admitting a will to probate is admissible as evidence to show the death of the testator, if it contains all the necessary recitals to show that the court acquired jurisdiction, but not if it shows that there were minor heirs living in the county, who were not served with citations to appear, for then the court does not acquire jurisdiction.—Randolph v. Baywe, 44 Cal. 366.

§ 289. Official Records and Reports.

[a] Under act of 1880, providing that counties may dispense with duplicate assessment-rolls, the statute which makes duplicate rolls prima facie evidence applies to the original rolls, and makes them admissible as such.—Lake Co. v. Sulphur Bank Quicksilver Co., 66 Cal. 17, 4 Pac. 876.

FOR AUTHORITIES FROM OTHER STATES:

Inquests and the evidence given thereat, admissibility of as evidence: 95 Am. St. Rep. 763, note. See, also, 17 Cyc. 306-316; 20 Cent. Dig., cols. 1738-1864, §§ 1247-1265.

§ 290. —— Official Maps.

[a] Map made by county surveyor, with protractions by his deputy, is admissible when both officers testify to correctness of protractions.—Gates v. Kieff, 7 Cal. 124.

§ 291. —— Municipal Records.

[a] Records of municipal board may be proved though not officially signed. Signatures only make records evidence without further proof.—People v. Eureka Lake etc. Canal Co., 48 Cal. 143.

§ 292. —— Records not Required by Law to be Kept.

[a] Book of accounts kept in office of alcalde is admissible in evidence as a register of the acts of that officer belonging to the office, though the law does not require such a record to be kept.—Kyburg v. Perkins, 6 Cal. 674.

[b] To entitle book to character of official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept.—Kyburg v. Perkins, 6 Cal. 674.

[c] Entries in a book kept by the sheriff in the usual course of his business, though not required by law, of a memorandum of his acts with reference to the levy of an attachment, of facts outside the information contained in the writs and returns, were admissible as entries in books of original entry.—Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156.

§ 293. —— Form and Authenticity.

[a] The statute requiring the chairman and clerk of a board of supervisors to sign the record of its proceedings does not invalidate such record as proof of the action of the board, if the clerk and chairman fail to sign, but has the effect merely of putting the party who desires to prove the official action of the board to some additional trouble in establishing the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced.—People v. Eureka Lake & Y. Canal Co., 48 Cal. 143.

§ 294. Grants and Patents for Land and Proceedings in Land Office.

[a] A patent from a state of lands sold as swamp or overflowed lands is not prima facie evidence, as against a claimant under the government, that such lands are swamp and overflowed.—Keeran v. Allen, 33 Cal. 542.

[b] A patent of the United States for the lands of a pueblo, confirmed under the act to settle private land claims in California, is issued in pursuance of authority conferred by said act, and is admissible in evidence.—Canfield v. Thompson, 49 Cal. 210.

[c] A patent for land, issued by the United States, may be proved by producing from the recorder's office the book in which it is recorded, without proof of loss of the original. Vance v. Kohlberg, 50 Cal. 346.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 313; 20 Cent. Dig., cols. 1772-1782, §§ 1273-1278.

§ 295. —— Surveys and Maps.

[a] On trial of an issue between a person claiming under the state as a grantee of swamp lands, and one claiming the same lands by pre-emption, the plat of the survey by the United States is admissible in evidence

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to show the line of the legal subdivision, but not to show that the lands in question are swamp and overflowed.—Richardson v. Forrest, 29 Cal. 317.

[b] In a suit of ejectment between a plaintiff claiming the land as swamp and overflowed, purchased by him from the state, and a defendant claiming it under the United States as dry land, the township plats from the land office are admissible in evidence on behalf of the plaintiff, as tending to prove that the land had been surveyed, and that the title had vested in the state under act of Congress of July 23, 1866.—Thompson v. Thornton, 50 Cal. 142.

§ 296. —— Authority of Surveyor.

[a] Survey or map of United States surveyor of grant is inadmissible as evidence to establish boundaries, without proof of the orders or authority under which he acted.—Rose v. Davis, 11 Cal. 133.

§ 297. —— Certificates of Officers.

[a] A certificate issued by a register of the land office, which was unauthorized by statute or by regulation of the land department, is inadmissible in an action involving title to land.—Hastings v. Devlin, 40 Cal. 358.

[b] In a suit to recover possession of certain land, to prove that it had been listed to the state, the plaintiff introduced the certificate of the register of the United States land office showing that as a fact. Held that, as there was no such certificate known to the law, it was improperly admitted.—Murphy v. Sumner, 74 Cal. 316, 16 Pac. 3.

§ 298. Records of Conveyances and Other Private Writings.

[a] Wherever acts of public officers are authenticated by their records the records are evidence of the acts.—Gregory v. McPherson, 13 Cal. 562.

[b] Records of Mexican government are original evidence of the grant, and exemplifications of such records are admissible.—Gregory v. McPherson, 13 Cal. 562.

[c] Book A of original grants, in custody of recorder of San Francisco, is admissible in evidence when introduced to prove that other grants were made than those found in "Blotter B."—Sill v. Reese, 47 Cal. 294.

[d] Records are not admissible to prove execution and contents of instruments unless absence of originals is explained and accounted for.—Brown v. Griffith, 70 Cal. 16, 11 Pac. 500.

[e] Entries in great register of county are inadmissible for any purpose.—Crozier, In re, 74 Cal. 182, 15 Pac. 618.

[f] In a suit to abate an obstruction on an alleged public road, a paper relating to the laying out of the road, and addressed to the supervisors, is inadmissible in evidence, where it does not appear to be a public record, but merely a written statement not under oath, and does not show that defendant was one of the parties living on such proposed road. Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 314-316; 20 Cent. Dig., cols. 1782-1787, §§ 1279-1282.

§ 299. —— Instruments Improperly Admitted to Record.

[a] A power of attorney not affecting real estate is not to be recorded, and therefore the record of it is no proof of its execution. Stevens v. Irwin, 12 Cal. 306.

[b] No law authorizes a recorder or clerk of a county to record a copy of a deed in the Spanish language so as to make it evidence, without further proof.—Wilson v. Corbier, 13 Cal. 166.

B. EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

NECESSITY AND ADMISSIBILITY IN GENERAL, § 300.
—— SUFFICIENCY AND ADMISSIBILITY OF ORIGINAL, § 301.
OFFICIAL DOCUMENTS AND RECORDS IN GENERAL, § 302.
—— MILITARY RECORDS, § 303.
—— PROBATE COURT RECORDS, § 304.
PUBLIC GRANTS AND RECORDS OF LAND OFFICE, § 305.
—— CERTIFICATES, § 306.
—— MAPS AND SURVEYS, § 307.
—— NECESSITY AND SUFFICIENCY OF CERTIFICATE AND ATTESTATION, § 308.
RECORDS OF CONVEYANCES AND OTHER PRIVATE WRITINGS, § 309.
—— DEEDS AND CONTRACTS OF SALE IN GENERAL, § 310.
—— POWERS OF ATTORNEY, § 311.
—— ARTICLES OF INCORPORATION, § 312.
—— SUFFICIENCY OF INSTRUMENT IN GENERAL, § 313.
—— SUFFICIENCY OF RECORD, § 314.
REQUISITES OF EXEMPLIFICATION OR CERTIFICATE OF OFFICIAL RECORDS IN GENERAL, § 315.
—— JUDICIAL RECORDS, § 316.
JUDICIAL PROCEEDINGS OF OTHER STATE, § 317.
OFFICIAL RECORDS OF FOREIGN COUNTRIES, § 318.
—— JUDICIAL PROCEEDINGS, § 319.
—— PROBATE OF WILLS, § 320.

§ 300. Necessity and Admissibility in General.

[a] A judgment, where offered in evidence, requires no exemplification, where it is the original record of the court in which it is offered.—Clink v. Thurston, 47 Cal. 21.

[b] Certified copy is made evidence by the code only after preliminary proof.—Brown v. Griffith, 70 Cal. 16, 11 Pac. 500.

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§ 301. —— Sufficiency and Admissibility of Original.

[a] A duly certified copy of a Mexican grant from the United States surveyor general's office is admissible in evidence, against the objection that the absence of the original is not accounted for, but is admissible only when the original itself would be.—Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

§ 302. Official Documents and Records in General.

[a] Where reliance is placed not upon production of certified copy of grant under the statute of 1857, but on proof aliunde of the copy; and where the original, as a document in the custody of a public officer, cannot be taken from his office, proof of that fact must be made preliminary to the introduction of the copy.—Soto v. Kroder, 19 Cal. 87.

[b] Under the act of 1857 a copy of a Mexican grant certified by the United States surveyor general to be a true and accurate copy of the grant on file in his office, is admissible in evidence "with the like effect as the original," without proof that the original could not be produced.—Soto v. Kroder, 19 Cal. 87.

[c] Such certified copies are admissible in evidence whenever the originals, if produced, would be admissible, the object of the statute being to remove objections to the copies on the ground that they are secondary evidence.—Soto v. Kroder, 19 Cal. 87.

[d] Where it is proven that the signatures of the governor and secretary of the department of California to a grant, at the time of its date, are genuine, then a copy duly certified under the act of 1857 is admissible in evidence.—Soto v. Kroder, 19 Cal. 87.

[e] Copy of letter from register of state land office to the county recorder, written in pursuance of section 46 of the act of March 28, 1868, and certified by the county recorder, is admissible in evidence.—People v. Hagar, 52 Cal. 171.

[f] Copy of petition for formation of swamp land district, certified by the clerk of the board of supervisors, and a copy of the by-laws, certified by the county recorder, are admissible in evidence.—People v. Hagar, 52 Cal. 171.

[g] A copy of the United States census returns, or any part thereof, certified to by the superintendent of the census, is admissible in evidence to show the results of the census.—People v. Williams, 64 Cal. 87, 27 Pac. 939.

[h] Under section 18 of the act of April 4, 1864, the records of a street assessment kept by the marshal of the city of Oakland, and signed by him, have the same force and effect as other public records, and copies therefrom duly certified are admissible in evidence with the same effect as the originals.—Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 357-359; 20 Cent. Dig., cols. 1795-1815, §§ 1289-1301.

§ 303. —— Military Records.

[a] A copy of a copy of a muster-roll of United States soldiers is not admissible in evidence to prove a man to be a soldier.—People ex rel. Orman v. Riley, 15 Cal. 48.

§ 304. —— Probate Court Records.

[a] A certified copy of a record of the probate court, consisting of a copy of a will, testimony of the subscribing witnesses, petition for admission to probate, notice, and order of hearing, and admission to probate, is admissible in evidence to prove the will, though letters may not have issued or executor been duly qualified.—Larco v. Casanueva, 30 Cal. 560.

§ 305. Public Grants and Records of Land Office.

[a] A certified copy of the affidavit and claim under the possessory act of this state is admissible in evidence upon proof by the party offering it that he never had the original in his possession, but has made search for it and is unable to find it.—Roberts v. Unger, 30 Cal. 676.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 330; 20 Cent. Dig., cols. 1816-1832, §§ 1302-1314.

§ 306. —— Certificates.

[a] Certified copies of grants made by surveyor general of United States are inadmissible in evidence, unless the absence of the originals is accounted for.—Hensley v. Tarpey, 7 Cal. 288.

§ 307. —— Maps and Surveys.

[a] A copy of a map on file in the office of the register of the land office, and certified by him, is admissible.—Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705.

§ 308. —— Necessity and Sufficiency of Certificate and Attestation.

[a] The surveyor general's certificate that a copy of a decree of confirmation by the United States board of land commissioners is a correct copy thereof, "as the same is on file," etc., is sufficient to admit the copy in evidence in a suit in ejectment.—Young v. Emerson, 18 Cal. 416.

§ 309. Records of Conveyances and Other Private Writings.

[a] Act of March, 1851, section 21, concerning county recorders, applies as much to

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copies of record of alcaldes as of records made under Act of 1851, and renders certified copies of alcaldes' records admissible in all cases where certified copies of the recorder's own records would be admissible, upon proof of inability to produce the original.—Touchard v. Keyes, 21 Cal. 202.

[b] A copy of a woman's recorded declaration as a sole trader, certified by the recorder, is inadmissible as primary evidence of either the existence or contents of an original, although perhaps admissible for the purpose of showing that a declaration had been recorded.—Reading v. Mullen, 31 Cal. 104.

[c] Under act of 1851 (Stats. 1851, p. 204), providing for the admission in evidence of transcripts from the books of the recorder's offices, certified copies of instruments found in the books of records of deeds, etc., kept by alcaldes, and which have been transferred to the custody of county recorders, are admissible in evidence under the same circumstances as are certified copies of records made by the recorders themselves.—Garwood v. Hastings, 38 Cal. 216.

[cd] Section 1951, Code of Civil Procedure, determines under what circumstances and upon what proof certified copy of record of private writing, affecting land, is admissible. Brown v. Griffith, 70 Cal. 16, 11 Pac. 500.

[d] Under sections 1919 and 1951 of the Code of Civil Procedure it is not necessary to prove the loss of an original patent before an exemplified copy thereof can be produced in evidence.—Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647.

[e] Under Code of Civil Procedure, section 1951, allowing the introduction of original records of instruments affecting real property without further proof, official county records of a release may be received in evidence without accounting for the original.—Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 330-336, 357, 358; 20 Cent. Dig., cols. 1832-1861, §§ 1315-1330.

§ 310. —— Deeds and Contracts of Sale in General.

[a] Copies of recorded deeds are not admissible in evidence without first accounting for the absence of the originals.—Macy v. Goodwin, 6 Cal. 579; Mayo v. Mazeaux, 38 Cal. 442; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386.

[b] Affidavit by party to suit, that original deed "is not in his possession, or under his control," is sufficient to admit in evidence a certified copy from the recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person.—Skinker v. Flohr, 13 Cal. 638.

[c] A certified copy of the record of a deed is admissible in evidence, where the party offering it proves that he never had control of the original deed, and that it was not then in his power or control.—Hurlbutt v. Butenop, 27 Cal. 50.

[d] Copies of the records of deeds, certified by the recorder, are admissible in evidence without accounting for the absence of the originals.—Canfield v. Thompson, 49 Cal. 211; Gethin v. Walker, 59 Cal. 502.

[e] The record of a deed could not properly be received in an action tried in 1888 without the preliminary proof then required by Code of Civil Procedure, section 1951, which provided that a certified copy of the record of an instrument affecting real estate, duly acknowledged, may be read in evidence with like effect, as the original, on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing the certified copy; the preliminary proof having been dispensed with by an amendment of section 1951 in 1889.—Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861.

[f] Since a provision for the assumption of the mortgage debt by the vendees is entitled to record with the rest of the deed, a certified copy of the record is evidence of such assumption.—Weaver v. McKay, 108 Cal. 546, 41 Pac. 450.

§ 311. —— Powers of Attorney.

[a] A certified copy of the record of a power of attorney, entitled to be recorded, is admissible in evidence to establish the same.—Jones v. Marks, 47 Cal. 242.

§ 312. —— Articles of Incorporation.

[a] Certified copies from the office of the Secretary of State of the articles consolidating two or more railroads are admissible in evidence to prove such consolidation. It is not necessary to produce the original articles which are filed in the office of the Secretary of State.—Vance v. Kohlberg, 50 Cal. 346.

§ 313. —— Sufficiency of Instrument in General.

[a] A certified copy of a deed which has been copied into a book of records, but has not been legally recorded, because the certificate of its acknowledgment was made by an officer not authorized by law to take acknowledgments, and was in form and substance insufficient, is admissible in evidence, provided that the existence and execution of the original deed are first proved.—McMinn v. O'Connor, 27 Cal. 238.

[b] A certified copy from the recorder's office of a power of attorney purporting to have been executed by four persons, but acknowledged by one only, is admissible in evidence.—Spect v. Gregg, 51 Cal. 198.

[c] Code of Civil Procedure, section 1951, provides that instruments affecting real property, acknowledged as provided by law, may, together with the certificate of acknowledg-

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ment, be read in evidence, and that a certified copy of the record thus acknowledged is admissible with like effect as the original, on proof that the original is not in possession or under control of the party producing the copy. Plaintiff sued on a contract in writing purporting to be a lien on the land of defendant, and alleged that the instrument had been duly acknowledged and recorded. Held, that plaintiff having produced an instrument purporting to be the one sued on, and which had not been acknowledged, the record of such instrument, with the acknowledgment added, was inadmissible, without accounting for the original.—Fresno Canal etc. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

§ 314. —— Sufficiency of Record.

[a] By a certified copy of a deed from the record, it appeared that the notarial acknowledgment concluded thus, "In witness whereof, I have hereunto set my hand and seal," and that in the margin of the record occurred the words, "No seal." Held, that these words were a mere note of the recorder as to the place of the notarial seal, and that the copy was admissible in evidence.—Jones v. Martin, 16 Cal. 165.

§ 315. Requisites of Exemplification or Certificate of Official Records in General.

[a] Certificate of surveyor general, that the paper "is a true and accurate copy of a document" on file in his office, is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant.—Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

[b] Where a certificate to a copy of a document recites the official character of the officer as the legal custodian of it, his authority to certify a copy of it is proved, prima facie, by the certificate itself.—Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172.

[c] Under Code of Civil Procedure, section 1918, providing that official acts and documents may be proved by certified copies, a certificate by the Secretary of State stating that articles of incorporation were filed in his office on a certain date, and "that a certificate of incorporation thereof was issued on said date," is inadmissible to prove the issuance of the certificate of incorporation.—Wall v. Mines, 130 Cal. 27, 62 Pac. 386.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 337-345; 20 Cent. Dig., cols. 1861-1901, §§ 1331-1360.

§ 316. —— Judicial Records.

[a] A certificate, officially signed and sealed by A B, stating that he is surrogate, and acting clerk of the surrogate's court; that he has compared the transcripts, etc.; and that his certificate is in due form of law.—is sufficient.—Low v. Burrows, 12 Cal. 181.

[b] To establish a discharge in insolvency, a certified copy of the decree and of each of the papers composing the record was offered. Held, that properly these should all have been joined, and the whole certified as one record, but that their separate certification would not authorize their rejection.—Goldstone v. Davidson, 18 Cal. 41.

§ 317. Judicial Proceedings of Other States.

[a] A certificate of exemplification of a judgment rendered in another state, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient under the act of Congress of May 26, 1790, to sustain an action upon the judgment in another state.—Thompson v. Manrow, 1 Cal. 428.

[b] The record of a judgment of another state, if certified in conformity with the act of Congress, is admissible in evidence in this state.—Parke v. Williams, 7 Cal. 247.

[c] Under act of Congress respecting authentication of record of a court of one state to be used in another it is only necessary that the certificate should state the main facts which are made necessary by the act when the offices of judge and clerk are both vested in one person.—Low v. Burrows, 12 Cal. 181.

[d] Certificate of clerk and presiding justice to foreign judgment is sufficient to authorize its introduction under section 1905, Code of Civil Procedure.—Bean v. Loryea, 81 Cal. 152, 153, 22 Pac. 513.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 347-359; 20 Cent. Dig., cols. 1901-1942, §§ 1361-1383.

§ 318. Official Records of Foreign Countries.

[a] The expediente, consisting of the petition, plat, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee. (Baldwin, J.)—Gregory v. McPherson, 13 Cal. 562.

[b] A translation of the expediente of a Mexican grant of land, unaccompanied by the original or a certified copy of the same, is not admissible in evidence.—Bixby v. Beat, 51 Cal. 590.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 360-363; 20 Cent. Dig., cols. 1942-1950, §§ 1384-1387.

§ 319. —— Judicial Proceedings.

[a] Code of Civil Procedure, section 1906, providing that a judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court, and certain other certificates, authorizes a copy

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of such record to be so proven.—Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89.

§ 320. —— Probate of Wills.

[a] To prove the probate of a will and administration granted in a foreign country, as to the procedure in which there is no evidence, a transcript of an order of the foreign court to the effect that on a certain day the will was proved and registered and administration granted is not sufficient, it being necessary to introduce the proceedings leading up to the order, and which gave the court jurisdiction.—Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89.

C. PRIVATE WRITINGS AND PUBLICATIONS.

UNOFFICIAL WRITINGS AND RECORDS IN GENERAL, § 321.
CORPORATE RECORDS AND PROCEEDINGS, § 322.
—— FORM AND AUTHENTICITY, § 323.
CONVEYANCES, CONTRACTS AND OTHER INSTRUMENTS, § 324.
—— NATURE, FORM AND VALIDITY OF INSTRUMENT, § 325.
—— EFFECT OF ALTERATION, § 326.
—— EXECUTION AND PROOF, § 327.
—— ACKNOWLEDGMENT OR RECORD, § 328.
—— DOCUMENTS INSUFFICIENT OR INCOMPLETE WHEN STANDING ALONE, § 329.
—— VOID OR RESCINDED INSTRUMENTS, § 330.
BOOKS OF ACCOUNT—IN GENERAL, § 331.
—— MATTERS PROPER FOR BOOK ENTRIES, § 332.
—— FORM, REGULARITY AND SUFFICIENCY OF ENTRIES, § 333.
—— PURPOSES OF PROOF AND ADMISSIBILITY FOR AND AGAINST PARTICULAR PERSONS, § 334.
—— BOOKS OF THIRD PERSONS, § 335.
PRIVATE MEMORANDA AND STATEMENTS, § 336.
—— MORTALITY TABLES, § 337.
LETTERS AND TELEGRAMS, § 338.
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MAPS, PLATS, DIAGRAMS AND PHOTOGRAPHS, § 340.
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—— PLATS REFERRED TO IN DEEDS, § 342.
—— SKETCH, DRAWING, OR OTHER PICTURE, § 343.
BOOKS AND OTHER PRINTED PUBLICATIONS, § 344.
—— PUBLISHED MARKET QUOTATIONS, § 345.
—— MEDICAL BOOKS, § 346.

§ 321. Unofficial Writings and Records in General.

[a] A nurse's record of the events transpiring at the sick bed of the decedent while she was present may be consulted to refresh her memory as a witness, but cannot be admitted in evidence independently.—Flint, In re, 100 Cal. 391, 34 Pac. 863.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 363; 20 Cent. Dig., cols. 1950-1959, §§ 1388-1397.

§ 322. Corporate Records and Proceedings.

[a] A resolution of the board of directors of a private corporation reciting that the president's salary was fixed at a certain amount during the preceding year is competent evidence of the fact.—Smith v. Woodville Consol. Silver Min. Co., 66 Cal. 398, 5 Pac. 688.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 401-405; 20 Cent. Dig., cols. 1959-1969, §§ 1398-1403.

§ 323. —— Form and Authenticity.

[a] An instrument, in form a certified copy of resolution by the board of directors of a corporation, duly attested, ratifying the execution of a mortgage, is presumably the act of the corporation, and admissible in evidence, without proof of the loss of the record of such resolution.—Purser v. Eagle Lake Land etc. Co., 111 Cal. 139, 43 Pac. 523.

[b] Extracts from the minutes of the board of directors of a corporataion held not properly certified to authorize their admission in evidence, as required by Code of Civil Procedure, section 1918, subds. 6, 7.—Nixon v. Goodwin (Cal. App.), 85 Pac. 169.

§ 324. Conveyances, Contracts and Other Instruments.

[a] A deed or patent cannot be excluded because the other party shows a better title.—Yates v. Smith, 40 Cal. 662, 669.

[b] Deed under which party claims title is admissible unless it is void on its face, or it appears therefrom that it does not relate to the lands in controversy.—Yates v. Smith, 40 Cal. 662.

[c] When a bill of sale of a lot of land contains no description of the land sold, but is written on the back of the copy of the grant of the lot, made by an alcalde while California was a part of Mexico, and refers to this copy for a description of the lot the copy may be received in evidence for the purpose of identifying the lot sold, and such copy constitutes a part of the bill of sale.—Sill v. Reese, 47 Cal. 294.

[d] Deed excepting part previously conveyed is admissible without first proving that premises in controversy had not been before conveyed.—Hogar v. Spect, 48 Cal. 406.

[e] Recitals in deed of corporation do not prove its existence against one claiming under another source of title.—Sonoma County Water Co. v. Lynch, 50 Cal. 503.

[f] Contract merged in another is admissible to show what was done under it, and as ex-

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planatory of transactions.—Heinlein v. Martin, 53 Cal. 340.

[g] In ejectment, plaintiff (who claims under a deed from defendant, payment of the consideration of which deed is denied by defendant) may, if his deed is regularly executed, read it in evidence, without being first required to allege or prove the consideration or payment thereof.—Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484.

[h] The notes from the grantor to the attorney in fact, with indorsements thereon, showing a payment, coinciding with the date of the deed, are admissible in evidence in connection with testimony that the grantor owed the attorney in fact money on notes, and that the deeds were in payment.—Mowry v. Mowry, 103 Cal. 314, 37 Pac. 398.

[i] Contract between other parties, which was referred to in the contract on which the action was based, for the purpose of fixing certain of its conditions is admissible in evidence.—Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

[j] Where a note and mortgage were given to the plaintiff through his agent, the note and mortgage, together with a power of attorney from the plaintiff to the agent, are properly admitted in evidence.—Rohrbough v. Johnson, 107 Cal. 144, 40 Pac. 37.

[k] Where plaintiff had leased premises to defendant under a written lease, in an action to recover the possession for breach of conditions, the verified complaint having alleged the execution of the lease, and its contents, which were not denied in the answer, it was not error to admit a copy of the written lease in evidence.—Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

[l] An agreement by the stockholders of an association which recited that, "being desirous of having my oranges handled in the manner set forth in the by-laws" of the association, they individually appointed the association their agent, may be introduced in evidence, without the by-laws referred to, in an action by the association on a contract between it and a fruit company for the sale of fruit.—Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. 693.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 363-365; 20 Cent. Dig., cols. 1969-2017, §§ 1404-1431.

§ 325. —— Nature, Form and Validity of Instrument.

[a] A will is not a conveyance, within the provisions of the act concerning conveyances, which can be read in evidence on the certificate of proof by a notary.—Carpentier v. Gardiner, 29 Cal. 160.

[b] A deed properly executed is admissible in evidence, although the grantor may have previously conveyed his interest in the property to another party; such objection affecting only its legal operation after admission. Peck v. Vandenberg, 30 Cal. 11.

[c] Where a deed is offered in evidence to show title to the locus in quo, the fact that such deed was not intended to include the entire premises in dispute goes only to the effect of the deed, and not to its admissibility as evidence.—Dent v. Bird, 67 Cal. 652, 8 Pac. 504; Hall v. Hebard, 8 Pac. 507.

[d] Plaintiff introduced a certified copy of a deed, purporting to be signed by P. D. G., the defendant, and conveying land then owned by him. In the body of the deed the grantor was described as D. P. G. The subscribing witness' affidavit was that he saw D. P. G., the person described in the deed, sign the same. No objection being made to the copy, held, that enough had been shown to make it admissible, and throw on the defendant the burden of proving that he did not execute the deed.—Bennett v. Green, 74 Cal. 425, 16 Pac. 231.

[e] A vendee having entered under a bond for a deed, and a contract that if he failed to pay interest the vendor might take possession without process of law, afterward made default in the payment of interest, and notified the vendor that he claimed an adverse title, and surrendered all rights under the bond. Held, that the bond for a deed was competent evidence, especially when the vendee admitted its genuineness.—Coates v. Cleaves, 92 Cal. 427, 28 Pac. 580.

[f] A memorandum given as a bill of sale of a "4-horse Concord" wagon, executed by the debtor to plaintiff, is competent evidence on the question of the sale, by the debtor to plaintiff, of the Concord wagon in dispute.—Bunting v. Salz, 22 Pac. 1132.

§ 326. —— —— Effect of Alteration.

[a] Party offering promissory note in evidence is not obliged, before the same is admitted, to account for an erasure appearing upon the face of it, unless the erasure has been made, or appears to have been made, after the execution of the instrument, and is on a part of the note which is material to the point in dispute.—Corcoran v. Doll, 32 Cal. 82.

[b] Alteration of instrument affects credit and weight to be given to it but does not make it inadmissible.—Reclamation Dist. v. Wilcox, 75 Cal. 448, 17 Pac. 241.

§ 327. —— Execution and Proof.

[a] When the grantor of a deed signs by a different name than that recited in the instrument the identity of person should be proved before the deed is admitted in evidence.—Tustin v. Faught, 23 Cal. 237.

§ 328. —— Acknowledgment or Record.

[a] Deed defective in acknowledgment should not be rejected as evidence for that reason, but should be admitted, with instruc-

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tions to the jury as to its effect in giving notice to third persons.—Hastings v. Vaughn, 5 Cal. 315.

[b] Deed may be offered to show date and character of possession, though defectively acknowledged as inoperative.—Low v. Henry, 9 Cal. 552, 553, 13 Cal. 220.

[c] Code of Civil Procedure, section 1951, provides that an instrument affecting real property, acknowledged as provided by law, may, together with the certificate of acknowledgment, be read in evidence, and that a certified copy of the record thus acknowledged is admissible with like effect as the original, on proof that the original is not in possession or under control of the party producing the copy. Plaintiff sued on a contract in writing purporting to be a lien on the land of defendant, and alleged that the instrument had been duly acknowledged and recorded. Held, that an instrument purporting to be the one sued on, or a duplicate, but which had not been acknowledged, was not admissible, though the plaintiff produced the record of the instrument with the acknowledgment added.—Fresno Canal etc. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275.

§ 329. —— Documents Insufficient or Incomplete When Standing Alone.

[a] If one deed refers to another for a description of the land conveyed, the latter is admissible in evidence for the purpose of showing such description, without any proof that the deed containing it is a valid conveyance.—Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

[b] A deed to which a deed admissible in evidence refers as containing a description of the premises conveyed is also admissible as explanatory of the other.—Satterlee v. Bliss, 36 Cal. 489.

[c] It is not a good objection to the introduction of a deed in evidence that it is not shown to include the premises in controversy. The calls of the deed are to be located after it is received in evidence. If it appears on the face of the deed that it does not include the premises in controversy, it may be objected to on that ground.—Cutter v. Caruthers, 48 Cal. 178.

§ 330. —— Void or Rescinded Instruments.

[a] Void tax deed is inadmissible.—Frink v. Roe, 70 Cal. 320, 11 Pac. 820.

[b] A rescinded instrument in writing between the plaintiff and another party may be offered in evidence as explanatory of this agreement with the defendant.—Chew Farng v. Keefer, 103 Cal. 46, 36 Pac. 1032.

§ 331. Books of Account—In General.

[a] Original account-books shown to have been properly kept are admissible.—West Coast Lumber Co. v. Newkirk, 80 Cal. 280, 22 Pac. 232.

[b] Books of bank showing original entries of transactions between itself and its customers are admissible and competent evidence.—McLennan v. Bank of California, 87 Cal. 575, 25 Pac. 760.

[c] Book accounts showing true state of account between parties entered at time of several transactions are admissible.—Ford v. Cunningham, 87 Cal. 211, 25 Pac. 403.

[d] In an action by a bank against a corporation on an account, it appeared that it was customary for the manager of defendant company, when bills were presented to "O. K." them, and that they were then presented to the bank, paid by the latter in the same manner as checks, and charged on its books to defendant's account; that defendant had no passbook, but at stated periods the bank would present a statement, and surrender the paid vouchers; and that these were transcribed to defendant's ledger. Held, that the books of the bank and the statements in defendant's ledger were prima facie evidence that the account of the bank was correct, and that the vouchers were admissible to show that the sums named therein were applied to the proper use of defendant.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[e] The fact that two officers of a cable company were interested in the bank does not affect the admissibility in evidence of the books of the bank; but such interest merely invites scrutiny of the accounts, and goes only to the weight of the testimony, and not to its admissibility.—Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

[ef] Poker-book kept by a cigar dealer containing entries of his losses at games played at store is not admissible as tradesman's book of original entry.—Frank v. Pennie, 117 Cal. 256, 49 Pac. 208.

[f] On an issue whether a sale of livestock on a ranch owned by the buyer was in fraud of creditors, where the seller had superintended the ranch, and at the time of the levy had a cropping contract which included a part of the land, books showing the condition of accounts between him and the buyer were properly allowed in evidence; the evidence otherwise showing that the books were kept under the direction of the seller, and that he delivered them to the buyer as showing the condition of their accounts.—Banning v. Marleau, 121 Cal. 240, 53 Pac. 692.

[g] The issue being whether goods were sold to A on B's credit, or sold to B, and by his order delivered to A, the seller's books showing they were shipped to A, and charged to B, were not competent; the bookkeeper who made the entry having no knowledge of the facts, and the one directing the form of the entry being accessible.—Butler v. Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040.

[h] A passbook shown to be in the handwriting of a bank's cashier, and to have been issued by him in the usual course of business,

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is admissible in evidence in an action by the depositor's administratrix against such bank to recover sums alleged to have been deposited.—Nicholson v. Randall Banking Co., 130 Cal. 533, 62 Pac. 930.

[i] A book kept by plaintiff held admissible in evidence as a book of original entries.—Idol v. San Francisco Const. Co., 1 Cal. App. 92, 81 Pac. 665.

FOR AUTHORITIES FROM OTHER STATES:

Account-books as evidence: 15 Am. Dec. 191, note; 52 L. R. A. 546, 833, note. See, also 17 Cyc. 365-398; 20 Cent. Dig., cols. 2017-2100, §§ 1432-1483.

§ 332. —— Matters Proper for Book Entries.

[a] Though account-book of tradesman, as general rule, is not admissible to prove a charge for money loaned, yet where it was shown that plaintiff had procured and paid for certain articles for defendant, and charged it as money loaned, the book is admissible.—Le Franc v. Hewitt, 7 Cal. 186.

[b] In an action on account, plaintiff's account books were admissible in evidence to prove the delivery of goods therein charged, where better evidence was not obtainable.—Severance v. Lombardo, 17 Cal. 57.

[c] A book of account is admissible in evidence to prove that a party to a suit has performed his contract, and given a credit which he has promised.—Ross v. Brusie, 70 Cal. 465, 11 Pac. 760.

§ 333. —— Form, Regularity and Sufficiency of Entries.

[a] In an action for wages, where plaintiff claimed that his contract with defendant was that his salary as master of a steamer should be in proportion to its profits, a private account of plaintiff, kept by himself, and containing only an account of money paid, is not admissible in evidence as against defendant.—Collin v. Card, 2 Cal. 421.

[b] It seems, though a tradesman's books are not admissible to prove a single item, they are to prove one charge for a lot of goods purchased on different days.—Le Franc v. Hewitt, 7 Cal. 186.

[c] Delay of three days in transferring items from slate to account-book is not such unreasonable delay as to make book inadmissible as one of original entries.—Landis v. Turner, 11 Cal. 573.

[d] The fact that charges are first made on slate and then transferred to the book does not affect the character of the book as one of original entries, the charges on the slate being mere memoranda, not intended to be permanent.—Landis v. Turner, 14 Cal. 573.

[e] Where suspicious alterations have been made in the entries in the account-book of a party to the suit, and they are explained only by the testimony of the party himself, a refusal to admit them in evidence is proper. Caldwell v. McDermit, 17 Cal. 464.

[f] Though ordinarily plaintiff would have had no right to introduce books as evidence of the settlement of partnership affairs after the dissolution of the partnership, when he had altered such books, a statement of account by an expert, made from such altered books, was admissible, where there was other evidence showing the correctness of the statement.—Butler v. Beach, 55 Cal. 28.

[g] In an action for the dissolution of a partnership and for an accounting, when the evidence showed that the books had been so improperly kept by the defendant that it was impossible to tell anything about the condition of the affairs of the partnership, the attorneys stipulated that experts should be employed by the referee to reduce the books to intelligible shape. The experts made out a set of new books from the old books. Held, that the expert books were properly admitted in evidence in connection with the report of the referee.—Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

§ 334. —— Purposes of Proof and Admissibility for and Against Particular Persons.

[a] Books of original entry, if properly kept, are admissible as part of res gestae, to prove services or sales of goods.—Lubert v. Chauriteau, 3 Cal. 458.

[b] Book of original entries being admitted, its entries, accompanied with proof of the party's reputation in the neighborhood of keeping correct accounts, by persons who had dealt with him, were sufficient prima facie evidence of the specific services rendered and their value, and of the specific materials furnished and their price, it not appearing that any higher evidence was attainable.—Landis v. Turner, 14 Cal. 573.

[c] Books of account kept by a party are not competent evidence, in an action for goods sold and delivered, to prove a copartnership between defendant L. and the other defendants, to whom certain lumber had been sold, L. not having dealt directly with plaintiffs.—Severance v. Lombardo, 17 Cal. 57.

[d] When it is sought to be proved that a house was constructed by a certain person, as one of a chain of events to show that he owned the lot on which it was built, and evidence is given tending to show that a certain firm built the house and furnished the materials, the account-books of such firm are admissible in evidence to show that they charged the labor and materials to such person, as such entries are of contemporaneous circumstances, to show who owned the house.—Sill v. Reese, 47 Cal. 294.

[e] Time-book kept by laborer is competent evidence of days upon which he has worked. Bushnell v. Simpson, 119 Cal. 662, 51 Pac. 1080.

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[f] Books of account kept by the deceased, if not containing proof of the payment of plaintiff's claim, may be looked to for evidence of the negative fact of nonpayment by the deceased during his lifetime; and notwithstanding the inhibition of section 1880 of the Code of Civil Procedure, the foundation for the introduction of such account-books, if kept by plaintiff for the deceased, may be laid by the testimony of the plaintiff.—Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221.

[g] In proceedings for redemption from a mortgage, where the question at issue is whether a deed absolute in form, with an agreement for reconveyance, was intended as a mortgage or not, a book of accounts cannot be introduced in evidence by defendant to show that he credited plaintiff with the alleged purchase price of the lot in controversy, since a party cannot make evidence in his own favor.—Ross v. Brusie, 10 Pac. 121.

[h] In an action for money due on contract, where one furnishes material and another does work under an agreement to divide the profits, the original books of entry of the parties are proper evidence to show the amount of work done.—Morgans v. Adel, 18 Pac. 247.

§ 335. —— —— Books of Third Persons.

[a] Entries in account-books kept by third persons, not parties to the suit, may be received in evidence after the death of the party making the entries, when the entries are contemporaneous with the principal fact sought to be proved, and form a link in a chain of events, and are a part of the res gestae.—Sill v. Reese, 47 Cal. 294.

§ 336. Private Memoranda and Statements.

[a] A memorandum of the circumstances, made by the witness at the time of the occurrence, is not admissible in evidence, although he states that it is correct.—People v. Elyea, 14 Cal. 144.

[b] A witness may be permitted to refresh his memory from a writing or memorandum made by himself at the occurrence of the facts to which it relates; but the memorandum is not competent evidence to prove the facts stated, in itself.—Baum v. Reay, 96 Cal. 462, 31 Pac. 561.

[c] Schedules presented by expert accountant in connection with his testimony that they were correct summarization of what books showed are admissible to show what books contained and what they should have contained but did not.—San Pedro etc. Co. v. Reynolds, 121 Cal. 86, 53 Pac. 410.

[d] Under Code of Civil Procedure, section 1946, prescribing when entries and writings of a deceased person may be used as evidence, entries on a private memorandum-book kept by deceased of money paid to plaintiff are not admissible against him, since the entries are in decedent's favor, and such a book is not admissible as a tradesman's book.—Thompson v. Orena Ruiz, 134 Cal. 26, 66 Pac. 24.

[e] In an action for the refusal to receive prunes sold, a witness who had been employed by the seller to process and box the fruit testified that he properly graded and boxed the goods, and identified a paper as a report made by him to the seller. This report showed the number of boxes of each grade. The witness did not testify that the report correctly represented the number of boxes, and the paper was not offered in aid of his memory, but was offered later while another witness was testifying. Held, that it was improperly admitted.—Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

For Authorities from Other States:

41 L. R. A. 449; 52 L. R. A. 689, notes. See, also, 13 Cyc. 307; 17 Cyc. 399, 400; 20 Cent. Dig., cols. 2100-2113, §§ 1484-1491.

§ 337. —— Mortality Tables.

[a] On an issue as to the value of a life estate of a person sixty years of age, tables of mortality held admissible without proof that the person in question was of sound health.—Cusick v. Boyne (Cal. App.), 82 Pac. 985.

For Authorities from Other States:

See 1 Cyc. 296; 17 Cyc. 422; 20 Cent. Dig., cols. 2143-2144, § 1520.

§ 338. Letters and Telegrams.

[a] Letter from Secretary of Interior is admissible to show that he had granted rehearing in land case.—Stewart v. Robinson, 76 Cal. 165, 18 Pac. 157.

[b] Unsigned letter may be admitted to prove condition it was intended to create.—Goldman v. Bashore, 80 Cal. 150, 22 Pac. 82.

For Authorities from Other States:

Telegrams, when admissible: 38 Am. Rep. 5, note; 44 L. R. A. 438, note. See, also, 17 Cyc. 406-412; 20 Cent. Dig., cols. 2114-2123, §§ 1492-1499.

§ 339. —— As Against Party Addressed.

[a] A telegraph message threatening suit if the addressee did not pay an overdue note is not admissible to show the addressee's fraud in transferring property on the day after the date of said message, in the absence of proof that the message was ever received, or at least delivered to a telegraph company for transmission.—Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301.

[b] Letter written to party, receipt of which is acknowledged, is admissible to charge

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him with notice of its contents.—Hurgren v. Union Mut. Ins. Co., 141 Cal. 592, 75 Pac. 168.

§ 340. Maps, Plats, Diagrams and Photographs.

[a] Map introduced as a diagram need not be made by county surveyor.—Provost v. Piper, 9 Cal. 553.

[b] Private survey is admissible, though not offered to rebut or explain survey of county surveyor.—Ellis v. Janes, 10 Cal. 458.

[c] A private survey is no legal evidence of facts it purports to contain, since, if it were, any man might recover the land of another by including it in his own boundaries. Rose v. Davis, 11 Cal. 133.

[d] A private survey is no evidence of the facts it contains; and therefore where a private map goes to the jury, even as a diagram, the court should be careful that the jury are not misled into treating it as evidence.—Rose v. Davis, 11 Cal. 133.

[e] A plat of a survey of lands made by a deputy surveyor which is not certified in the form prescribed by statute may be admitted as a plat of a private survey, the deputy surveyor being on the stand and testifying in relation to it.—Doherty v. Thayer, 31 Cal. 140.

[f] Since the board of state land commissioners appointed under act of May 18, 1853, which established such board, were authorized to find the red line or water front of San Francisco, as established by act of March 26, 1851, their map is competent evidence to prove the position of that line.—People v. Klumpke, 41 Cal. 263.

[g] Photographic views are original evidence respecting description of premises they reproduce.—Bliss v. Johnson, 76 Cal. 601, 16 Pac. 542, 18 Pac. 785.

[h] Motion to strike out as evidence map conceded to be genuine and admitted without objection is properly denied.—Olsen v. Rogers, 120 Cal. 227, 52 Pac. 486.

[i] In an action against a grantee of the owner to abate a nuisance consisting of a fence erected by her on a strip of land claimed to have been dedicated as a highway, it was not error to exclude the field-notes and memorandum books of the surveyor where it appeared that they were never shown to defendant's grantor and were not recorded, and the evidence showed that the map was made from the field-notes, and it did not appear that the notes if admitted would throw any additional light on the map, or the grantor's intention in having it made, and the surveyor used the field-notes in testifying, and was not restrained from stating any facts relating to the survey found in them.—Smith v. Glenn, 129 Cal. xviii, 62 Pac. 180.

[j] Where, in an action to determine a boundary line, a witness has testified to a survey, the admission in evidence of a map made by him explanatory of such survey is not error.—Pickering Light etc. Co. v. Savage, 137 Cal. xix, 69 Pac. 846.

For Authorities from Other States:

See 17 Cyc. 412; 20 Cent. Dig., cols. 2126-2133, §§ 1500-1508.

§ 341. —— —— Acknowledgment and Record.

[a] The map of an "addition," which is of record in the office of the county recorder, is not admissible in evidence because not acknowledged.—Colton Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

§ 342. —— Plats Referred to in Deeds.

[a] Where a deed describes land conveyed as "lot number one in the subdivision of the tract of land lying on the new county road, and known as 'Foley's Tract,' the map of which is duly recorded in the recorder's office, reference to which is herein made," the particular tract of land referred to cannot be identified by the production in evidence of a map not recorded, but made in pencil, and pasted in between the leaves of the recorder's book.—Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131.

[b] Where a deed refers to a map for a description of land conveyed, no other similar map will answer the description, and be admissible in evidence to identify the land. Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131.

§ 343. —— Sketch, Drawing, or Other Picture.

[a] In an action for damages for libel against a dentist, whom defendant had publicly denounced as a disgrace to the profession, a diagram exhibiting the condition of the defendant's teeth on which the plaintiff had operated before and after they were injured by plaintiff is inadmissible, as such drawing was unnecessary to illustrate the facts asserted.—Thrall v. Smiley, 9 Cal. 529.

§ 344. Books and Other Printed Publications.

[a] An article published in a newspaper by a witness without the knowledge of either of the parties to the suit is not admissible in evidence for the purpose of showing an agreement of the parties concerning the subject matter of the suit.—Dwinelle v. Henriquez, 1 Cal. 387.

[b] On the trial of the issue whether a certain house (the Willows) was at a given date a hotel within the meaning of the chattel mortgage statute, the proprietors' advertisements of the house in the newspapers of the vicinity at and before that date were held to be competent evidence, as tending to

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establish its public character.—Stringer v. Davis, 35 Cal. 25.

FOR AUTHORITIES FROM OTHER STATES:

Newspaper reports as evidence: 90 Am. Dec. 258, note.

Books and treatises admissible in evidence: 38 Am. Rep. 578, note.

Almanacs as evidence: 39 Am. Rep. 416, note; 17 L. R. A. 851, note. See, also, 17 Cyc. 421-425; 20 Cent. Dig., cols. 2137-2144, §§ 1513-1520.

§ 345. —— Published Market Quotations.

[a] The published "reports of sales" of a stock exchange are not competent evidence of market value, without proof as to the sources from which the information therein was obtained, or whether the quotations of prices were derived from actual sales or otherwise.—Vogt v. Cope, 66 Cal. 31, 4 Pac. 915.

§ 346. —— Medical Books.

[a] Code of Civil Procedure, section 1936, makes books of science or art prima facie evidence of facts of general notoriety or interest. Held, that a standard medical work is not admissible to prove the nature of injuries, and their probable effect.—Gallagher v. Market St. Ry. Co., 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869.

[b] Medical works are hearsay and inadmissible.—Baily v. Kreutzmann, 141 Cal. 521, 75 Pac. 104.

D. PRODUCTION, AUTHENTICATION AND EFFECT.

PUBLIC DOCUMENTS, RECORDS, EXEMPLIFICATIONS OR OTHER OFFICIAL COPIES, § 347.
—— PRODUCTION OF PART OF RECORD OF JUDICIAL PROCEEDING, § 348.
—— EXECUTION WITHOUT JUDGMENT UPON WHICH IT IS BASED, § 349.
—— SHERIFF'S DEEDS, § 350.
—— AUTHORITY FOR EXECUTORS OF ADMINISTRATOR'S DEED, § 351.
—— TAX DEEDS, § 352.
COMPELLING PRODUCTION BY ADVERSE PARTY, § 353.
—— NATURE OF DOCUMENT AND RELATION TO ISSUE, § 354.
—— NOTICE, IN GENERAL, § 355.
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§ 347. Public Documents, Records, Exemplifications or Other Official Copies.

[a] The alcalde's book of grants is admissible as evidence of a grant contained in it, when it is shown to be a book of the alcalde's office, in which grants were entered, that it bears the genuine signatures of the alcalde and clerk at the time of the grant for the place where the land lies, and that it belongs to the recorder's office of the county where the land lies.—Downer v. Smith, 24 Cal. 114.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 2145-2174, §§ 1521-1539.

§ 348. —— Production of Part of Record of Judicial Proceeding.

[a] The judgment and findings in a former action are not competent evidence unless the judgment-roll be offered in connection therewith, from the inspection of which it can be seen whether the court had jurisdiction to render the judgment.—Mason v. Wolff, 40 Cal. 246.

[b] One attempting to avail himself of a decree as an adjudication of title, etc., must produce the judgment-roll, for determination whether the court had jurisdiction.—Harper v. Rowe, 53 Cal. 233.

§ 349. —— Execution Without Judgment upon Which It is Based.

[a] To admit an execution in evidence, the judgment upon which it issued must be produced.—Vassault v. Austin, 32 Cal. 597.

§ 350. —— Sheriff's Deeds.

[a] Sheriff's deed inadmissible without proof of judgment and execution.—Sullivan v. Davis, 4 Cal. 291.

[ab] A sheriff's deed cannot be given in evidence without producing the judgment and execution under which the sale was made, such documents being necessary to show that the sheriff had authority to sell.—Vassault v. Austin, 32 Cal. 597.

[b] Sheriff's deed is not admissible without proof of judgment and execution under which he acted.—Peterson v. Weissbein, 75 Cal. 178, 16 Pac. 769.

§ 351. —— Authority for Executors of Administrator's Deed.

[a] A deed made under an act of the legislature authorizing the executors of a deceased person to sell and convey lands of their tes-

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tator is not admissible in evidence without first proving the testator's death and his appointment of the executors.—Kimball v. Semple, 25 Cal. 440.

§ 352. —— Tax Deeds.

[a] A tax deed properly acknowledged is admissible as evidence without further proof, but when fraudulently acknowledged it is inadmissible without further proof.—Wetherbee v. Dunn, 32 Cal. 106.

§ 353. Compelling Production by Adverse Party.

[a] Practice Act authorizes court to make order directing a party to produce books and papers in court.—Barnstead v. Empire Mining Co., 5 Cal. 299.

[b] Where it appeared from the testimony of the plaintiff, who was administratrix of the estate of her deceased husband, that there were in the possession of her attorneys writings of his relating to the purchase of the property in controversy, which the defendant, who was a brother of the deceased, claimed was purchased by the deceased and himself jointly, in equal shares, it was the duty of the court to allow the defendant to make further inquiries of the plaintiff regarding such papers, and to order them to be produced.—Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976.

[c] Where a party was notified to produce a letter sent him, a longhand copy thereof, shown to be such, is admissible, though not a facsimile.—Grant v. Dreyfus, 52 Pac. 1074.

FOR AUTHORITIES FROM OTHER STATES:

15 L. R. A. 138, note. See, also, 16 Cyc. 1266-2168; 17 Cyc. 457-464; 20 Cent. Dig., cols. 2175-2194, §§ 1540-1558.

§ 354. —— Nature of Document and Relation to Issue.

[a] Where, in an action against a street railway for personal injuries, it appeared that written statements as to the cause of the injury had been made by some of defendant's employees, and were in the hands of defendant's counsel at the trial, plaintiff's counsel was entitled on demand to receive such statements and to introduce them in evidence for the purpose of impeaching a witness.—Freel v. Market St. Cable Ry. Co., 97 Cal. 40, 31 Pac. 730.

§ 355. —— Notice in General.

[a] Sufficiency of notice to the adverse party, to produce on trial a certain paper in his possession, is a question of discretion in the court trying the case.—Burke v. Table Mountain Water Co., 12 Cal. 403.

[b] Literal accuracy cannot be expected in the description given in the notice to produce. Such description as will apprise a man of ordinary intelligence of the document desired is sufficient.—Burke v. Table Mountain Water Co., 12 Cal. 403.

§ 356. Preliminary Evidence for Authentication in General.

[a] The presumption arising from the existence of an ordinance upon the record of ordinances is sufficient to entitle it to be received in evidence without further proof, in the absence of evidence showing its invalidity.—County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644.

[b] In an action against a defendant who is the president of a mining corporation, to enforce his personal liability for lumber sold, the minute-book of the corporation referred to in the deposition of the defendant, but not attached to the deposition nor returned with it, cannot be read in evidence without proof of its identity.—Bradford v. Woodworth, 108 Cal. 684, 41 Pac. 797.

FOR AUTHORITIES FROM OTHER STATES:

35 L. R. A. 321, 44 L. R. A. 142, notes. See, also, 17 Cyc. 425-442; 20 Cent. Dig., cols. 2195-2338, §§ 1559-1657.

§ 357. —— Proof of Execution.

[a] Where the plaintiffs in ejectment were a joint stock company, and claimed by a transfer from the original members of the company, assignments of what had been issued as certificates of stock, which constituted the only evidence of membership recognized by the company, were not admissible as evidence of the transfer until their execution had been proved.—Pennsylvania Min. Co. v. Owens, 15 Cal. 135.

[b] Patent issued by government is admissible in evidence, without any proof of its execution. The official seal sufficiently authenticates it.—Gallup v. Armstrong, 22 Cal. 480.

[c] In an action upon a contract referring to a previous contract as containing the plan by and prices for which the work sued for is to be done, the previous contract is admissible in evidence for purposes of description, whether its execution is proved or not.—Neuval v. Cowell, 36 Cal. 648.

[d] In an action on an assigned claim, it was not necessary for defendant to prove a release by the subscribing witness, or account for his absence, before relying on the similarity of signatures disclosed by the release and the assignment.—Castor v. Bernstein (Cal. App.), 84 Pac. 244.

[e] In a suit on an assigned claim, defendant held entitled to introduce a release alleged to have been signed by plaintiff's assignor, without proof of such signature except by comparison with the signature on the assignment, as provided in Code of Civil Procedure, section 1944.—Castor v. Bernstein (Cal. App.), 84 Pac. 244.

§ 358. —— Proof of Authority to Execute.

[a] A deed executed by an unauthorized agent may yet be admissible to show the dis-

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of the grantee's possession under it, and to show that the agent's possession was under, or inured to the benefit of, the grantors.—McDonald v. Bear River etc. Min. Co., 13 Cal. 220.

[b] Assignment made by an agent is not admissible without proof of authority.—McMinn v. Whelan, 27 Cal. 300, 316.

[c] A deed without the corporate seal, purporting to be executed by the trustees of the corporation, is inadmissible as the deed of the corporation, without first showing the authority of the trustees to execute such deed. The recital of the authority in the deed itself would furnish no evidence whatever of its existence.—Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

§ 359. —— Proof of Execution of Original to Authorize Introduction of Copy.

[a] Act of 1851, section 21, gives to papers properly recorded like effect as originals, but it does not dispense with proof of execution.—Powell's Heirs v. Hendricks, 3 Cal. 427.

[b] Though a duly certified copy of a Mexican grant from the United States general surveyor's office is admissible in evidence under Acts of 1857, page 317, the execution of the original must be proved if denied; but, if not denied when the copy is offered, the execution is admitted.—Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

[c] Certified copies of instruments duly recorded may be read in evidence without proof of the execution of the originals.—Mayo v. Mazeaux, 38 Cal. 442; Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889.

§ 360. —— Proof of Delivery.

[a] The term "has executed unto," when applied to instruments of writing, imports both making and delivery.—Bagley v. Administrator of McMickle, 9 Cal. 430.

[b] No proof of delivery is necessary of a grant entered in the alcalde's book.—Downer v. Smith, 24 Cal. 114.

§ 361. —— Mode and Sufficiency in General.

[a] Where a subscribing witness to a bill of sale is out of the state, and the proof is that witness saw subscribing witness put his name to it, and saw grantor sign it, and recognizes the paper from hearing it read—not being able to read himself—and another witness testifies that the signature of the subscribing witness is in his handwriting, this is sufficient evidence to identify the paper and authorize it to be read in evidence.—McGarrity v. Byington, 12 Cal. 426.

[b] A subscribing witness, who is called to prove execution of instrument, who testifies that it was signed in his presence, "to the best of his recollection," is sufficient to allow it to be read in evidence.—McGarrity v. Byington, 12 Cal. 426.

§ 362. —— Best and Secondary Evidence of Execution.

[a] To admit proof of handwriting of witness to an instrument it must be shown that the witness is beyond the jurisdiction of the court, or that he could not be found after diligent search for him had been made; that his absence may be inferred.—Powell's Heirs v. Hendricks, 3 Cal. 427.

[b] A subscribing witness to a written instrument, if within the jurisdiction of the court, must be produced, or some sufficient reason given for his absence.—Stevens v. Irwin, 12 Cal. 306.

[c] A bill of sale is sufficiently proved when the handwriting of the subscribing witness, who is absent from the state, and the execution by the vendor are proven. And this, though the subscribing witness was in the state after suit instituted and near the place of trial, and plaintiff used no efforts to get the testimony of the witness before he left the state.—Jackson v. Feather River Water Co., 14 Cal. 18.

[d] The execution of an instrument which the law does not require to be attested by witnesses may be authenticated by proof of the handwriting of the grantor or obligor, if the subscribing witnesses are beyond the jurisdiction of the court.—Landers v. Bolton, 26 Cal. 393.

[e] Where a conveyance not acknowledged is offered in evidence, and it is proved that it was executed by the grantor and witnessed by subscribing witnesses out of the state, and there is no evidence to show that the subscribing witnesses were ever in the state, a sufficient presumption is raised that the subscribing witnesses are not within the jurisdiction of the court, so as to admit secondary evidence of its execution by the grantor.—Landers v. Bolton, 26 Cal. 393.

[f] When the subscribing witness to a deed is beyond the jurisdiction of the court, such instrument is admissible in evidence on proof of the signature of the grantor, without proving the handwriting of the subscribing witness, unless the instrument is one which the law requires to be attested by witnesses, in which case proof of the handwriting of both parties and subscribing witnesses might be necessary.—Landers v. Bolton, 26 Cal. 393.

[g] An instrument in writing executed and attested by a subscribing witness at a place beyond the jurisdiction of the court can be proved by producing evidence of the handwriting of the party who executed it.—McMinn v. Whelan, 27 Cal. 300.

[h] It is not necessary, in order to prove the execution of a deed made in a foreign country, to produce the attesting witness, or account for his absence, or prove his handwriting.—McMinn v. O'Connor, 27 Cal. 238.

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§ 363. Books of Account, Memoranda and Statements.

[a] On a bill by attaching creditors to restrain proceedings against the property attached under a judgment against the debtor, alleged to have been obtained by fraud, where all the material allegations of the bill except those of fraud are admitted, the books of the judgment creditor are not admissible as evidence for the defense, to show an entry of the original transaction on which the judgment is based, where the only predicate laid is evidence that the judgment creditor was possessed of capital sufficient to have loaned the amount of the judgment to the judgment debtor.—Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519.

[b] Plaintiff testified that he kept no clerk, and had no books except the one produced; that the one produced was his book of original entries in which he kept his accounts; and that the entries were made at their dates. Held, that the book was proved, and was admissible.—Landis v. Turner, 14 Cal. 573.

[c] Foundation necessary to be laid for admission of account-books, stated.—Watrous v. Cunningham, 71 Cal. 32, 33, 11 Pac. 811.

[d] Account-books of vendor showing part payment of purchase price are not admissible to establish that no further payments had been made.—Kerns v. McKean, 76 Cal. 88, 89, 18 Pac. 122; Kerns v. Dean, 77 Cal. 558, 19 Pac. 817.

[e] Tradesman's shop-book of original entries properly kept is admissible when supported by tradesman's oath.—White v. Whitney, 82 Cal. 166, 167, 22 Pac. 1138.

§ 364. —— Testimony of Party.

[a] In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm, by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence.—Landis v. Turner, 14 Cal. 573.

§ 365. —— Mortality Tables.

[a] The court may admit tables of life expectancy without preliminary proof of authenticity and standard quality.—Keast v. Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

§ 366. Letters.

[a] It is error to admit letters in evidence without proving that they were written by the party intended to be charged by their contents.—Sinclair v. Wood, 3 Cal. 98.

[b] Petitioner introduced evidence tending to show that she received at Buffalo a letter signed C. K. (testatrix's name), containing a railroad ticket and five dollars. It was shown that the address of C. K. was at 616½ N. street, and that at about that time she borrowed five dollars to send, as she said, to her sister at Buffalo. Held, that petitioner might introduce from the book of registered letters of the San Francisco postoffice an entry reciting the receipt of a letter from C. K., 616½ N. street, addressed to M. R. (petitioner), Buffalo, such testimony being proper, as affording some evidence that the letter came from deceased.—Kennedy's Estate, In re, 36 Pac. 1030.

[c] Where, in an action for the price of goods sold, a letter purporting to be written by defendant to plaintiff's brother, and received in due course of mail, was shown to relate directly to plaintiff's claim, an objection to it on the ground that it referred to a different account, and was addressed to one other than plaintiff, was properly overruled. Judgment (1898) 52 Pac. 1132, affirmed.—Ryland v Heney, 130 Cal. 426, 62 Pac. 616.

[d] Where, in an action for grapes sold, a letter purporting to have been written by defendant to plaintiff's brother was claimed by plaintiff to relate to the transaction involved, but objected to by defendant on the ground that it was addressed to a different person, and relating to another account, a question put to the brother, as to whether he had any account personally with defendant, was proper, in order to connect the letter with plaintiff's demand. Judgment (1898) 52 Pac. 1132, affirmed.—Ryland v. Heney, 130 Cal. 426, 62 Pac. 616.

[e] Where, in an action for goods sold, it appeared that defendant's wife at times in his absence answered his letters, and that she wrote a letter to the plaintiff relative to the transaction involved, signing her husband's name to the same, and thereafter defendant received a reply to such letter, and in answer wrote one to plaintiff, referring to the former letter as emanating from himself, but by mistake the letter was sent to plaintiff's brother, who was acting as plaintiff's agent in the transaction, and such letter was received in evidence without objection on the part of defendant, the letter written by the wife was properly admitted in evidence. Judgment (1898) 52 Pac. 1132, affirmed.—Ryland v. Heney, 130 Cal. 426, 62 Pac. 616.

§ 367. Maps and Plats.

[a] The field-notes made by the defendant's surveyor and engineer, who did not testify to their correctness, and the correctness of which was not proved by any competent evidence, were properly excluded.—Scanlan v. San Francisco etc. Ry. Co., 128 Cal. 586, 61 Pac. 271.

§ 368. Conclusiveness and Effect.

[a] Entry of satisfaction of warrants, made under the loose provisions of the act of April 4, 1864, in relation to board of supervisors of Butte county, is entitled to no more weight than oral testimony.—Day v. Callow, 39 Cal. 593.

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[b] Relative value or effect of deeds introduced in evidence by the respective parties to the action can only be determined by the court or jury to whom they are submitted for consideration.—Yates v. Smith, 40 Cal. 662.

[c] Record only proves itself as a record.—Brown v. Griffith, 70 Cal. 16, 11 Pac. 500.

[d] Record is conclusive evidence.—Dyer v. Brogan, 70 Cal. 139, 11 Pac. 589.

[e] Entries in minute-book of board of supervisors are only prima facie evidence of facts stated therein.—Reclamation Dist. v. Wilcox, 75 Cal. 448, 449, 17 Pac. 241.

[f] An indorsement by a recorder upon a notice of lien is at least prima facie evidence of its filing and the date of its recording.—Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

[g] Certified copy of entries in justice's docket is prima facie evidence of facts stated.—Shatto v. Crocker, 83 Cal. 631, 24 Pac. 836.

[gh] The fact that goods sold are charged on the seller's books to another than the one to whom they are delivered is not conclusive evidence that such other was the real purchaser, but is open to explanation.—Lane v. Turner, 114 Cal. 396, 46 Pac. 290.

[gi] Where an account of one party is put in evidence by the adverse party, the latter must call for any required explanation of an item of the account, and the item will not be disallowed because it does not indicate what it was for.—Bank of British Columbia v. Frese, 116 Cal. 9, 47 Pac. 783.

[h] A tax deed is evidence that the assessor had prepared a delinquent list for the year for which the land assessed was sold for taxes. A copy of the delinquent list, duly verified and filed, as required by section 3769 of the Political Code, establishes the original in the absence of evidence to the contrary; and the loss of the original cannot affect the rights of the purchaser at the tax sale.—Davis v. Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15.

[i] Code of Civil Procedure, section 1963, subdivision 34, authorizing the admission of ancient documents in evidence without proof of authenticity, merely creates a presumption that the documents are genuine, and does not import verity to any of their recitals.—Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

[j] The minutes of the meeting of the directors of a corporation are not conclusive evidence of the terms of a contract between the corporation and another, where the latter had no knowledge of such minutes.—Gabriel v. Bank of Suisun, 145 Cal. 266, 78 Pac. 736.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 464; 20 Cent. Dig., cols. 2342-2362, §§ 1660-1677.

§ 369. —— Effect of Introducing Part of Document or Record.

[a] Defendant cannot offer in evidence an extract or single clause of a book containing the mining rules, but must offer the whole book, the book being in court and in possession of defendant, and it being necessary to a fair understanding of any one part that the whole should be inspected.—English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574.

[b] If one party read a portion of a document in evidence in his behalf, the other party is entitled to the reading of the remaining portions thereof, before the intervention of other testimony.—Spanagel v. Dellinger, 38 Cal. 278.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

A. Contradicting, Varying or Adding to Terms of Written Instruments, §§ 370-420.
   1. Writings Excluding Extrinsic Evidence in General, §§ 370-394.
   2. Grounds for, or Purpose of Extrinsic Evidence in General, §§ 395-420.

B. Invalidating Written Instrument, §§ 421-427.

C. Separate or Subsequent Oral Agreements, §§ 428, 429.

D. Construction or Application of Language of Written Instrument, §§ 430-444.

E. Showing Discharge or Performance of Obligation, §§ 445-447.

A. CONTRADICTING, VARYING OR ADDING TO TERMS OF WRITTEN INSTRUMENTS.

1. Writings Excluding Extrinsic Evidence in General, §§ 370-394.

2. Grounds for, or Purpose of Extrinsic Evidence in General, §§ 395-420.

1. Writings Excluding Extrinsic Evidence in General.

JUDICIAL RECORDS OR PROCEEDINGS, § 370.
OFFICIAL RECORDS AND DOCUMENTS, § 371.
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—— CONTRACTS FOR SALE OF LAND OR CHATTELS, § 389.
—— DESCRIPTION OF PROPERTY INCLUDED, § 390.
BILLS AND NOTES, § 391.
—— INDORSEMENT AND TRANSFER, § 392.
RECEIPTS, § 393.
MEMORANDA NOT CONSTITUTING CONTRACT OR DISPOSITION OF PROPERTY, § 394.

§ 370. Judicial Records or Proceedings.

[a] Parol evidence is admissible to show a former adjudication, and all facts bearing upon it.—Walsh v. Harris, 10 Cal. 392.

[b] Parol evidence is not admissible to vary the terms of a decree of divorce, or change the rights of the parties thereunder.—Wilson v. Wilson, 45 Cal. 399.

[c] There is some conflict in the authorities upon the question whether parol evidence can ever be resorted to for the purpose of showing what matters within the issues were not submitted to the jury in a former action; but none as to the inadmissibility of such evidence to prove that matters outside of the issues were submitted and passed upon.—Meredith v. Santa Clara M. Assn., 56 Cal. 178.

[d] Parol evidence is not admissible for the purpose of showing that the judgment might have located the ditch in a different position, or that the description of said ditch in the said judgment is not absolutely accurate.—Wishon v. Superior Court of Tulare County, 138 Cal. 73, 70 Pac. 1007.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 571-581; 20 Cent. Dig., cols. 2365-2388, §§ 1678-1697.

§ 371. Official Records and Documents.

[a] The record of the board of supervisors of the county, under their seal, is evidence of its contents, unless impeached in direct proceedings; and it could not be shown that a matter therein recorded was not complete. People v. Bircham, 12 Cal. 50.

[ab] Official surveys cannot be impeached and invalidated by parol proof.—Chapman v. Polack, 70 Cal. 487, 11 Pac. 764.

[b] It is not competent to supply alleged deficiencies in records by parol evidence.—Bode v. Trimmer, 82 Cal. 518, 23 Pac. 187.

[c] The change from the old to the new constitution does not affect the rule that the record of the authenticated and enrolled statute in the office of the Secretary of State cannot be impeached by evidence of any fact outside of such record.—County of Yolo v. Colgan, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 581-587; 20 Cent. Dig., cols. 2388-2405, §§ 1698-1713.

§ 372. —— Registration or Certificate Thereof.

[a] A certificate by the proper custodian of a public official document or record that a copy thereof is correct cannot be shown by parol to be false.—People v. Hagar, 52 Cal. 171.

[b] A statement in the certificate of a recorder that a lien was duly sworn to is conclusive evidence of that fact.—Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217.

§ 373. Corporate Records and Proceedings.

[a] A corporation may introduce parol evidence to show that the minutes of a resolution of its board of trustees do not correctly express a proposition voted by the board.—Gilson Quartz Min. Co. v. Gilson, 51 Cal. 341.

[b] In a suit on an assessment, the subscriber cannot show, in contradiction of the secretary's minutes, that the directors were not elected by ballot.—San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; San Joaquin Land etc. Co. v. Belding, 35 Pac. 353.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 588; 20 Cent. Dig., cols. 2406, 2407, §§ 1717, 1718.

§ 374. Deeds.

[a] Parol evidence is inadmissible to add to, vary, or change the terms of a deed not attacked on the ground of fraud or mistake.—Judson v. Malloy, 40 Cal. 299; Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

[ab] Parol evidence is inadmissible to show intention of grantor that deed should have effect different from that apparent on its face.—Mowry v. Heney, 86 Cal. 475, 25 Pac. 17.

[b] Under Civil Code, section 1625, providing that the execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument, and Code of Civil Procedure, section 1856, providing that when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and that the term "agreement" includes deeds as well as contracts between parties, evidence of oral agreements made during negotiations leading up to the execution and delivery of deeds in exchange of land, and contradictory of such deeds, is incompetent.—Beall v. Fisher, 95 Cal. 568, 30 Pac. 773.

FOR AUTHORITIES FROM OTHER STATES:

16 L. R. A. 321, note. See, also, 17 Cyc. 613-620; 20 Cent. Dig., cols. 2408-2436, §§ 1719-1728.

§ 375. —— Official Deed.

[a] Parol evidence is inadmissible to show that a constable's sale was made by virtue

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of any other judgment or execution than that recited in the deed; and it is also inadmissible to show that the constable sold the interest of a person in the land described in the deed, whose interest the deed itself does not recite upon its face to have been sold.—Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78.

§ 376. —— Description of Premises.

[a] Where a boundary line in a deed was described as commencing at a tree, and "thence running easterly parallel with the southern line of said Antelope ranch, according to the survey of the same made by the United States surveyor general for said state, to said Antelope creek," held, that the language was not ambiguous, and evidence aliunde was not admissible to show that a straight line following the general course of the southern boundary was intended.—Fratt v. Woodward, 32 Cal. 219, 91 Am. Dec. 573.

[b] Vendee cannot show by parol that vendor agreed in same contract to sell and convey other lands not included in the deed.—Ward v. McNaughton, 43 Cal. 159; Altschul v. San Francisco etc. Assn., 43 Cal. 171.

[c] Where the description in a deed is broad enough to include both high lands and marsh lands, but it is silent as to the quantity of land intended to be conveyed, parol evidence is not admissible to show the intention of the grantor to exclude such marsh lands. Dent v. Bird, 67 Cal. 652, 8 Pac. 504; Hall v. Hebard, 8 Pac. 507.

[d] Under a deed purporting to convey a certain number of feet along a street, commencing at a certain point, only that number of feet passed by the deed; and therefore evidence that the grantor, in measuring off the land granted, measured more than that number of feet, is incompetent to show that more than the number of feet stated passed by the deed.—Hogins v. Boggs, 34 Pac. 653.

§ 377. Patents.

[a] Patent cannot be reformed or varied by parol evidence.—Chipley v. Farris, 45 Cal. 528.

§ 378. Stipulations.

[a] Evidence is inadmissible to contradict a written stipulation.—Lord v. Sherman, 2 Cal. 498.

§ 379. Assignments.

[a] Parol evidence is admissible to show that an assignment of stock, with dividends from date fixed, did not include a dividend expected before that date.—Brewster v. Lathrop, 15 Cal. 21.

[b] Under Code of Civil Procedure, section 1856, limiting the rule that parol evidence is inadmissible to contradict a written agreement by the parties to the agreement and their representatives and successors in interest, parol evidence of a transfer of coyote bounty claims to plaintiff could not be objected to by the state, in an action thereon, on the ground that it tended to contradict certain powers of attorney executed to the transferees as a part of the transfer.—Bickerdike v. State, 144 Cal. 681, 78 Pac. 270.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 635; 20 Cent. Dig., cols. 2443-2446, §§ 1733-1835½.

§ 380. Bills of Sale.

[a] Parol evidence as to what property was covered by a certain bill of sale introduced in evidence, the property being therein described, is inadmissible.—Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243.

[b] One who accepts a bill of sale purporting to transfer a certain number of cattle is not estopped thereby from denying that he actually received that number.—Murdock v. Clarke, 90 Cal. 427, 24 Pac. 272, 27 Pac. 275.

[c] Oral evidence is inadmissible to show that from a sale of a photograph gallery by bill of sale transferring all the material and working apparatus and all cameras and negatives in the gallery, the parties orally reserved a lens and camera, and a stated number of negatives located therein.—Hodson v. Varney, 122 Cal. 619, 55 Pac. 413.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 593, 594; 20 Cent. Dig., cols. 2436-2442, §§ 1729-1732.

§ 381. —— Warranty.

[a] A written agreement for the sale of personal property will be presumed to express all the terms of the agreement between the parties, and parol evidence is inadmissible to show the existence of a warranty not expressed in the contract.—Johnson v. Powers, 65 Cal. 179.

§ 382. Leases.

[a] Parol evidence to show what was said at the time of and before executing a lease, for the purpose of varying its terms, is not admissible.—Jungerman v. Bovee, 19 Cal. 354.

[b] Parol evidence of an agreement that the tenant should have the right to remove buildings erected by him is inadmissible, the written lease providing that the premises should be surrendered at the end of the term, reasonable use, etc., excepted.—Jungerman v. Bovee, 19 Cal. 354.

[c] Unexecuted oral agreement cannot alter written lease under Civil Code, section 1698. Taylor v. Soldati, 68 Cal. 28, 8 Pac. 518.

[d] Testimony as to conversation affecting written lease held inadmissible.—Johnston v. Mulcahy (Cal. App.), 88 Pac. 491.

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FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 622-625; 20 Cent. Dig., cols. 2446-2456, §§ 1736-1745.

§ 383. Mortgages.

[a] Declaration in mortgage that seal affixed is seal of person signing, cannot be varied by parol evidence.—Richardson v. Scott River etc. Co., 22 Cal. 150.

[b] When an overdraft account with a bank is secured by a note and mortgages payable on or before three years, and interest as due is charged in the account, the rules against parol evidence (Civ. Code, sec. 1625; Code Civ. Proc., sec. 1856) forbid proof of an oral agreement that the debt should be due at any time within the three years, at the bank's option.—Bullion & Exchange Bank v. Spooner, 36 Pac. 121.

[c] Parol evidence is not admissible to show that a mortgage securing advances made was also to cover future advances.—Barnhart v. Edwards, 47 Pac. 251.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 626-628; 20 Cent. Dig., cols. 2456-2463, §§ 1746-1753.

§ 384. Contracts in General.

[a] In the absence of fraud or mistake, parol evidence is not admissible to vary or add to the terms of a written contract.—Leonard v. Vischer, 2 Cal. 37; Swain v. Grangers' Union, 69 Cal. 187, 10 Pac. 404; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Miller v. Butterfield, 79 Cal. 65, 21 Pac. 543; Johnson v. Bibb Lumber Co., 140 Cal. 98-101, 73 Pac. 730.

[b] Where parties enter into a written contract, their rights must be controlled thereby, and in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject matter, varying, modifying, or contradicting the written agreement, is inadmissible.—Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529; Bryan v. Idaho Quartz Min. Co., 73 Cal. 249, 14 Pac. 859.

[c] Parol evidence is not admissible to show a mistake in a written contract, unless the mistake is pleaded, and a reformation asked. Pierson v. McCahill, 21 Cal. 123.

[d] Where a letter and contract are unambiguous, a witness cannot testify as to his understanding of the meaning thereof.—Donohoe v. Mariposa Land etc. Co., 66 Cal. 317, 5 Pac. 495.

[e] Where there is a written agreement to repay a loan at a stated time, the lender will not be allowed to testify as to an oral agreement to alter the terms of the written agreement, made at the time of the loan.—Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225.

[f] Parol evidence is inadmissible to show negotiations antecedent to written contract. Schurtz v. Romer, 82 Cal. 478, 23 Pac. 118; Board of Education v. Grant, 118 Cal. 44, 50 Pac. 5.

[g] Deviation not varying terms of contract but merely expanding them as provided in it may be proved by parol.—White v. Soto, 82 Cal. 658, 23 Pac. 210.

[h] Parol evidence is inadmissible to prove agreements superseded by written contract.—Smith v. Taylor, 82 Cal. 546, 23 Pac. 217.

[i] Where an irrigation company contracts to furnish a certain amount of water, parol evidence that the purchaser, and others holding similar contracts, understood the same to confer the right of receiving the water in an accumulated flow, is inadmissible.—Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 Pac. 893.

[j] Evidence of surety's intention to give the amount of the debt to the principal held an attempt to vary a written contract by parol, in violation of Civil Code, sections 1639, 1698, and Code of Civil Procedure, section 1856.—Townsend v. Sullivan (Cal. App.), 84 Pac. 435.

[k] An indorsement of a compromise on a bill is not a mere receipt, but a contract of satisfaction, which could not be varied by parol.—Jersey Island Dredging Co. v. Whitney (Cal. App.), 86 Pac. 509.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 596; 20 Cent. Dig., cols. 2464-2492, §§ 1756-1765.

§ 385. —— Contract for Partnership.

[a] Parol evidence is inadmissible to enlarge, extend, or otherwise vary a contract entered into between plaintiff and defendant to share equally in any mine which they might find; and any subsequent contract, whether written or parol, with respect to the management or disposal of the property to be acquired, is wholly immaterial.—Miller v. Butterfield, 79 Cal. 62, 21 Pac. 543.

§ 386. —— Contracts of Employment.

[a] A written proposition for employment by defendant to plaintiff was orally accepted by plaintiff. Held that, in an action by plaintiff for wrongful discharge, oral evidence is inadmissible to change the contract, except as to matters necessarily implied in it or necessary to its performance.—Wiley v. California Hosiery Co., 32 Pac. 522.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 604; 20 Cent. Dig., cols. 2492-2498, §§ 1766-1771.

§ 387. —— Power of Attorney.

[a] Parol evidence is admissible to interpret power of attorney.—Frink v. Roe, 70 Cal. 307, 11 Pac. 820.

[b] Parol evidence is inadmissible to enlarge agent's powers or confer others not

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enumerated.—Frink v. Roe, 70 Cal. 307, 314, 11 Pac. 820.

§ 388. —— Amount of Value of Services.

[a] Where the written contract provides for a certain payment for the work to be performed, it cannot be varied by proof of a prior parol agreement for a less price.—McDonald v. Poole, 113 Cal. 437, 45 Pac. 702.

§ 389. —— Contracts for Sale of Land or Chattels.

[a] Where the written contract is that the vendee should take the land subject to a specified mortgage, evidence that, when the contract was executed, he knew of the existence of other encumbrances, and that there was a parol agreement as to how, when, and by whom they were to be paid off, is inadmissible, as Civil Code, section 1625, provides that when the parties to a contract reduce it to writing, the writing supersedes all other agreements between them on that subject.—Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Good v. Taylor, 23 Pac. 220; Carscaddon v. Taylor, 23 Pac. 220.

[b] In an action for damages for defendant's failure to deliver certain personalty, pursuant to a contract in writing, effected through the agent of plaintiff's assignor, and providing for payment on delivery, where it was averred in the answer that defendant had been induced to enter into such contract by means of a fraudulent parol promise, by such agent, that a portion of the agreed price should be paid in advance of the time of delivery, it was error to reject evidence that such promise was made without any intention that it should be performed, and was therefore one of the forms of actual fraud, as defined in Civil Code, section 1572, though, if honestly made, it was within the rule forbidding proof of a contemporaneous or prior oral agreement to detract from the terms of a contract in writing.—Langley v. Rodriguez, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406.

[c] Code of Civil Procedure, section 1856, does not authorize admission of parol evidence to show a sale to be one by sample (Civ. Code, secs. 1753, 1754).—Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964.

[d] In an action to recover for logs sold and delivered, where there is no allegation of mistake or misunderstanding, the evidence of one who made the contract for defendant as to what he understood by certain terms therein is inadmissible.—Bullock v. Consumers' Lumber Co., 31 Pac. 367.

§ 390. —— Description of Property Included.

[a] Where a contract was for the sale and delivery of so much sound rice, without specifying any particular rice, there being no ambiguity on the face of the contract, parol evidence is inadmissible for the purpose of varying its terms by causing it to refer to a particular cargo.—Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618.

[b] Oral evidence is inadmissible to include other and more property in a sale than that described in the written contract.—Osborn v. Hendrickson, 7 Cal. 282.

§ 391. Bills and Notes.

[a] Absolute promise in bill or note cannot be changed by parol proof to a conditional one.—Aud v. Magruder, 10 Cal. 282.

[b] Parol evidence is not admissible, as showing a want of consideration, where it does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.—Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529.

[c] Where a note on its face draws two and a half per cent per month interest, parol evidence is not admissible to prove that from a certain time the interest had been reduced by a verbal agreement between the parties to one and a half per cent per month. Interest beyond the statutory rate cannot be established by parol.—Adler v. Friedman, 16 Cal. 138.

[d] In an action on note, it cannot be shown that there was a contemporaneous parol agreement that the same should be payable only out of a particular fund, since to do so would be to vary by parol the terms of a written contract.—Guy v. Bibend, 41 Cal. 322.

[e] Parol evidence is not admissible to show that note was to be surrendered upon settlement of an account which it was given to secure.—San Jose Sav. Bank v. Stone, 59 Cal. 183.

[f] Provision in note to pay interest cannot be varied by proof of parol agreement.—Fisk v. Casey, 119 Cal. 645, 51 Pac. 1077.

[g] Parol evidence is inadmissible to show that note payable on certain date was not to be paid except on happening of certain event. Prouty v. Adams, 141 Cal. 307, 74 Pac. 845.

[h] Where the makers of notes resisted payment on the ground of failure of consideration, evidence to vary the terms of the notes, which in no way related to consideration, was properly excluded.—Easton Packing Co. v. Kennedy, 131 Cal. xviii, 63 Pac. 130.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 589; 20 Cent. Dig., cols. 2531-2551, §§ 1799-1806.

§ 392. —— Indorsement and Transfer.

[a] Where demand and notice are both waived by the indorser of a note, the former verbally and the latter in writing, parol evidence is admissible to prove the verbal waiver.—Mills v. Beard, 19 Cal. 158.

[b] The written contract of indorsement on a note cannot be changed from a contract of

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conditional liability, depending on proper demand and notice, to an unconditional promise, by parol evidence of statements made before and at the time of the indorsement.—Goldman v. Davis, 23 Cal. 256.

[c] Contract of indorsement cannot be varied or changed by parol evidence of verbal agreement made prior to or after it.—Citizens' Bank v. Jones, 121 Cal. 32, 53 Pac. 354.

[d] Evidence of the intention of an indorser not to waive presentation or notice, who is found on sufficient proof to have attached his signature under the stamped waiver, is not admissible, and, if admitted without objection, is irrelevant and immaterial, and cannot affect or change his liability.—Farmers' Exchange Bank v. Altura Gold Mill etc., 129 Cal. 263, 61 Pac. 1077.

§ 393. Receipts.

[a] A receipt acknowledging payment of a debt, whether in money or some other medium, may be explained or contradicted by parol.—Hawley v. Bader, 15 Cal. 44.

[b] A receipt in a broker's contract for the sale of stock acknowledging the receipt of the first payment on the margin of the contract is only prima facie evidence of the payment of the money, and may be explained by parol testimony.—Winans v. Hassey, 48 Cal. 634.

[c] Receipt is always open to explanation and purpose for which it was given may be shown.—Comptoir D. De P. v. Dresbach, 78 Cal. 27, 20 Pac. 28.

[d] Parol evidence is admissible to show that money recited in receipt to be paid for one purpose was paid for another.—Snodgrass v. Parks, 79 Cal. 60, 21 Pac. 429.

[e] A receipt given an officer to make up his record in a foreclosure suit may be explained by parol evidence showing that no money was in fact received.—Hardin v. Dickey, 123 Cal. 513, 56 Pac. 258.

[f] A receipt may always be explained by parol.—Lacrabere v. Wise, 71 Pac. 175.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 629-634; 20 Cent. Dig., cols. 2584-2610, §§ 1829-1842.

§ 394. Memoranda not Constituting Contract or Disposition of Property.

[a] An entry in a memorandum book is subject to explanation by the party making it, to the same extent as it would have been had the words been spoken instead of being written.—Rice v. Heath, 39 Cal. 609.

[b] Written admissions are explainable by parol.—Comptoir D. De P. v. Dresbach, 78 Cal. 28, 20 Pac. 28.

[c] The rule that parol evidence is not admissible to vary the terms of a written contract does not apply to a memorandum, signed by one of the parties, which contains no contract stipulations, and does not define the mutual obligations, and which appears on its face to be intended as an informal memorandum, to be considered in connection with oral negotiations which preceded it.—Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109.

[d] A draft of a chattel mortgage prepared by the plaintiffs to be executed by the original defendant, but not executed, is not a written instrument within the rule that oral testimony is not admissible to vary its meaning; but its statements coming from the plaintiffs were merely admissions on their part which were subject to explanation, equally with like verbal admissions.—Wise v. Collins, 121 Cal. 147, 53 Pac. 640.

[e] In an action to quiet the title of the grantee of the deed absolute against the father and daughter, where the defendants offered in evidence a written memorandum showing the different items which made up the amount of the price to be paid by the daughter, including taxes for the year, under the option to repurchase, a question asking for parol proof as to who was to pay the taxes for the year was properly disallowed.—Garwood v. Wheaton, 128 Cal. 399, 60 Pac. 961.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 636; 20 Cent. Dig., cols. 2614-2620, §§ 1846-1854.

2. Grounds for, or Purpose of, Extrinsic Evidence in General.

IN GENERAL, § 395.
SUSTAINING VALIDITY OF INSTRUMENT, § 396.
MATTERS FOR WHICH WRITING DOES NOT PROVIDE, § 397.
—— IN OFFICIAL RECORDS AND PROCEEDINGS, § 398.
—— IN CONTRACTS, IN GENERAL, § 399.
—— IN ASSIGNMENTS, § 400.
—— RAILROAD TICKET, § 401.
—— IN CONTRACTS OF PARTNERSHIP, § 402.
WRITING SHOWING ALTERATION, § 403.
—— EXPLAINING ALTERATION, § 404.
CONNECTION OF CONTEMPORANEOUS WRITINGS, § 405.
PARTIES TO INSTRUMENT OR OBLIGATION, § 406.
—— AFFECTING RIGHTS AND LIABILITIES OF PERSONS NOT NAMED, § 407.
—— PERSONAL OR REPRESENTATIVE CAPACITY, § 408.
—— EXISTENCE OF RELATION CREATED BY WRITING, § 409.
NATURE OF CONSIDERATION, § 410.
—— OF CONTRACT, IN GENERAL, § 411.
—— OF ASSIGNMENTS, § 412.
—— OF MORTGAGES, § 413.
—— OF BILLS AND NOTES, § 414.
— OF RELEASE, § 415.
EXISTENCE OF CONDITION OR CONTINGENCY, § 416.
EXISTENCE OF CUSTOM OR USAGE, § 417.
EXISTENCE OR ACCRUAL OF LIABILITY, § 418.
NATURE AND EXTENT OF LIABILITY, § 419.
EFFECT OF WRITING AS TO PERSONS NOT PARTIES OR PRIVIES THERETO, § 420.

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§ 395. In General.

[a] Parol evidence is admissible when it relates to the execution or authenticity of a written contract.—Verzan v. McGregor, 23 Cal. 339.

[b] Delivery of an instrument may be shown by parol.—Verzan v. McGregor, 23 Cal. 339.

[c] Parol evidence contradicting the date of an official record is admissible.—Gately v. Irvine, 51 Cal. 172.

[d] Parol evidence should not be allowed to vary terms of writing, though admitted for another purpose.—Tyler v. Stone, 81 Cal. 238, 22 Pac. 598.

[e] While the possession of a deed by the grantee is prima facie evidence that it was delivered by the grantor with intent that it should take effect according to its terms, yet such possession is not conclusive evidence of a valid delivery; and it may be shown by parol evidence that a deed in the possession of the grantee was not delivered.—Black v. Sharkey, 104 Cal. 279, 37 Pac. 939.

[f] Parol evidence is admissible when it is entirely consistent with and in no manner changes or contradicts written instrument.—Johnson v. Bibb Lumber Co., 140 Cal. 98, 73 Pac. 730.

[g] Evidence as to the understanding of parties when a contract was executed, as to its meaning, was properly excluded. Judgment (1902) 70 Pac. 470, reversed on rehearing.—Swift v. Occidental Min. etc. Co., 141 Cal. 161, 74 Pac. 700.

§ 396. Sustaining Validity of Instrument.

[a] The general rule that parol testimony is inadmissible to vary a written contract does not exclude parol proof of mistake in its execution or terms, when a reformation of the instrument is sought.—(1862) Pierson v. McCahill, 21 Cal. 122; (1863) Pierson v. McCahill, 23 Cal. 249; Murray v. Dake, 46 Cal. 644.

§ 397. Matters for Which Writing Does not Provide.

[a] The docket of a justice is primary evidence under the statute, but its omissions may be supplied by parol evidence, when necessary.—Blair v. Hamilton, 32 Cal. 49.

[b] Parol evidence is admissible when parties have not incorporated into instrument all the terms of their agreement.—Sivers v. Sivers, 97 Cal. 521, 32 Pac. 571; Bradford Inv. Co. v. Joost, 117 Cal. 210, 48 Pac. 1083.

[c] Under Civil Code, section 226, providing that an order of adoption must be made by a judge of the county where the adopting parent resides, where an order fails to recite that fact, extrinsic evidence is admissible to show it.—Williams' Estate, In re, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

[d] Parol evidence is admissible when from an inspection of the writing it appears upon its face that it is not intended to be a complete contract.—Johnson v. Bibb Lumber Co., 140 Cal. 98, 73 Pac. 730.

§ 398. —— In Official Records and Proceedings.

[a] Parol evidence is admissible to prove facts omitted from the record, unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.—Gordon v. San Diego, 108 Cal. 264, 41 Pac. 301.

§ 399. —— In Contracts in General.

[a] Where the sale of materials employed in the construction and alteration of a building is made by a written contract, which is silent as to the purpose for which the articles sold were intended to be used, parol evidence is admissible to show such purpose, and thereby establish a mechanic's lien for the price in favor of the seller.—Donahue v. Cromartie, 21 Cal. 80.

[b] Under Civil Code, section 1614, which declares that "a written instrument is presumptive evidence of a consideration," a real estate agent is entitled to show by parol evidence the reasonable value of his services in effecting a sale under the authority of a memorandum which does not state the commission he is to receive.—Toomey v. Dunphy, 86 Cal. 639, 25 Pac. 130.

[c] Where a written contract relates to services to be rendered by one of the parties, but is silent as to the compensation to be paid therefor, oral evidence is admissible to show the compensation agreed on, as such evidence does not tend to vary the terms of the written contract, but to establish an independent collateral agreement, not inconsistent therewith.—Guidery v. Green, 95 Cal. 630, 30 Pac. 786.

[d] In an action on a written contract for the payment of money, where no time of payment is fixed, it is competent to show by oral testimony when such contract was agreed to be performed.—Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571.

§ 400. —— In Assignments.

[a] Where an assignment of a claim failed to name the assignee, parol evidence is properly admitted, on the trial of an action thereon, to show that plaintiff was the assignee, and that his name was omitted by mistake; and plaintiff's offer to have the assignment corrected by the assignor by inserting his name should be allowed by the court.—Owen v. Meade, 104 Cal. 179, 37 Pac. 923.

§ 401. —— Railroad Ticket.

[a] A railroad passenger ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement, and hence parol evidence is admissible

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to show the limitations and conditions on which a ticket was sold.—Ames v. Southern Pac. Co., 141 Cal. 728, 75 Pac. 310.

§ 402. —— In Contracts of Partnership.

[a] When stranger to joint written contract, entered into by several persons, relies on it as evidence of a partnership between the persons who signed it, in reference to the work the parties undertook by the contract to perform, such parties may show, by parol evidence, the true relations between themselves, even though such evidence vary or contradict its terms.—Smith v. Moynihan, 44 Cal. 53.

§ 403. Writing Showing Alteration.

[a] Parol evidence is admissible to show that a contract for hay and pasture for cattle was prepared by their owner; that it provided for payment for all hay used by the cattle at a certain price; that the owner of the hay and pasture refused to sign it, insisting that all the hay should be taken, or none; that the owner of the cattle then erased from the contract the provision as to paying for the hay used, and added thereto a provision for taking all the hay, but, by an oversight, a provision of general similar import to the one erased was still retained in another part of the contract.—Lassing v. James, 107 Cal. 348, 40 Pac. 534.

§ 404. —— Explaining Alteration.

[a] In absence of circumstances of estoppel, postscript to genuine letter may be shown to have been added without knowledge or authority of writer.—Robinson v. Nevada Bank, 81 Cal. 112, 22 Pac. 478.

§ 405. Connection of Contemporaneous Writings.

[a] Parol evidence is admissible to show whether a memorandum made at the bottom of a written contract, below the signatures of the parties, was intended to form a part of the contract.—Verzan v. McGregor, 23 Cal. 339.

§ 406. Parties to Instrument or Obligation.

[a] Parol evidence is admissible to show that the respective parties to a contract are interested in its subject matter in a different manner, capacity, or extent than is indicated on the face of the contract, or to show who are the real principals in the transactions to which the contract relates.—Ellis v. Crawford, 39 Cal. 523.

[b] In an action on a contract signed by G. as principal and H. as witness, parol evidence is admissible to show that G. had no interest in the matter further than to act as a disguise for H., and that the latter was the real party in interest.—Curran v. Holland, 141 Cal. 437, 75 Pac. 46.

§ 407. —— Affecting Rights and Liabilities of Persons not Named.

[a] One who in writing assigns a written contract to another, knowing that a third person was to be equally interested with the assignee in the rights assigned, cannot show by parol that such third person was intended to be bound by an agreement which he did not sign, executed by the assignee in consideration of the assignment.—Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65.

§ 408. —— Personal or Representative Capacity.

[a] Where a bond made in connection with a mortgage to secure a debt of a corporation was signed by four persons, without description of themselves as agents, or statement that the corporation was the party intended to be bound, parol evidence is inadmissible to show such bond to be that of the corporation, or that such persons signed it in their capacity as directors.—Richardson v. Scott River W. & M. Co., 22 Cal. 150.

[b] Parol evidence may be introduced to show that a contract reciting that "A. W. Von Schmidt, president of the Von Schmidt Dredging Co., charters from the Southern Pacific Co." two barges, "to be used as pontoons to hold up the discharge pipes of the dredging company," and signed "A. W. Von Schmidt, President Von Schmidt Dredge Co.," is the contract of the company, and not of Von Schmidt individually.—Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650.

[c] Where a contract was made by the agent of a corporation for the corporation's benefit, parol evidence was admissible to show such fact, though the contract bore no such suggestion on its face.—Escondido Oil etc. Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040.

§ 409. —— Existence of Relation Created by Writing.

[a] When beneficiary is named in a trust deed, parol evidence is inadmissible to show that trustee was intended as beneficiary.—Young America Engine Co. No. 6 v. City of Sacramento, 47 Cal. 594.

§ 410. Nature of Consideration.

[a] As to instruments under seal generally, the American rule seems to be that the consideration clause in a deed can be explained by parol proof, at least where the consideration proven is of the same species as that mentioned in the instrument.—Bennett v. Solomon, 6 Cal. 134.

[b] Parol evidence is admissible to prove some other consideration than that which is expressed, if it be consistent with that which is expressed, and does not alter the effect of the instrument.—Coles v. Soulsby, 21 Cal. 47.

[c] Parol proof is admissible to show a consideration where none is expressed in the deed, or the sum is left blank.—Merle v. Mathews, 26 Cal. 455.

[d] The clause in a deed acknowledging payment of the consideration is mere prima

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facie evidence, and may be controlled and rebutted by parol evidence.—Millard v. Hathaway, 27 Cal. 119; (1884) Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889.

[e] Recital of money consideration may be contradicted by parol evidence to show a gift.—Peck v. Vandenberg, 30 Cal. 12.

[f] In a personal action by the grantor to recover the purchase money, not founded on the covenant to pay, defendant may show by parol that the consideration named in the deed was not to be paid at all, or was not the real consideration, and may prove what was the actual consideration.—Rhine v. Ellen, 36 Cal. 362.

[g] Conditional agreement to reconvey may be proved by parol, as part of consideration. Rhine v. Ellen, 36 Cal. 362.

[h] Where a conveyance is made to the husband, or to the wife after the death of her husband, under a contract of sale, made by him in his lifetime, it is competent for the wife, or anyone claiming under her, to show by parol that the consideration was paid out of her separate estate.—Ingersoll v. Truebody, 40 Cal. 603.

[i] If a husband, who is free from debt, purchase property with community funds and direct the conveyance to be made to his wife, with intent to make it her separate estate, the deed will take effect as a gift; and if the conveyance be on its face an ordinary deed of grant, bargain, and sale, reciting a valuable consideration, it is competent to show by parol the real facts, in order to rebut the presumption that it is common property. Woods v. Whitney, 42 Cal. 358.

[j] Parol evidence to show a deed to be a gift is admissible at law as well as in equity. Higgins v. Higgins, 46 Cal. 265.

[k] In an action to set aside a deed for inadequacy of consideration it may be shown in defense that the consideration was different in kind from that recited therein.—Carty v. Connolly, 91 Cal. 15, 27 Pac. 599.

[l] It is competent to prove other consideration than that mentioned in a deed.—Cook v. Cockins, 117 Cal. 152, 48 Pac. 1025.

[m] The evidence was not admissible on the theory that the consideration might be shown by parol owing to the confidential relation of partnership, no unfairness or suppression of knowledge being averred.—Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23.

§ 411. —— Of Contract in General.

[a] Parol evidence cannot be introduced to contradict or show that the consideration of a contract was different from that expressed in the writing, when the legal operation of the writing to pass the entire interest, according to the purpose therein designated, would be defeated.—Hendrick v. Crowley, 31 Cal. 471.

[b] Plaintiff alleged that, he and defendant having been partners, plaintiff transferred his interest solely that defendant might conveniently handle the business, and the prayer was for a dissolution and accounting. The defense was that there had been a dissolution and transfer for value. Plaintiff introduced a written instrument between him and defendant reciting a dissolution and transfer for value. Held, proper not to allow plaintiff to testify that the instrument was without consideration.—Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23.

§ 412. —— Of Assignments.

[a] The consideration of the assignment of a personal chattel or chose in action may be proven by parol and a different one established from that expressed in the instrument. Bennett v. Solomon, 6 Cal. 134.

[b] In case of a written assignment, verbal testimony to show the real consideration is admissible, notwithstanding the recitals, even if its actual effect is to show the object of the assignment.—Lockwood v. Canfield, 20 Cal. 126.

§ 413. —— Of Mortgages.

[a] Parol evidence is admissible to prove existence of debt for which a mortgage was given.—Shaver v. Bear River etc. Min. Co., 10 Cal. 396.

§ 414. —— Of Bills and Notes.

[a] Where, in an action on a note, it appeared that said note was given in consideration of the balance due on a prior note, such prior note being collateral to and described in a written agreement on the part of plaintiff to sell defendant certain property therein, and compliance therewith to be deemed full consideration for the note therein set out, oral evidence is inadmissible to show that certain land warrants, not specified in such agreement, formed part of the consideration of the note in suit.—Langan v. Langan, 89 Cal. 186, 26 Pac. 764.

§ 415. —— Of Release.

[a] Oral evidence is admissible to show the true consideration on which a written release is executed. Such evidence does not tend to alter the terms of the release.—Stufflebeem v. Arnold, 57 Cal. 11.

§ 416. Existence of Condition or Contingency.

[a] Where the words import an unconditional promise to pay the payee so much money at a certain time, the law affixes to this unequivocal language its obvious signification. The payor is not permitted to contradict the words by showing that when he promised to pay absolutely he meant to bind himself to pay conditionally, or on some contingency, or if another did not, or if de-

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mand was made and notice given.—Aud v. Magruder, 10 Cal. 282.

[b] Parol evidence is admissible to show whether a contract was delivered absolutely or on condition.—Verzan v. McGregor, 23 Cal. 339.

[c] Parol evidence is inadmissible to show that absolute deed delivered to grantee was not to take effect except in event of grantor's death.—Mowry v. Heney, 86 Cal. 475, 476, 25 Pac. 17.

[d] In an action to foreclose a mortgage to which the son was a party, evidence is admissible to show that the mother executed to him a deed of the property prior to the mortgage, and placed it in the hands of another person as a depositary, to be delivered after her death, and that the mortgagee had notice of the execution and deposit of the deed at the time he received his mortgage; and parol evidence is admissible to show all the facts and conditions upon which the deed was deposited.—Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300.

[e] In an action by the payee of a promissory note against the makers, where the payee had agreed in writing to indemnify the makers "in the payment" of the note, which was given in lieu of rent for certain land, title to which was in litigation, the makers could not interpose a defense inconsistent with such contract of indemnity, to the effect that they were not to be required to pay the note unless the payee's title to the land was established.—Prouty v. Adams, 141 Cal. 304, 74 Pac. 845.

[f] Parol evidence held inadmissible to add new terms to a full written escrow agreement signed by both parties.—Womble v. Wilbur (Cal. App.), 86 Pac. 916.

§ 417. Existence of Custom or Usage.

[a] Code of Civil Procedure, section 1870, subdivision 12, provides that evidence of usage may be given to explain the true character of a contract where its true character is not otherwise plain. A foreign shipper agreed to sell to defendant in San Francisco cargoes of coal at a specified price, the seller to pay cost of freight, insurance, exchange, and duty, and shipment to be made on a charter-party requiring port charges, pilotage and wharfage dues and charges to be paid for the ship as customary. The cargo was entered after a reduction of duty. Held, that evidence was not admissible of a custom among dealers in San Francisco that when coal was bought in a foreign country, and the duty was reduced, such reduction operated to the benefit of the purchaser. Judgment, 71 Pac. 697, reversed. Withers v. Moore, 140 Cal. 591, 74 Pac. 159.

[b] Evidence of a custom allowing a prospector to burn oil produced on a claim is inadmissible to show the rights of the lessee of an oil claim under a written lease. Judgment (1902) 70 Pac. 470, reversed on rehearing.—Swift v. Occidental Mining etc. Co., 141 Cal. 161, 74 Pac. 700.

§ 418. Existence or Accrual of Liability.

[a] In an action on a note, by the payee, or by one taking it with notice, the maker may, by way of defense, prove a parol contemporaneous agreement that the note having been given for the price of a stack of hay, if the value of such hay at a fixed price per ton did not amount to the face of the note, a rebate was to be made in the maker's favor of the difference between the actual value of the hay and the face of the note, and that, under such agreement, a less sum is due than that sued for.—Braly v. Henry, 71 Cal. 481, 60 Am. Rep. 543, 11 Pac. 385, 12 Pac. 623.

[ab] Plaintiff loaned money to defendant, taking as security certain mortgage bonds, under a written agreement giving power of sale, and providing that, if the security deteriorated in value, defendant should reduce the note in proportion. Held, that parol evidence that plaintiff offered to look only to the securities is inadmissible as contradicting the written agreement.—Bradford Inv. Co. v. Joost, 117 Cal. 204, 48 Pac. 1083.

[b] Contemporary oral agreement whereby order or promise contained in note is rendered null or conditional on payment made to depend upon future contingency, is inadmissible.—Leonard v. Miner, 120 Cal. 406, 407, 52 Pac. 655.

[c] Where premises were leased under a written lease, in an action to recover the possession, for failure to pay the rent after notice, it was proper to reject parol evidence that the time for the payment of the rent becoming due on the date mentioned in the lease was extended.—Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

§ 419. Nature and Extent of Liability.

[a] When a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest.—Kritzer v. Mills, 9 Cal. 21.

[b] Parol evidence is inadmissible for one of the makers of a note to show a verbal agreement, contemporaneous with the note, that he should be liable only after default on the part of the other promisor as surety. Aud v. Magruder, 10 Cal. 282.

[c] One cannot contend, when sued on his note, that it was agreed that the note should stand as security only for such an amount as should be found ultimately due on an accounting.—San Jose Sav. Bank v. Stone, 59 Cal. 183.

[d] Where a note bore an indorsement that it was given "for the purpose of securing the payment of" a mortgage debt of a third person, parol evidence was not admissible to show that the maker intended to guarantee only the deficiency remaining after foreclo-

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ure of the mortgage.—Adams v. Wallace, 119 Cal. 67, 51 Pac. 14.

[e] Proof of waiver of forfeiture clause of contract does not tend to vary its terms and may be established by parol.—Knarston v. Manhattan Ins. Co., 140 Cal. 63, 64, 67, 73 Pac. 740.

[f] Under Civil Code, section 2831, parol evidence is admissible to show that the maker of an instrument is a surety, except as against persons who have acted on the faith of his apparent character of principal.—National Bank of Commerce of San Diego v. Schirm (Cal. App.), 86 Pac. 981.

§ 420. Effect of Writing as to Persons not Parties or Privies Thereto.

[a] The rule that parol evidence is not admissible to contradict or vary a written contract does not apply in an action between one of the parties to the contract and a stranger. Smith v. Moynihan, 44 Cal. 53; Hussman v. Wilke, 50 Cal. 250.

[b] B., who had delivered personal property to certain persons under a written agreement to give them a bill of sale when their note for the price was fully paid, assigned the contract, giving the assignee authority to complete the same and collect the money; but the assignment did not purport to transfer title to the property, and B. thereafter received from C., one of the buyers, the latter's share of the note. Plaintiff, who claimed under a bill of sale from B.'s assignee, sought to recover the property from defendants, who had purchased the same from C. Held, that evidence was admissible to show an oral agreement between B. and C. that the latter should have title to one-third of the property on payment of his share of the price, since Code of Civil Procedure, section 1856, makes parol evidence incompetent for the purpose of varying the terms of a written instrument only as between the parties thereto and their representatives or successors in interest, and plaintiff was neither. Dunn v. Price, 112 Cal. 46, 44 Pac. 354.

B. INVALIDATING WRITTEN INSTRUMENT.

IN GENERAL, § 421.
INSUFFICIENCY OR IRREGULARITY OF DELIVERY, § 422.
WANT OR FAILURE OF CONSIDERATION, § 423.
MISTAKE, § 424.
FRAUD, § 425.
ILLEGALITY, § 426.
—— USURY, § 427.

§ 421. In General.

[a] Parol evidence offered for the purpose of showing that what a party claims to be a record is not a record is properly admissible, and is not parol evidence for the purpose of contradicting a record.—Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589.

§ 422. Insufficiency or Irregularity of Delivery.

[a] The presumption that a deed was delivered on the day given in the body of the deed is not conclusive, but the true date of delivery may be proved aliunde.—Treadwell v. Reynolds, 47 Cal. 171.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 701; 20 Cent. Dig., cols. 2829-2933, §§ 1975-1980.

§ 423. Want or Failure of Consideration.

[a] In an action by a husband to compel his wife to reconvey to him certain lands conveyed to her on her oral promise to reconvey them when requested, parol evidence is admissible to contradict the consideration expressed in the deed, and to show fraud and a resulting trust.—Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

[b] A grantor conveying land by a deed reciting a valuable consideration, in the absence of actual or constructive fraud, accident or mistake, cannot show by parol that no consideration passed, and that the conveyance was made in trust, the grantee agreeing to reconvey on request.—Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826.

[c] Oral evidence is admissible to show want of consideration, fraud or mistake.—Leonard v. Miner, 120 Cal. 406, 52 Pac. 655.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 2833-2847, §§ 1981-1989.

§ 424. Mistake.

[a] Where no distinct proceeding has been had to reform a contract on the ground of mistake, and the complaint on the contract does not allege the existence of a mistake therein, parol evidence is inadmissible to show that a material clause in the contract was omitted by mistake.—Pierson v. McCahill, 21 Cal. 123.

[b] A mistake in a note in the recital of the rate of interest may be shown by parol evidence, but such proof should be very clear. Hathaway v. Brady, 23 Cal. 121.

[c] Parol evidence is admissible to show mistake in a written contract.—Murray v. Dake, 46 Cal. 644.

[d] Fraud or mistake always constitutes exception to general rule that parol evidence is inadmissible for the purpose of contradicting, adding to, or varying the language of a written instrument. Parol evidence is always admissible in case of mistake or fraud in actions in equity to rescind a contract or to reform an agreement so as to make it speak the real intention of the parties.—Isenhoot v. Chamberlain, 59 Cal. 630.

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[e] Oral evidence as an alleged mistake was admissible in an action to reform a deed on such ground.—Capelli v. Dondero, 123 Cal. 324, 55 Pac. 1057.

[f] Parol evidence is admissible to vary the terms of a contract, which, through mutual mistake, does not express the intent of the parties.—Kee v. Davis, 137 Cal. 456, 70 Pac. 294.

[g] In an action for the price of logs sold and delivered under a written contract, defendant offered to prove that by reason of the belief of his agent, who made the contract, as to the meaning of certain terms, he agreed to pay more for the logs than he would otherwise have paid, and also offered to show from the "mill tally," the quantity of merchantable lumber obtained from the logs. Held, that this evidence was properly excluded, the price as well as the mode of ascertaining the quantity of lumber being fixed by the contract.—Bullock v. Consumers' Lumber Co., 31 Pac. 367.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 702-705; 20 Cent. Dig., cols. 2848-2860, §§ 1990-2004.

§ 425. Fraud.

[a] Parol evidence is admissible to defeat a conveyance upon the ground of fraud.—Coles v. Soulstry, 21 Cal. 47.

[b] Parol evidence is admissible to show that the execution of a contract was procured by fraud.—Murray v. Dake, 46 Cal. 644; Isenhoot v. Chamberlain, 59 Cal. 630.

[c] Parol evidence is admissible to show that partition deeds fraudulently omitted right of way orally agreed upon between the parties prior to their execution.—Peterson v. Lauretzen, 68 Cal. 21, 22, 8 Pac. 607.

[d] Rule as to contradicting or adding to writing by parol evidence has application in cases of actual fraud.—Brison v. Brison, 75 Cal. 528, 5 Am. St. Rep. 189, 17 Pac. 689.

[e] In a suit to set aside a deed, the action being based on a charge of fraud in procuring the deed, proof of the verbal contract under which the deed was given could not be barred on the ground that negotiations precedent to the deed were merged therein.—Hick v. Thomas, 90 Cal. 289, 27 Pac. 208.

[f] In an action to cancel a deed for a right of way for a water ditch on account of the false representations of the defendant as to its ownership of the waters of a certain source of supply, which were represented by it as being sufficient to irrigate the plaintiff's land, parol evidence of such representations, and of their falsity, and that the deed was made by reason thereof, is admissible.—Barfield v. South Side Irr. Co., 111 Cal. 118, 43 Pac. 406.

[g] Code of Civil Procedure, section 1856, excluding evidence of the terms of an agreement reduced to writing other than the contents of the writing, but expressly admitting evidence of fraud, does not exclude parol evidence as to a written application for life insurance, couched in terms not readily understood by one not versed in insurance matters, and which was prepared by an agent and solicitor of the insurer, who represented that it called for a different policy than in fact was the case, and which application was not understood by the applicant, since it thus appears to have been made under the influence of fraud.—Maxson v. Llewellyn, 122 Cal. 195, 54 Pac. 732.

[h] In a suit to set aside an exchange of property for fraud, oral misrepresentations made to induce plaintiff to enter into the contract were not inadmissible under Civil Code, section 1625, providing that a written contract supersedes previous verbal negotiations, such section being inapplicable until after the contract in writing has been executed.—Willey v. Clements, 146 Cal. 91, 79 Pac. 850.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 695-700; 20 Cent. Dig., cols. 2860-2883, §§ 2005-2020.

§ 426. Illegality.

[a] The fact that a mortgage was given as security for the performance of an unlawful contract may be shown by oral testimony in an action for foreclosure, though no infirmity appears on the face of the mortgage. Benicia Agricultural Works v. Estes, 32 Pac. 938, following Buffendeau v. Brooks, 28 Cal. 641.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 700; 20 Cent. Dig., cols. 2884-2890, §§ 2025-2029.

§ 427. —— Usury.

[a] In an action to foreclose a mortgage given by defendant to secure a note for money loaned to him by plaintiff, defendant may show by parol evidence that at the time of executing the note and mortgage it was agreed, as part of the same transaction, that defendant should pay all taxes levied on the money loaned, or on the mortgage, but that the agreement was purposely omitted from the mortgage, in order to evade Constitution, article 13, section 5, which provides that imposing such an obligation on a borrower shall avoid the contract, as to any interest specified therein, as such parol evidence tends to "establish illegality" of the contract, within Code of Civil Procedure, section 1856, prescribing when such evidence is admissible to affect a writing.—Daw v. Niles, 33 Pac. 1114.

C. SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

§ 428. Prior and Contemporaneous Collateral Agreements.

[a] Where an oral agreement provides that the lessees, tenants from month to month,

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are to pay the same rent per month as the lessors should succeed in getting for an adjoining store, and the lease of the adjoining store on its face provides for a rental of three hundred dollars per month, a written agreement, contemporaneously executed, under which the lessors agreed to allow the tenants of the adjoining store a rebate of one hundred dollars per month, is admissible in an action by the lessees of the first store to recover the amount overpaid by them under the oral agreement.—Corson v. Berson, 86 Cal. 433, 25 Pac. 7.

[b] It may be proved by oral evidence that purchaser agreed to pay additional amount contingent upon some future event or transaction, such as that upon a sale by him he would pay to the vendor part or all of the proceeds that might be received in excess of the amount paid by him.—Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119.

[bc] When the plaintiff in a foreclosure suit alleges that a smaller sum was advanced to defendant than that recited in the mortgage, and asks judgment therefor, it is competent for defendant, upon a cross-complaint seeking judgment against plaintiff for the remaining part of the loan, to show a collateral parol agreement by plaintiff to pay him that amount in partial payments from time to time subsequent to the execution of the mortgage. Savings Bank of Southern California v. Ashery, 117 Cal. 96, 48 Pac. 1081.

[c] When time for performance is not fixed in written contract, proof of contemporaneous oral agreement fixing time is admissible.—Wolters v. King, 119 Cal. 176, 51 Pac. 35.

[d] It seems that parol evidence is inadmissible to show separate, oral, collateral agreement, contemporaneous with written contract.—Johnson v. Bibb Lumber Co., 140 Cal. 98, 101, 73 Pac. 730.

[e] Where the complaint in an action by one bank against another contains two counts, one on a note and the other for money loaned, both for the same debt, though defendant asserts that plaintiff bought the note, proof of the negotiations for the loan, and that defendant received its proceeds, is not incompetent as varying the written instrument, it being in support of the other count.—First Nat. Bank v. California Nat. Bank, 35 Pac. 639.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 713-721; 20 Cent. Dig., cols. 2890-2919, §§ 2030-2051.

§ 429. Subsequent Agreements.

[a] At the time of the execution of a mortgage, the mortgagor gave to the mortgagee a verbal lease of the land, wherein it was stipulated that the rent was to offset the interest on the note. Held, that the lease, being a separate and supplementary matter, was not in contradiction of the provisions of the note that, if the interest was not paid when due, it was to be compounded, and oral evidence of its provisions as to the payment of interest on the note was admissible.—Raynor v. Drew, 72 Cal. 307, 13 Pac. 866.

[b] Where contract is uncertain, parol evidence of subsequent agreement making it definite is admissible.—Kotz v. Bedford, 77 Cal. 323, 19 Pac. 523.

[c] A lease of a store for two years, at the monthly rental of three hundred dollars, gave the lessees the privilege of a renewal at the same rental. The lease also provided that if the lessees should hold over after the expiration of the two years, with the consent of the lessors, such holding should be construed as a tenancy from month to month. Held, that an oral agreement made after the expiration of the two year term, which had not been extended, and while the lessees were holding as tenants from month to month, under which agreement they were to pay the same rent per month as the lessors should succeed in getting for an adjoining store, did not vary the terms of the written lease, as that had already expired.—Corson v. Berson, 86 Cal. 433, 25 Pac. 7.

[d] Parol evidence offered for the purpose of showing that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the action is based, had been executed upon the consideration and agreement that the prior contract should be canceled, and all claims of the plaintiff against the defendant thereunder waived, is not incompetent as having the effect to vary or contradict the terms of either of the written instruments, or to add any terms thereto.—Guidery v. Green, 97 Cal. 630, 30 Pac. 786.

[e] A contract in writing may be altered by an executed oral agreement, and evidence is admissible to show such an executed agreement and the circumstances attending it.—Dunn v. Price, 112 Cal. 46, 44 Pac. 354.

[f] Where defendant executed a written contract to cure and deliver all his raisins to certain factors for sale on commission, and he delivered to them all his raisins, including a lot of dipped raisins, called "Valencias," he cannot thereafter claim that such raisins were delivered under the factors' subsequent parol contract to purchase such raisins, in the absence of evidence that the factors ever paid anything on such alleged purchase, under Civil Code, section 1698, permitting evidence of a subsequent executed parol agreement to vary a written contract, since defendant was bound by the written contract to deliver such raisins, and the subsequent oral agreement, if made, was wholly executory.—Mackenzie v. Hodgkin, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; Hodgkin v. Williams, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 734-736; 20 Cent. Dig., cols. 2919-2933, §§ 2052-2065.

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D. CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

CONSTRUCTION, IN GENERAL, § 430.
—— SHOWING CONNECTION OF SEPARATE WRITINGS, § 431.
PATENT AMBIGUITY, § 432.
—— IN DESCRIPTIONS OF PROPERTY, § 433.
LATENT AMBIGUITY, § 434.
—— MEANING OF WORDS, PHRASES OR ABBREVIATIONS, § 435.
IDENTIFICATION OF PARTIES, § 436.
IDENTIFICATION OF SUBJECT MATTER, § 437.
—— BOUNDARIES, § 438.
—— LOCATION AND IDENTIFICATION OF MONUMENTS OR CALLS, § 439.
—— REFERENCE TO OTHER INSTRUMENTS, § 440.
—— OF DEBT OR OBLIGATION COLLATERAL TO SECURITY, § 441.
SHOWING INTENT OF PARTIES AS TO SUBJECT MATTER, § 442.
SHOWING PURPOSE OF WRITING, § 443.
SHOWING MODE OF PERFORMANCE OF OBLIGATION, § 444.

§ 430. Construction in General.

[a] Where a party signs a note with the addition to his name of the word "Trust," parol evidence of an agreement that he was not to be personally liable thereon, but that the note was to be paid from a fund of which he was trustee, is not admissible.—Connor v. Clark, 12 Cal. 168, 73 Am. Dec. 529.

[b] Parol evidence is admissible to show whether land covered by a patent of the state for lands sold as swamp and overflowed before they were listed to the state by the United States as such lands are dry, swamp, or overflowed.—Robinson v. Forrest, 29 Cal. 317.

[c] Parol evidence is admissible to interpret writing but not to enlarge its scope.—Frink v. Roe, 70 Cal. 307, 11 Pac. 820.

[d] Parol evidence is admissible to identify official map of town referred to in a deed.—Cadwalder v. Nash, 73 Cal. 45, 14 Pac. 385.

[e] Parol evidence is admissible to show circumstances under which contract is made and to show its object.—Renton, Holmes & Co. v. Monnier, 77 Cal. 457, 19 Pac. 820.

[f] Where the language of a contract is fairly susceptible of either one of two interpretations, without doing violence to its usual and ordinary import, or some established rule of construction, an ambiguity arises for the explanation of which extrinsic evidence may be resorted to.—Balfour v. Fresno etc. Co., 109 Cal. 221, 41 Pac. 876.

[g] For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that they intended and understood the language in the sense contended for; and for that purpose the conversations between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown.—Balfour v. Fresno etc. Co., 109 Cal. 221, 41 Pac. 876.

[h] Plaintiffs agreed in writing with N. to consign him a stock of merchandise, on his furnishing a bond with two sureties for his performance of the agreement. Defendants were the sureties on the bond furnished. The agreement to consign was to run one year, N. to take an inventory, report sales, and remit monthly, and plaintiffs to have the right to verify N.'s accounts and inventories. The bond contained substantially the same provisions, and was conditioned that N. would faithfully discharge his duties as consignee and account, and limited defendant's liability to two thousand dollars. Shipments were made to N. and remittances made by him for nearly a year, when he failed, being indebted to plaintiffs. Held, in an action on the bond, that evidence that the bond was only intended to secure the first shipment was properly rejected, since the bond and agreement were unambiguous and not susceptible of parol explanation.—Braun v. Woollacott, 129 Cal. 107, 61 Pac. 801.

[i] It is not error to receive evidence of negotiations preceding a written order for a harvester which broke down in the work for which it was purchased.—Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311.

[j] Plaintiff sued on a writing whereby defendant acknowledged the receipt from C. of certain grain bags, the property of plaintiff, and agreed to pay for such of them as were not shipped to plaintiff by a certain date. Defendant, at the date mentioned, stored the bags in warehouses leased by C., and claimed he was authorized so to do by C. Held error not to admit evidence that C. was plaintiff's agent.—Curtin v. Ingle, 137 Cal. 95, 69 Pac. 836, 1013.

[k] Where a contract has been interpreted on an appeal to this court, such contract is not ambiguous or uncertain, and on a new trial parol evidence cannot be introduced to show the intention of the parties, under Civil Code, section 1649, and Code of Civil Procedure, section 1864, authorizing parol evidence in cases of doubtful and ambiguous contracts, for these sections do not apply when the courts are able to declare the true intent of the parties.—San Diego Flume Co. v. Chase, 32 Pac. 245.

[l] A San Francisco merchant cabled to a coal dealer in New South Wales, "Offer subject to immediate reply twenty-four shillings cost freight and insurance exchange duty paid two cargoes." The coal dealer replied, "Ultimatum twenty-four shillings and three pence. The merchant responded by letter confirming his cabled acceptance, and saying, "We beg to confirm having purchased from you [stating kind of coal and price] 'cost,' 'freight,' 'insurance,' 'exchange,' 'duty paid,'" etc. Held, that the contract of sale thus evidenced was free from ambiguity, so that extrinsic evidence of a custom of the port of San

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Francisco giving to the purchaser of imported goods the advantage of a reduction of customs duties was inadmissible.—Withers v. Moore, 71 Pac. 697.

[m] Where a clause in a deed was not ambiguous, parol evidence was inadmissible to show that the parties intended it to operate as a condition subsequent and clause of forfeiture.—Hawley v. Kafitz (Cal. Sup.), 83 Pac. 248.

§ 431. —— Showing Connection of Separate Writings.

[a] Parol evidence is inadmissible to show identity of map referred to in deed where reference is equally applicable to two different maps.—Cadwalder v. Nash, 73 Cal. 47, 48, 14 Pac. 385.

§ 432. Patent Ambiguity.

[a] Parol evidence is inadmissible for the purpose of explaining a patent ambiguity in written contract.—Mesick v. Sunderland, 6 Cal. 297.

[b] Where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning, but at the same time consistently admits of two interpretations, according to the subject matter in the contemplation of the contracting parties, it is not such a patent ambiguity as falls within the rule forbidding its explanation by parol testimony. It belongs to that intermediate class of cases which partake of the nature both of patent and latent ambiguities.—Jenny Lind Co. v. Bower, 11 Cal. 194.

[c] Parol evidence is inadmissible to show what the assessor intended to express by figures in the assessment-roll in the valuation column which were put down without indicating whether they represented dollars or cents, the assessment being void.—People v. San Francisco Sav. Union, 31 Cal. 132.

[d] Patent ambiguity in note cannot be helped by evidence aliunde.—Poorman v. Mills, 39 Cal. 345, 2 Am. Rep. 451.

[e] Where a charter-party provided that the charterer hired the vessel for three voyages to a certain port at a certain specified rate, it was not ambiguous, and could not be treated as a "rough memorandum," so as to authorize the admission of parol evidence of an agreement authorizing the charterer to make one trip to an intermediate port instead of the port designated.—Johnson v. D. H. Bibb Lumber Co., 140 Cal. 95, 73 Pac. 730.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 680-682; 20 Cent. Dig., cols. 2967-2974, §§ 2085-2092.

§ 433. —— In Descriptions of Property.

[a] A deed which shows on its face that there are two lots to which the description equally applies is void for uncertainty, and parol evidence is inadmissible to explain the ambiguity.—Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33.

§ 434. Latent Ambiguity.

[a] To remove or explain a latent ambiguity, parol evidence is admissible.—Mesick v. Sunderland, 6 Cal. 312.

[b] Where meaning of written instrument is doubtful, extrinsic evidence may be resorted to for removal of doubt, but such evidence is not admissible to show that effect of instrument is different from that which its terms plainly and unequivocally denote.—Richardson v. Scott River W. & M. Co., 22 Cal. 150.

[c] A latent ambiguity in a contract or writing may be explained by parol evidence. Piper v. True, 36 Cal. 606.

[d] Where a quitclaim deed provided that the premises were to be occupied and used by the grantee to work and operate a mine, the grantee to erect and maintain necessary gates and bars for entering on such premises through the fences of the grantor, etc., and to the habendum clause were added the words, "For the uses and purposes aforesaid and on the conditions hereinbefore specified," there was sufficient uncertainty as to the intention of the parties to justify a resort to parol evidence of circumstances under which it was made in order to properly construe such deed.—Baker v. Clark, 128 Cal. 181, 60 Pac. 677.

[e] A policy of reinsurance insuring wheat in a certain warehouse held to contain a latent ambiguity which was subject to explanation by parol.—Fireman's Fund Ins. Co. v. Aachen & M. Fire Ins. Co. (Cal. App.), 84 Pac. 253.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 676-678; 20 Cent. Dig., cols. 2975-2986, §§ 2093-2101.

§ 435. Meaning of Words, Phrases or Abbreviations.

[a] In an action concerning a disputed boundary between two mining claims, depending on an agreement between the parties, in which the word "north" was used, parol evidence is properly admissible to show the custom of the locality to run boundary lines by the magnetic meridian, and that such was the understanding of the parties.—Jenny Lind Co. v. Bower, 11 Cal. 194.

[b] In suit on an account, against B. & S. as a firm, a receipt to B. alone, signed by plaintiffs, "in full for acct's and demands due as at this date," was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on. Held, that the parol proof was admissible, that the term "all accounts" may be shown to cover firm as well as personal indebtedness.—Hawley v. Bader, 15 Cal. 44.

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[c] Parol evidence is admissible to explain the meaning of particular expressions used in a deed, where they do not convey a definite meaning without such explanation.—Reamer v. Nesmith, 34 Cal. 624.

[d] A letter written to defendant by plaintiff, who claimed an account stated, was introduced by defendant to show that the account was not stated, and read as follows: "We would call your attention to your unsettled account. The balance due is $2,326.35. Please call and settle same, and oblige." Held, that it was not error to allow the writer to explain that he used the word "unsettled" in the sense of "unpaid," and not as opposed to an account stated or agreed upon.—Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371.

[e] Parol evidence is admissible to explain all technical words or phrases used in local or special sense.—Preble v. Abrahams, 88 Cal. 250, 22 Am. St. Rep. 301, 26 Pac. 99.

[f] The fact that the abbreviation "S/87" is used as descriptive of wheat to be delivered under a contract does not make the complaint in an action on the contract unintelligible and uncertain, as oral evidence may be introduced to explain the customary meaning, and need not be pleaded.—Berry v. Kowalsky, 27 Pac. 286.

[g] Parol evidence is inadmissible to explain the meaning of certain words in a written instrument, where they are free from ambiguity.—Bullock v. Consumers' Lumber Co., 31 Pac. 367.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 682-689; 20 Cent. Dig., cols. 2988-3004, §§ 2104-2108.

§ 436. Identification of Parties.

[a] Where a party signs a note with the addition to his name of the word "trustee," parol evidence is inadmissible to show an agreement at the time of the execution of the note that the maker was not to be personally liable, but that it was to be paid out of a fund of which he was trustee.—Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529.

[b] The rule as to extrinsic evidence in order to determine what passes and who takes by an instrument is that every material fact that will enable the court to identify the person or thing mentioned in the instrument and place the court, whose province it is to declare the meaning of the words used, as near as may be in the situation of the parties to the instrument, is admissible.—Hancock v. Watson, 18 Cal. 137.

[c] Parol evidence admissible to show that one party to a writing is agent of the other. Pierson v. McCahill, 23 Cal. 250, 254.

[d] Who was real principal to a written contract may be shown by parol.—Ellis v. Crawford, 39 Cal. 523.

[e] Parol evidence is admissible to show that "he" and "his" used in written instrument refers to female.—Berniaud v. Beecher, 71 Cal. 42, 11 Pac. 802.

[f] Parol evidence is admissible to show who was intended to be bound by due bill signed by agent for principal.—Burgess v. Fairbanks, 83 Cal. 216, 17 Am. St. Rep. 230, 23 Pac. 292.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 711; 20 Cent. Dig., cols. 3004-3018, §§ 2109-2114.

§ 437. Identification of Subject Matter.

[a] Parol evidence is not admissible to add to description of property.—Osborn v. Hendrickson, 8 Cal. 31.

[b] Where a mortgage describes the property as the "interest in the quartz-mill and lode formerly owned by John H. Hancock, said interest being one-half of the mill and lode," extrinsic evidence is admissible to identify the property.—Hancock v. Watson, 18 Cal. 137.

[c] Where plaintiff claims title to a city lot under a deed describing it as "commencing at the northeast corner of Pacific street and Lone Mountain Cemetery avenue, as such corner may be established by the city hereafter, whether known as such street or not," parol evidence is admissible to show that there was an open place known as Cemetery avenue, which, if extended, would have crossed Pacific street at the southwest corner of such lot.—Altschul v. San Francisco Homestead Assn., 43 Cal. 171.

[d] Where a description of land is imperfect, but not void for uncertainty, the defect will be cured by parol evidence to identify the premises.—Walbridge v. Ellsworth, 44 Cal. 353.

[e] Where the description of the land conveyed by deed is equivocal, ambiguous, or insufficient, evidence of the subsequent acts of the parties while in interest is admissible on the question of their intention.—Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

[f] Parol evidence is admissible to determine whether term "houses" in bill of sale includes a barn.—Claffey v. Hartford Ins. Co., 68 Cal. 170, 171, 18 Pac. 711.

[g] Parol evidence is admissible to aid defective description of land conveyed.—Cleveland v. Choate, 77 Cal. 78, 18 Pac. 875.

[h] Parol evidence is admissible to show that the goods sold by the pledgor and those offered for delivery by the pledgee were identical.—Habenicht v. Lissak, 77 Cal. 139, 19 Pac. 260.

[i] Parol evidence is admissible to apply description to subject matter but not to furnish a description.—Marriner v. Dennison, 78 Cal. 208, 20 Pac. 386.

[j] Parol evidence is admissible to aid description in deed.—Carter v. Bacigalupi, 83 Cal. 193, 23 Pac. 361.

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[k] Parol evidence is admissible to identify subject matter of contract.—Preble v. Abrahams, 88 Cal. 250, 22 Am. St. Rep. 301, 26 Pac. 99.

[l] In an action against a corporation to recover money it appeared that plaintiff had been a stockholder in the corporation, and had made advances to it to the amount sued for; that he had transferred his stock and interest in defendant corporation to other stockholders therein by a written instrument which recited that he sold "all right, title, and interest of whatsoever nature in and to all property . . . . hitherto and now belonging to" defendant, including all "claims and advances." Held, that parol evidence was admissible to show to whom the claim for "advances" mentioned in the instrument belonged, and that they were those which formed the basis of the action.—Darby v. Arrowhead Hot Springs Hotel Co., 97 Cal. 384, 32 Pac. 454.

[m] Parol evidence is admissible to show that a tract of land described in a deed as a part of "Colton addition" lies within the limits of the city of Colton.—Colton Land etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

[n] Where a written contract is to furnish peaches to be grown in "sundry orchards in" specified counties, parol evidence is admissible to identify the orchards referred to.—Ontario Deciduous Fruit-Growers' Assn. v. Cutting Fruit-Packing Co., 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681.

[o] Parol evidence that a written contract for sale of "shares of capital stock" of a corporation was for shares a certificate for which was not to be issued for five years does not contradict or vary the terms of the writing.—Williams v. Ashurst Oil Land etc. Co., 144 Cal. 619, 78 Pac. 28.

[p] Where contract for the sale of land described it as a certain ranch, parol evidence held admissible to identify it. Code Civ. Proc., sec. 1860.—Hill v. McCoy, 1 Cal. App. 159, 81 Pac. 1015.

[q] In an action on a contract held proper to admit parol evidence to identify the subject matter.—Gardiner v. McDonough, 147 Cal. 313, 81 Pac. 964.

[r] Under Code of Civil Procedure, section 1860, evidence as to surrounding circumstances held admissible on the issue of what premises were agreed to be conveyed by a land contract, the description in which was uncertain.—Garnier's Estate, In re, 147 Cal. 457, 82 Pac. 68.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 724; 20 Cent. Dig., cols. 3018-3066, §§ 2115-2128.

§ 438. —— Boundaries.

[a] Where there is a conflict between the boundaries of a grant of land as designated in the grant by parallels of latitude and as designated by a map referred to in the grant, parol evidence is admissible in explanation of the boundaries and to fix the location of the land granted.—Ferris v. Coover, Ferris v. Chapman, 10 Cal. 589.

[b] Parol evidence is admissible to explain the location of the objects mentioned in the description of a deed, and thus fix the boundary lines of the tract conveyed.—Colton v. Seavey, 22 Cal. 496.

§ 439. —— Location and Identification of Monuments or Calls.

[a] Parol evidence is admissible to locate and identify monuments and calls in a description of land.—Colton v. Seavey, 22 Cal. 496.

[b] Where mortgage on land describes the land generally by name, but does not state all the monuments bounding it on its several sides, and the complaint contains an averment as to what the monuments not given were, parol evidence may be introduced to identify the mortgaged premises as set out in the complaint.—Began v. O'Reilly, 32 Cal. 11.

[c] The true location of the land in dispute having been ascertained, parol evidence is admissible to show the proper location of all the descriptive designations and calls of the deed, to the end of determining whether or not the land in dispute passed by it, and thus give effect to the true intent of the parties.—Reamer v. Nesmith, 34 Cal. 624.

[d] In construing doubtful clauses in a deed it is important to ascertain all the attendant circumstances in order to arrive at the intention of the parties; and, whilst it is not competent to alter, enlarge, or vary the instrument by parol, oral testimony is admissible to explain its calls by applying its descriptive portions to the natural objects called for.—Altschul v. S. F. C. P. H. A., 43 Cal. 171.

[e] Extrinsic evidence is admissible to explain calls of deed, to apply them to subject matter and give effect to the deed.—Thompson v. Motor Road Co., 82 Cal. 500, 501, 23 Pac. 130.

[f] Extrinsic evidence is always admissible to explain the calls of a deed, for the purpose of applying them to the subject matter, and thus to give effect to the deed.—Thompson v. Southern California Motor Road Co., 82 Cal. 497, 23 Pac. 130.

[g] For the purpose of identifying and locating artificial monuments in a deed to plaintiff, the court admitted in evidence a written contract to convey, made by a former owner of the land in dispute, together with parol testimony showing that, in pursuance of the contract, the monuments in question were located by a surveyor, and that the descriptions in the deed to plaintiff's predecessor were made from the report of the surveyor. Evidence was also admitted, by one of the surveying party, as to the location of the monuments. Held, that all this evidence

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was competent.—Anderson v. Richardson, 92 Cal. 623, 28 Pac. 679.

[h] Where a deed designated certain monuments as the corners of the tract conveyed, in addition to giving the length of each side, the former description will prevail; and, in trespass, parol evidence is admissible to point out such monuments.—Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. 98.

§ 440. —— Reference to Other Instruments.

[a] In an action to recover land conveyed by grant, a map referred to in the grant must be regarded, for the purpose of identifying the land, as a portion of the grant, and parol evidence is admissible to show the circumstances under which the grant was made, in order to determine what portion of the lands marked on such map should be rejected, if any.—Cornwall v. Culver, 16 Cal. 423.

[b] When a deed of a town lot refers for description of the lot to the official map of the town plat, parol evidence of the actual survey may be received to correct the boundaries of the lot as indicated by the map.—O'Farrell v. Harney, 51 Cal. 125.

[c] If a deed describes the property conveyed as a lot of land in a town "known and described on the official map of said town as block No. 6," map may be identified by parol evidence, and, when identified, constitutes a portion of the deed.—Penry v. Richards, 52 Cal. 496.

[d] A deed having described the land conveyed by reference to the plat of an addition to a town, parol evidence is competent to locate the land granted from data given in the plat, and it is not necessary as against the grantor to show that there was an actual survey of the addition.—Redd v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

[e] In 1837 the Mexican government granted P. and V. a tract called the "San Jose Rancho," and in 1840 regranted the same land and an additional league to P., V., and A. In 1846 partition was made, and, in proceedings thereafter for confirmation of the grants, separate patents were issued for each tract. In 1864 V. conveyed his interest in the Rancho San Jose, the description being the "rancho known as 'San Jose'" and referring for further description to the Mexican government grant, the confirmation thereof by the United States land commission and district court, and the government survey. In such grant the parties were declared owners of one league "in augmentation of the place called 'San Jose.'" In proceedings before the land commissioners the entire tract was called "San Jose"; and the deed of confirmation to V. declared that the land confirmed is a portion of the place called "San Jose." The record in the confirmation proceedings contained a map compiled from exhibits on file in the office of the United States surveyor general, purporting to give the boundaries of the Rancho San Jose, Rancho Azusa, and addition to Rancho San Jose as fixed by the United States surveyor. Held, that there was such ambiguity in the description of the land conveyed as to warrant the admission of extrinsic evidence to show what was intended to be conveyed by the words "Rancho San Jose."—Vejar v. Mound City Land etc. Assn., 97 Cal. 659, 32 Pac. 713.

§ 441. —— Of Debt or Obligation Collateral to Security.

[a] Where a written contract provides for the payment of all the "present and future" indebtedness of one of the parties, parol evidence is inadmissible to show what indebtedness was referred to by such terms, and that a certain existing debt was not intended to be included, since the meaning of the words "all indebtedness, present and future," is not a question for the jury, but for the court. Swain v. Grangers' Union, 69 Cal. 186, 10 Pac. 404.

§ 442. Showing Intent of Parties as to Subject Matter.

[a] Oral evidence is admissible to show the intention and understanding of the parties in the construction of a deed, but not to contradict or vary its terms.—Brannon v. Mesick, 10 Cal. 95.

[b] Parol evidence is admissible to show that assignment of stock with dividends from a certain date did not include dividend sooner anticipated, but delayed till after date mentioned in assignment.—Brewster v. Lathrop, 15 Cal. 21.

[c] Where a written contract recites an aggregate sum as the consideration for the transfer of several items of property, the actual consideration for each item may be shown by parol, and when that is done the transaction will stand as though it was so recited in the contract.—Field v. Austin, 131 Cal. 379, 63 Pac. 692.

[d] Where a parent purchases property in the name of a child, parol evidence is admissible to rebut the presumption that an advancement was intended.—Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482.

[e] A contract between the owners of a water right and one S. recited that the owners had secured a system of water right in a certain canyon producing three inches of water, "with other springs to be developed to the amount of eight inches," and that it was agreed that S. should furnish pipe "to bring said water down to the residence" of the owners in consideration of a third of the water that would be produced from said springs "during the dry season of the year." Held, that parol evidence was admissible to show whether S. was obliged to lay pipe not only from the point of diversion, but from the various supplies, consisting of small springs in the hills, down to the main point of diversion.—Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784.

[f] Under Civil Code, section 1647, parol evidence held admissible to show that a contract for the sale of goods and merchandise

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in the seller's storeroom was a contract for the sale of a business.—Shafer v. Sloan (Cal. App.), 85 Pac. 162.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 670, 671, 724, 734; 20 Cent. Dig., cols. 3066-3074, §§ 2129-2133.

§ 443. Showing Purpose of Writing.

[a] The rule which refuses the admission of parol evidence to contradict or vary a written instrument does not exclude an inquiry into the object and purpose of the parties in the execution of such instrument.—Pierce v. Robinson, 13 Cal. 116.

[b] Parol evidence is admissible to prove that a written assignment of personal property, absolute upon its face, was in fact made in trust for the benefit of others than the assignees, and to prove the character of the trust.—Lockwood v. Canfield, 20 Cal. 126.

[c] Proof of parol agreement whereby mortgagee holds mortgage in trust for himself and another does not vary terms of mortgage.—Tapia v. Demartini, 77 Cal. 388, 389, 11 Am. St. Rep. 288, 19 Pac. 641.

[d] In an action to redeem it is competent for defendant to show by parol that a conveyance by the mortgagor to the mortgagee was made, not as a forfeiture, but to consummate a sale made by the mortgagor to a a third party.—Corcoran v. Hinkel, 34 Pac. 1031.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 3074-3091, §§ 2134-2139.

§ 444. Showing Mode of Performance of Obligation.

[a] Where defendant's written contract to deliver sufficient water for the irrigation of plaintiff's land failed to specify a time for performance, evidence of an oral agreement that defendant should not deliver water before March, 1893, was admissible to show when the contract was to be performed.—Richter v. Union Land etc. Co., 129 Cal. 367, 62 Pac. 39.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 3091-3093, §§ 2140-2143.

E. SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION.

RELEASE OR OTHER DISCHARGE WITHOUT PERFORMANCE, § 445.
PERFORMANCE, § 446.
PAYMENT, § 447.

§ 445. Release or Other Discharge Without Performance.

[a] Parol evidence is admissible to establish new and distinct agreement upon a new consideration, which is to be a substitute for the old written agreement; but it must appear that the old agreement is abandoned, and it is competent to show by parol the incorporation of new terms and conditions, and the new agreement must be valid in itself, and such as may be the basis of an action.—Adler v. Friedman, 16 Cal. 138.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 691; 20 Cent. Dig., cols. 3094-3097, § 2145.

§ 446. Performance.

[a] In an action on a note, the maker may show that it was given to secure the performance of a certain agreement, which has been performed.—Howard v. Stratton, 64 Cal. 487, 2 Pac. 263, 264.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 691; 20 Cent. Dig., cols. 3101-3103, § 2147.

§ 447. Payment.

[a] Where, in an action on a note against the debtor and one who signed as surety, the defense is that other notes were given by the debtor, at the same time as the one in suit, with a verbal agreement with plaintiff that the first payments made by the debtor should be applied on the note signed by the surety, until it was paid, and that payments had been made and wrongfully indorsed on the notes not signed by the surety, defendants may give such verbal agreement in evidence to show that the debtor, when he made the payments, had not changed his first intention as to how the payments were to be applied.—Clarke v. Scott, 45 Cal. 86.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 691; 20 Cent. Dig., cols. 3105-3111, § 3148.

XII. OPINION EVIDENCE.

A. Conclusions and Opinions of Witnesses in General, §§ 448-474.
   1. Conclusions and Matters of Opinion or Facts, §§ 448-458.
   2. Special Knowledge as to Subject Matter, §§ 459-465.
   3. Subjects of Opinion Evidence and Examination of Witness, §§ 466-474.

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A. CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

1. Conclusions and Matters of Opinion or Facts, §§ 448-458.
2. Special Knowledge as to Subject Matter, §§ 459-465.

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3. Subjects of Opinion Evidence and Examination of Witness, §§ 466-474.

1. Conclusions and Matters of Opinion or Facts.

CONCLUSIONS OF FACTS, § 448.
—— OPINIONS AND CONCLUSIONS, § 449.
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—— MOTIVE AND INTENT OR UNDERSTANDING, § 451.
—— ABILITY TO SEE, § 452.
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—— TITLE AND OWNERSHIP, § 456.
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§ 448. Conclusions of Fact.

[a] The opinion of a witness as to what the facts prove is not admissible. It is the province of the jury alone to draw conclusions.—Largan v. Central R. Co., 40 Cal. 272.

[b] An expert witness may properly testify that a defect is discoverable by applying certain tests specified, but he cannot be permitted to testify whether it would have been discoverable by ordinary care and precaution, that being part of the ultimate question of negligence to be determined by the jury.—Pacheco v. Manufacturing Co., 113 Cal. 541, 45 Pac. 833.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 62-80, 209-219; 20 Cent. Dig., cols. 3112-3153, §§ 2149-2185.

§ 449. —— Opinions and Conclusions.

[a] In an action for the value of goods deposited, a witness was asked who he understood was the depositor. Held incompetent, as requiring the opinion of the witness.—Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232.

[b] In an action by a father to quiet the title to land promised by him to his daughter, and upon which she had moved and made improvements, a question asked of him, whether he had said anything to the daughter which led her to believe that she was going to obtain title, was improper, as asking for a conclusion of the witness.—Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

[c] Mere conclusions or opinions are inadmissible.—Schurtz v. Kerkow, 85 Cal. 279, 24 Pac. 609.

[d] The opinion of a witness may be received in connection with his statement of the facts upon which it is based, when the impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, and the judgment or opinion of the witness by whom they have been experienced is the only mode by which they can be presented to a jury.—Healy v. Visalia and Tulare R. R. Co., 101 Cal. 585, 36 Pac. 125.

[e] On an issue as to waiver of an insurance premium, testimony that insurer's agent had excused insured from paying it is a conclusion, and admissible.—Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922.

[f] In an action to enforce a stockholder's liability on a corporate debt for money loaned by F., and assigned to plaintiff, the evidence showed that at the instance of a stockholder plaintiff made a loan to the corporation, and gave his check therefor to the stockholder, and the latter gave his check to the corporation's manager, who indorsed it to F., and F. indorsed it to the corporation. The corporation executed its note to F., who indorsed it to plaintiff. Defendant called F., and asked him whether the corporation ever borrowed any money of him. Held, that the answer was properly excluded, as it called for a conclusion of the witness as to whether or not the transaction constituted a loan.—Spreckels v. Butler, 128 Cal. 645, 61 Pac. 378.

[g] In an action against sureties on a contractor's bond guaranteeing payment of labor and material, an objection to the question whether plaintiff relied on a "statutory bond," in agreeing to furnish labor and material, should be sustained, since it is not the province of the witness to determine whether the bond was statutory or not.—Union Sheet-Metal Works v. Dodge, 129 Cal. 390, 62 Pac. 41.

[h] Where, in a suit on an accident policy, plaintiff's evidence tended to show that decedent's death was caused by a blow on the head, the question, "Describe . . . . whether it was a light and easy blow, whether it was a strong and heavy blow, or whether it was a medium heavy blow, according to your idea, as you saw it," was proper.—Stout v. Pacific Mut. Life Ins. Co. of California, 130 Cal. 471, 62 Pac. 732.

[i] A question whether defendant wanted plaintiff "to do anything" at a certain time was rightly excluded as calling for a conclusion.—Whitmore v. Ainsworth, 38 Pac. 196.

§ 450. —— Facts.

[a] The issue being whether or not a sale was fraudulent as against creditors, the question put to a witness, "Did you see any difference in the appearance or management of things after the sale from that before the sale?" is not objectionable, as calling for an opinion of the witness.—Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114.

[b] Testimony of person having knowledge of character of fence to keep out stock is not opinion evidence.—Silvarer v. Hansen, 77 Cal. 584, 20 Pac. 136.

[c] In an action for work done and materials furnished, where plaintiff has testified to the work which he agreed to do and the kind of materials he was to furnish, a ques-

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tion whether he completed the work in accordance with the contract is not objectionable, as calling for the opinion of the witness.—Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109, distinguishing Connor v. Stanley (1885), 67 Cal. 315, 7 Pac. 723, and Taylor's Estate, In re (1891), 92 Cal. 564, 28 Pac. 603.

[d] Opinion asked of an architect whether he could tell which of the two adjoining buildings which used the party-wall was constructed first, is not objectionable as calling for the opinion of the witness, and when, in reply to the question, he states the facts within his knowledge and observation, it is proper to overrule the objection thereto.—Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061.

[e] Evidence of another bookkeeper is admissible to show that certain books were not complicated, but a simple set of books, and that anyone of ordinary skill in bookkeeping could keep them.—Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700.

[f] Where, on an issue as to the making of false representations as to the value of a mine by the vendor's agent, he had fully and specially testified concerning the same, a question asking whether he had made any false representations as to the value of the mine was not objectionable as calling for his opinion.—Williams v. Long, 139 Cal. 186, 72 Pac. 911.

[g] For the purpose of showing, in an action by a married woman on a claim for services rendered by her, that the claim was her separate estate, by agreement with her husband, as authorized by Civil Code, sections 158, 159, the husband, who has testified that he had had an understanding with her ever since their marriage as to the control and management of her earnings, may testify as to who had had the management and control thereof during such time.—Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272.

[h] In an action to quiet title, a question asked of a witness as to who was in possession of the property in a certain year was not objectionable as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions put to witnesses indicating that the word was used in its technical sense as synonymous with "seisin."—Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739.

[i] Witness who has stated facts may state his conclusion therefrom.—Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292.

[j] A question as to whether the debtor, subsequent to the sale, and up to the time of the levy of the attachment, exercised any acts of ownership or control over the property, is not objectionable, as calling for opinion evidence.—Bunting v. Salz, 22 Pac. 1132.

[k] Where a witness states that he "does not consider" or "does not think," etc., such expressions are not expressions of opinion merely, as witnesses are not required to give their testimony with absolute positiveness.—Prior v. Diggs, 31 Pac. 155.

§ 451. —— Motive and Intent, or Understanding.

[a] Where a witness has testified to the performance of certain acts by another, he cannot give his impressions as to the object the other had in their performance. Such an inference is for the court.—Tait v. Hall, 71 Cal. 149, 12 Pac. 391.

[b] Questions asked, calling, not for facts, but for the conclusion of the defendant as a witness, as to what the plaintiff and a third person understood, in reference to the interest of the plaintiff in a prospecting venture, and as to whether the plaintiff expected wages from the defendant, were properly disallowed.—Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700.

§ 452. —— Ability to See.

[a] In a case of collision, after the witness had testified concerning the position of the vessels and the character of the night, he was asked whether a vessel, on such a night, and in such a place, could be seen at a considerable distance from a vessel approaching the shore, and, if so, how far. Held, that the question should have been allowed. Innis v. Steamboat Senator, 4 Cal. 5, 60 Am. Dec. 577.

§ 453. —— Ability to Hear.

[a] A witness testifying to declarations made by the agent of the vendor plaintiff, in a conversation, that he had purchased the mortgage in controversy from the vendor, uttered while he was sitting in a buggy with the agent and cashier of the defendant bank, which was then about to make a loan thereupon, and while the latter was seeming to give attention to the conversation, may give his opinion that the agent of the bank was within such distance that he might have heard the conversation.—Raymond v. Glover, 122 Cal. 471, 55 Pac. 398.

§ 454. —— Mental Condition or Capacity.

[a] A question as to what was the appearance of a person, as to his being rational, is a question of fact, and not of opinion, and is competent.—People v. Lavelle, 71 Cal. 351, 12 Pac. 226.

[b] A person who appreciates the varying moods of another, and who is able to judge of his acts with full knowledge of his peculiarities, would be an "intimate acquaintance," within the meaning of Code of Civil Procedure, section 1870, subdivision 10, making competent "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason of the opinion being given."—Carpenter v. Bailey, 94 Cal. 406, 29 Pac. 1101.

[c] The objection to allowing witnesses who were not intimate acquaintances of testator to state their opinion of his sanity cannot be avoided by varying the form of the question, and asking how he appeared mentally.—

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Carpenter v. Bailey, 94 Cal. 406, 29 Pac. 1101.

[d] There is no abuse of discretion in holding a witness competent as an "intimate acquaintance," within Code of Civil Procedure, section 1870, subdivision 10, allowing expression of opinion of an intimate acquaintance respecting the mental sanity of a person; it appearing that witness had known him for eighteen years, had until the last six years lived next door to him, and seen him every day, and had since then visited the family, where he lived, twice a week or more, and had often had conversations with him.—Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317.

[e] In an action to set aside a deed for mental incapacity of the grantor, a nonexpert witness may be asked as to the grantor's appearance at a given time, with reference to his being rational or irrational, as the question calls for a fact, and not an opinion as to his mental condition, concerning which only experts and intimate acquaintances (Code Civ. Proc., sec. 1870, subd. 10) can express an opinion.—Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

[f] Where a witness has testified to a business transaction with the testator, a question as to how he conducted the transaction is relevant and material, and does not call for an opinion of the witness, but for a statement as to the conduct and appearance of the testator at the time of the transaction.—Estate of Wax, 106 Cal. 343, 39 Pac. 624.

[g] Where witnesses are shown to have been more or less intimate with a deceased testator, the court, in its discretion, may permit them to testify as to whether testator appeared to them rational or irrational.—Keithley's Estate, In re, 134 Cal. 9, 66 Pac. 5.

[h] Under Code of Civil Procedure, section 1870, subdivision 10, providing that an intimate acquaintance may state his opinion respecting the mental sanity of a person, the reason for the opinion being given, it is not error to permit a witness, shown to have been an intimate acquaintance of a testator, to state his opinion as to testator's mental sanity.—Keithley's Estate, In re, 134 Cal. 9, 66 Pac. 5.

[i] Where a witness has testified that he lived in the same house with testator, occupying apartments across the hall, and had seen testator nearly every day for a year before his death, it is not an abuse of discretion to admit his opinion of testator's mental soundness.—Keegan's Estate, In re, 139 Cal. 123, 72 Pac. 828; Monihen v. Kane, 139 Cal. 123, 72 Pac. 828.

[j] Under Code of Civil Procedure, section 1870, subdivision 10, permitting the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason being given, to be introduced in evidence, persons who had known testatrix for upward of twenty years, who were on terms of social intimacy with her, and who had conversed with her immediately before and after the execution of the will, were competent to testify as to her mental condition.—McKenna's Estate, In re, 143 Cal. 580, 77 Pac. 461.

[k] Where certain witnesses were acquainted with a testatrix, had been associated with her, and conversed with her before and after the execution of her will, the court did not abuse its discretion in permitting them to express an opinion as to her mental soundness, under Code of Civil Procedure, section 10, subdivision 1870, permitting intimate acquaintances to give their opinion respecting the mental sanity of a person.—McKenna's Estate, In re, 143 Cal. 580, 77 Pac. 461.

[l] In a will contest, witnesses may testify, as bearing on an issue of mental capacity, to general conversations had with the testatrix, embraced within a reasonable time before and after the making of the will, where they are limited exclusively to showing the condition of testatrix's mind.—McKenna's Estate, In re, 143 Cal. 580, 77 Pac. 461.

§ 455. Conclusions of Law.

[a] In an action against an attorney for negligence in conducting a suit, evidence of another attorney is not admissible to show that, upon the facts admitted or proved, the attorney was guilty of negligence.—Gambert v. Hart, 44 Cal. 542.

[ab] Where one has testified on cross-examination as to the time when, and the circumstances under which, he signed an instrument, a further question on cross-examination, "Do you swear that you signed that instrument as a witness?" calls for a conclusion of law based on the facts stated by him. Pottkamp v. Buss, 46 Pac. 169.

[b] Evidence calling for conclusion of witness as to question of negligence is inadmissible.—Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292.

§ 456. —— Title and Ownership.

[a] The opinions of a witness are inadmissible in evidence upon the question whether a title is indisputable and satisfactory.—Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57.

[b] The opinion of a witness as to the title to real property is not evidence of title.—Schroeder v. Wittram, 66 Cal. 636.

§ 457. —— Construction and Effect of Contracts or Instruments.

[a] In ejectment for land, which the evidence showed plaintiffs had agreed to convey to defendants on performance by the latter of certain conditions, a question to defendants as to whether they had performed all the conditions of the contract was properly excluded, as calling for a conclusion.—Wallace v. Maples, 79 Cal. 433, 21 Pac. 860.

[b] The issue being whether an instrument, in terms an absolute conveyance, was accepted as such, as contended by plaintiff, or as security, as contended by defendant, a ques-

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tion asked plaintiff, "State what you believed that document to be at the time it was delivered to you," will not be held to ask an opinion as to its legal effect.—Pottkamp v. Buss, 46 Pac. 169.

§ 458. Matters Directly in Issue.

[a] A witness cannot be permitted to give his opinion in answer to an inquiry embracing the whole merits of the case.—Connor v. Stanley, 67 Cal. 315, 7 Pac. 723.

[b] In an action to quiet title, where defendants alleged that an absolute deed given plaintiff was a mortgage, after testifying fully as to what occurred, and the reasons for executing the deed, defendant could not testify whether he was willing to deed, or considered that he was deeding, the property absolutely to plaintiff.—Garwood v. Wheaton, 128 Cal. 399, 60 Pac. 961.

2. Special Knowledge as to Subject Matter.

IN GENERAL, § 459.
BODILY CONDITION, § 460.
QUANTITY OR CAPACITY, § 461.
CAUSE AND EFFECT, § 462.
HANDWRITING, § 463.
VALUE OF REAL PROPERTY, § 464.
DAMAGES, § 465.

§ 459. In General.

[a] The opinion of a witness as to what certain land would produce, if irrigated, is competent, the witness having had experience in cultivating and irrigating the same and neighboring land.—Ellis v. Tone, 58 Cal. 289.

[b] Cases in which nonexperts may testify on account of their knowledge of facts, reviewed.—San Diego L. & T. Co. v. Neale, 78 Cal. 77-79, 20 Pac. 372.

§ 460. Bodily Condition.

[a] In an action against a fraternal organization for the recovery of sick benefits, a question asked a witness who knew the plaintiff quite intimately and saw him frequently, and had conversations with him about his health during the period covered by his claim against the defendant, as to whether when he saw the plaintiff he was apparently well, is competent, and the fact that it involves the opinion of a nonexpert witness based upon observation of the apparent health of the plaintiff does not render it inadmissible.—Robinson v. Exempt F. Co. of S. F., 103 Cal. 1, 42 Am. St. Rep. 93, 36 Pac. 955.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 87; 20 Cent. Dig., cols. 3242-3247, §§ 2237-2241.

§ 461. Quantity or Capacity.

[a] The capacity of a ditch to carry water does not require for its proof unusual scientific attainments or peculiar skill. It may be established, like any other fact, by competent testimony; and witnesses who have had long experience in measuring and selling water are as competent to testify to the fact as experts.—Frey v. Lowden, 70 Cal. 550, 11 Pac. 838.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3275-3277, § 2267.

§ 462. Cause and Effect.

[a] A person, though not an expert, is competent to testify to consequences immediately following upon every bodily injury, and palpable to the senses.—Bland v. Southern Pac. R. Co., 65 Cal. 626, 4 Pac. 672.

[b] In an action for the diversion of water from a mine, a witness who testifies that he knows the claims and ditches involved; that he has been over the ditches and at the mines of both plaintiff and defendant; that he has resided in the vicinity twelve or thirteen years, and is a miner by occupation, having been engaged mostly in hydraulic mining—is qualified to give his opinion as to whether it is practicable for plaintiff to run his mine if defendant continues to run his in the same way as before.—Bennett v. Morris, 37 Pac. 929.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 99; 20 Cent. Dig., cols. 3290-3297, §§ 2275-2282.

§ 463. Handwriting.

[a] A witness whose only knowledge of another's signature has been derived from an examination of official documents in official custody, purporting to be signed by such other, may give his opinion as to the genuineness of such person's signature to a paper offered in evidence.—Sill v. Reese, 47 Cal. 294.

[b] Expert evidence of handwriting cannot be introduced without preliminary proof of qualification of expert and genuineness of writing used for comparison.—Spottiswood v. Weir, 80 Cal. 450, 22 Pac. 289.

[c] The successor of a county surveyor, having charge of the documents in the office, who testifies that he has made frequent examination of documents purporting to be in his predecessor's handwriting, is competent to testify that interlineations appearing in a survey made by his predecessor are in his handwriting.—Burdell v. Taylor, 89 Cal. 613, 26 Pac. 1094.

[d] One who was personally familiar with the handwriting of a deceased person is a competent witness as to such writing, although he was familiar with her signature only.—Marchall's Estate, In re, 126 Cal. 95, 58 Pac. 449.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 155-184; 20 Cent. Dig., cols. 3253, 3254, § 2247.

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§ 464. Value of Real Property.

[a] The opinions of witnesses, founded upon a knowledge of the location, productiveness, or adaptation of the land to other uses, not speculative, or of the market or selling price of the land in the vicinity, are legal evidence to prove its value; otherwise, as to the opinions of those who do not possess this knowledge.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[b] The mere fact that one lives near certain land, and has had a reasonable opportunity to become acquainted with it, does not necessarily make him a competent witness to testify to its value.—Reed v. Drais, 67 Cal. 491, 8 Pac. 20.

[c] Opinions of witnesses who have knowledge of the land in controversy, and of sales in its immediate vicinity, are admissible as to its value, although such witnesses may not be, strictly speaking, experts.—San Diego Land etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

[d] A witness' opinion as to the value of land should be rejected if it is based entirely on incompetent matters.—San Diego Land etc. Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

[e] An owner of land is qualified to testify as to its value, without proof of expert knowledge on his part.—Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

[f] Witnesses testifying as to the market value of land need not be experts in the severe sense of the term, provided they show sufficient knowledge and experience as to values of land in the neighborhood.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 115, 119, 124, 129. See 20 Cent. Dig., cols. 3284-3287, § 2273.

§ 465. Damages.

[a] The opinion of witnesses who have never seen the land until after the right to compensation and damages accrued should not be received.—San Diego Land etc. Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 3297-3316, §§ 2283-2289.

3. Subjects of Opinion Evidence and Examination of Witnesses.

INFERENCES OR IMPRESSIONS, IN GENERAL, § 466.
CHARACTERISTICS, § 467.
BODILY APPEARANCE OR CONDITION, § 468.
DUE CARE AND PROPER CONDUCT, § 469.
NATURE, CONDITION AND RELATION OF OBJECTS, § 470.
QUANTITY, DISTANCE, AND RATE OF SPEED, § 471.
VALUE, § 472.
DAMAGES, § 473.
EXAMINATION OF WITNESSES, § 474.

§ 466. Inferences or Impressions in General.

[a] Speculative opinions of ordinary witnesses are inadmissible.—Innis v. The Senator, 4 Cal. 5, 60 Am. Dec. 577.

[b] Opinion of witness is inadmissible to prove whether a third party did certain act "voluntarily."—Ellen v. Lewison, 88 Cal. 261, 26 Pac. 99.

[c] When the question to be determined is the result of common experience, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness. If the circumstances out of which negligence is said to arise have been or can be established by proof, the ultimate fact of negligence is to be inferred by the jury, and cannot be established by the opinions of witnesses.—Sappenfield v. Main Street etc. R. R. Co., 91 Cal. 48, 27 Pac. 590.

[d] In an action for personal injuries caused by being thrown from the forward end of a hand-car which left the track, a passenger on the car may testify whether it was possible for one, sitting in the position plaintiff was in, to stand the jars, and still retain her seat, and that he thought the car too narrow for the track.—Healy v. Visalia etc. R. Co., 101 Cal. 585, 36 Pac. 125.

[e] Where witness had described a house removed from rented premises in detail, together with its manner of construction, it was not error to sustain defendant's objection to a question as to whether the house was a substantial structure.—O. L. Shafter Estate Co. v. Alvord (Cal. App.), 84 Pac. 279.

§ 467. Characteristics.

[a] In an action to enforce a marriage contract, where the defense is that defendant's intestate was unduly influenced by plaintiff by means of spirit mediums to make the contract, witnesses cannot give their opinions as to whether defendant's intestate was liable to be wholly influenced by such spirit mediums.—Conner v. Stanley, 67 Cal. 315, 7 Pac. 723.

§ 468. Bodily Appearance or Condition.

[a] In an action for personal injuries, a witness may testify as to the appearance of plaintiff immediately after the accident.—Healy v. Visalia etc. R. Co., 101 Cal. 585, 36 Pac. 125.

[b] One who acted as a nurse for plaintiff after her injury need not be an expert to testify to complaints of pain and suffering which she heard from plaintiff.—Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

§ 469. Due Care and Proper Conduct.

[a] Where the question is whether an electric railway company was negligent in op-

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erating a car with but one man in charge, it being necessary for him to get off, at the top of a grade, to change the trolley to another wire, and all the circumstances are established by unconflicting evidence, opinion evidence is not admissible.—Redfield v. Oakland Consol. St. Ry. Co., 112 Cal. 220, 43 Pac. 1117.

[b] A witness who was on the platform of the horsecar at the time of its collision with the electric-car, and who saw the situation, though not an expert, may testify to his opinion that had the driver of the horsecar been at his post, the car could have been stopped to avoid it.—Howland v. Oakland Cons. St. Ry. Co., 115 Cal. 487, 47 Pac. 255.

[c] A witness in an action against a railroad for injuries to a traveler in a collision with a train cannot testify that the engineer in charge of the train took every precaution that an engineer could take to stop the train and avoid the accident.—Johnson v. Center (Cal. App.), 88 Pac. 727.

§ 470. Nature, Condition and Relation of Objects.

[a] Opinion evidence is admissible as to the grade per mile of a ditch used in conveying water for beneficial purposes, although it may be overcome if more accurate information is obtained by the other side.—Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532.

[b] In an action for the death of a servant owing to the fall of a derrick mast, photographs were introduced showing a heavier counterbalance on the derrick than had been there at the time of the accident, and the jury visited the derrick and inspected it with such counterbalance on it. A witness then testified that he did not know the weight of the counterbalance, but, when asked to give an estimate of it, did so. Held, that the admission of the testimony was not erroneous.—Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

[c] The lines described in a patent must be located by the court according to the calls of the patent. Witnesses can testify only as to the existence and condition on the ground of what is called for in the writing; and it is error to admit their opinions, speculations, or conjectures as to the location of the lines.—Tognazzini v. Morganti, 23 Pac. 138.

§ 471. Quantity, Distance, and Rate of Speed.

[a] Witness may testify to estimate of distance.—Innis v. The Senator, 4 Cal. 5, 60 Am. Dec. 577.

[b] In an action to recover for fruit sold under guaranty, where the quantity shipped to defendant was in issue, and it appeared that defendant had packed the fruit in what were called "forty-pound boxes," the testimony of witnesses engaged in packing fruit was properly admitted to show that such boxes, if well packed, would hold more than forty pounds.—Ah Tong v. Earl Fruit Co., 112 Cal. 679, 45 Pac. 7.

[c] Persons who have been accustomed to riding on a street-car line, where it has been shown that the schedule and statutory rate of speed of the cars is the same, may testify that a car was running very fast, and at an unusual rate of speed, for the purpose of showing that it was going at a prohibited rate of speed.—Johnsen v. Oakland etc. Electric Ry. Co., 127 Cal. 608, 60 Pac. 170.

[d] The fact that witness was a passenger on a street-car, rather than a bystander, does not disqualify him to testify as to the approximate speed at which the car was running, where it is shown he had been accustomed to riding on the line, and knew what the usual rate of speed was.—Johnsen v. Oakland etc. Electric Ry. Co., 127 Cal. 608, 60 Pac. 170.

§ 472. Value.

[a] In an action against a steamboat for not transporting plaintiff within the agreed time, the opinion of a witness that plaintiff's time was worth one hundred dollars per day, based on the fact that he was a large stock speculator and frequently made more than that a day, was inadmissible.—Hastings v. The Uncle Sam, 10 Cal. 341.

[b] A witness stated that he had been employed as a ranch superintendent in the same character of work as that done by plaintiff at the K. ranch, particularizing the character, places, and times of such work; that he had seen plaintiff working on the K. ranch, and that he (witness) was familiar with that ranch; that he knew plaintiff was superintendent of the K. ranch, and looked after the stock and farming of the place; that he knew the fair and reasonable value of such services as were rendered by plaintiff on the K. ranch during the years in dispute; that he knew about what was being paid in the vicinity for such services during said years. Held, that the witness was qualified to testify as to the value of plaintiff's services.—Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221.

[c] The fact that plaintiff's witnesses, called to testify as to the value of services rendered by him, resided in another city of the same county, and admitted that they did not know the value of like services in the city where they were performed, does not render their testimony incompetent, where they were present in court, and heard plaintiff describe the nature and extent of his services, were business men of experience, and had employed persons for services similar to those performed by plaintiff, and testified that they knew the value of such services in such county.—Crusoe v. Clark, 127 Cal. 341, 59 Pac. 700.

§ 473. Damages.

[a] In trespass for driving cattle upon land, questions to a witness, "What would have been the injury to the land by turning in two

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hundred head of cattle, on April 12th, 13th and 14th, and letting them remain six or seven days?" Also, "What would it have been worth to pasture two hundred or three hundred cattle for six or seven days on this land?"—are not objectionable on the ground that they are an estimate of damages.—Woodbeck v. Wilders, 18 Cal. 131.

[b] Where a witness for plaintiff in an action to recover damages from the construction of a railroad testified that after the road was built plaintiff's land was worth a certain sum less than before it was built, but on cross-examination testified that this estimate might have been based partly upon the worth of the property had the road passed through the town upon some other street (which would have increased the value), defendant cannot have the testimony stricken out on the ground that the basis for the estimate was erroneous, as the objectionable evidence did not relate to the testimony given in direct examination, and was not prejudicial, where the court charged that in estimating damages the value of the land if the railroad had been constructed through some other part of the city should not be considered.—Abbott v. Southern Pac. R. Co., 109 Cal. 282, 41 Pac. 1099.

[c] In a proceeding to condemn a right of way for a public road, after a petition to the board of supervisors, a member of such board may testify as to the damages which will be sustained by the defendant.—Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468.

[d] In trespass for entering plaintiff's close and diverting the waters of his well, evidence by plaintiff that his loss was four dollars per day, estimated on the loss of profits on his crop of vegetables, is incompetent, as being the conclusion of the witness, and not the facts on which an estimate could be made. Razzo v. Varni, 21 Pac. 762.

§ 474. Examination of Witnesses.

[a] In proceedings to condemn lands for public uses, witnesses giving their opinion of the value of the land taken cannot, upon direct examination, testify as to particular transactions, such as sales of adjoining lands, or how much has been offered for adjoining land or the land in question, or how much the railroad company has been compelled to pay in other and like cases, notwithstanding those transactions may constitute the source of their knowledge.—Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[b] Witness may testify to estimate of amount of damages without first giving reasons or grounds on which he bases his estimates.—Razzo v. Varni, 81 Cal. 292, 22 Pac. 848.

[c] In order to enable a witness to testify to the appearance of a person with reference to his being rational or irrational in his presence and under his observation, it is not necessary that he should be an intimate acquaintance of such person, or be qualified as an expert witness.—Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

[d] Where an attorney testified to the value of certain legal services, the question what annual income such a valuation would enable a man to make was properly excluded.—Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459.

[e] Where the attorney who opposed plaintiff's assignor in the trial of a case stated to the jury all the facts on which he based the value of the assignor's legal services, but testified that he could not state their value without looking into his mind, an answer, after consideration, fixing the value, was not objectionable as based on what was in the witness' mind, and not on the evidence. Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459.

[f] On the issue whether a grantor was competent to transfer property, a physician testifying as to the physical and mental condition of the grantor could not give his abstract opinion as to whether she was competent.—Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086.

[g] In an action for personal injuries resulting from an assault, it was not prejudicial error to allow plaintiff to answer the preliminary question, "You may state whether or not you have ever received any injury caused by . . . . defendant," when there follows, without objection, a narration of how the injury was received, and what was said and done by defendant.—Townsend v. Briggs, 32 Pac. 307.

[h] On an issue of testamentary capacity, questions calling for nonexpert opinion based on what witness had "learned and observed," held objectionable.—Dolbeer's Estate, In re (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

[i] A nonexpert held only entitled to testify as to the insanity of an intimate acquaintance, under Code of Civil Procedure, section 1870, on giving reasons for his opinion.—Dolbeer's Estate, In re (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

[j] Hypothetical questions involving facts not testified to by the witnesses themselves cannot be put to nonexperts testifying on the issue of insanity.—Dolbeer's Estate (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

FOR AUTHORITIES FROM OTHER STATES:

39 L. R. A. 305, note. See, also, 17 Cyc. 242-255; 20 Cent. Dig., cols. 3316-3337, §§ 2290-2307.

B. SUBJECTS OF EXPERT TESTIMONY.

IN GENERAL, § 475.
MATTERS OF COMMON KNOWLEDGE, § 476.
PHYSICAL CONDITION, § 477.
MATTERS INVOLVING SCIENTIFIC OR OTHER SPECIAL KNOWLEDGE, § 478.

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HANDWRITING, § 479.
DUE CARE AND PROPER CONDUCT, § 480.
—— CONSTRUCTION OF MACHINERY AND APPLIANCES, § 481.
—— MANAGEMENT AND OPERATION OF MACHINERY, § 482.
—— MANAGEMENT AND OPERATION OF STREET-CARS, § 483.
CUSTOM OR USAGE AND CONSTRUCTION OF WRITINGS, § 484.
NATURE, CONDITION AND RELATION OF OBJECTS, § 485.
VALUE, § 486.
CAUSE AND EFFECT, § 487.
DAMAGES, § 488.

§ 475. In General.

[a] The opinions of witnesses are generally admissible only when they relate to matters of science, or art, or to skill in some particular profession or business.—Hastings v. Steamer U. S., 10 Cal. 341.

[b] The testimony of experts is not admissible as to the sufficiency of bars and a barway to restrain cattle.—Enright v. San Francisco etc. R. R. Co., 33 Cal. 230.

[c] Court may allow expert evidence of accountants upon a number of front feet represented upon a petition.—Mulligan v. Smith, 59 Cal. 226.

[d] Qualified sawmill expert may testify that machinery was operated in the usual manner.—Sanborn v. Madera etc. Co., 70 Cal. 269, 11 Pac. 710.

[e] Where the form of questions put to an expert machinist as to the impossibility of foretelling the leakage, under assumed circumstances, called for a simple affirmative or negative answer which would have involved the conclusion of the witness upon three several questions of fact, one of which was clearly not the subject of opinion evidence, and another may not have been such subject according to what his opinion may have been as to the true cause of the break or leak, objections to the questions that they were not the proper subject of opinion evidence were properly sustained.—Kahn v. Triest-Rosenberg Cap. Co., 139 Cal. 340, 73 Pac. 164.

[f] In an action for injuries received in an accident due to a defective switch, evidence by a skilled switch-tender as to whether anything was not done that could have been done to avoid the accident is inadmissible, as invading the province of the jury.—Fogel v. San Francisco etc. Ry. Co., 42 Pac. 565.

§ 476. Matters of Common Knowledge.

[a] In an action for injuries caused by an exposed shaft, it was error to admit the testimony of machinists as to whether the shaft would be more dangerous if it were jagged and split on the end, since the jury was capable of deciding such question without the aid of experts.—Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

[b] In an action to abate a nuisance, it is not error to exclude an answer to the question: "Now, in your opinion as an expert, would that plastering be in the condition that you found it, had the building, since the plastering was placed there, settled six or seven inches?" since it must appear to anyone that the plaster of a building which has settled six or seven inches cannot be in the condition that it was before the building settled.—Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458.

[c] The question as to the proper height of stakes to be used at the ends of a car loaded with ties is not a matter for expert evidence. Kerrigan v. Market St. Ry. Co., 138 Cal. 506, 71 Pac. 621.

[d] The probable effect of the unsoundness of any of the timbers in a trestle held not a matter of expert testimony.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 229, 230. See, also, 17 Cyc. 228-241; 20 Cent. Dig., cols. 3340-3343, § 2310.

§ 477. Physical Condition.

[a] The expert evidence of medical witnesses based only upon the inadmissible declarations of the deceased as to his physical condition and symptoms, have no basis, and are wholly inadmissible.—Estate of James, 124 Cal. 653, 57 Pac. 578, 1008.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3348, 3349, §§ 2312, 2313.

§ 478. Matters Involving Scientific or Other Special Knowledge.

[a] In an action for damages caused by the explosion of nitroglycerin in a dynamite manufactory, expert evidence that, if the manufacturing and handling of dynamite is properly carried on, an explosion will not occur, is admissible.—Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718.

[b] Expert testimony is admissible to determine whether or not two certain pieces of cloth are of the same texture and quality. People v. Lovren, 119 Cal. 88, 51 Pac. 22.

[c] In an action for the price of peaches sold on a contract fixing the price per pound for each of several sizes of fruit "per box packed," where defendant contended that the size and weight of the boxes determined the size and weight of the fruit, an experienced fruit raiser and packer, who saw plaintiff's fruit packed, could testify that peaches could not be graded in that way, as they were packed in "break joints," by placing the upper layer in the space between the fruit in the lower layer; and he could also testify as to the average size of plaintiff's fruit, and

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the average weight of the several sizes as packed.—Thresher v. Gregory, 42 Pac. 421.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3343-3347, § 2311.

§ 479. Handwriting.

[a] Where plaintiff contended that a certain word on a record was the word "four," and that an attempt had been made to change it to the word "town," by changing the initial and final letters, it was not competent for an expert to state whether or not the fact that the final letter had been changed was strong evidence that the initial letter had also been changed, it being the duty of the court to make the deduction from the facts. Kruse v. Chester, 66 Cal. 353, 5 Pac. 613.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3351-3354, § 2315.

§ 480. Due Care and Proper Conduct.

[a] When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury must determine the question of negligence without the aid of experts.—Shafter v. Evans, 53 Cal. 32.

[b] In an action for a death resulting from a runaway, the competency or incompetency of the driver is not a subject for expert testimony.—Rowe v. Such, 134 Cal. 573, 66 Pac. 862.

[c] In an action for the death of a servant by the fall of a derrick, it was the theory of defendant that the fall was occasioned by a latent defect in the pivot, which had been found broken after the accident; but it was the theory of plaintiff that the fall was occasioned because the ties supporting the rails to which the derrick was clamped were decayed. Held, that it was proper to permit civil engineers of many years' experience, familiar with the mechanical principles of derricks, to testify as to the proper balancing of derricks, the effect of the breaking of a pivot on an evenly-balanced derrick, and as to whether the fall of a derrick mast would fracture the pivot.—Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

[cd] Before a witness can testify on the issue of a physician's neglect and unskillful practice, his competency must be shown. Heintz v. Cooper, 47 Pac. 360.

[d] In an action for injuries to a miner by the fall of a portion of the roof, an expert held properly permitted to testify as to what conditions made it necessary to timber a mine.—Bird v. Utica Gold Min. Co. (Cal. App.), 84 Pac. 256.

[e] In an action for injuries by the alleged insufficient lighting of excavations in a street, whether the lights maintained were sufficient held not a proper subject of expert testimony.—Carty v. Boeseke-Dawe Co. (Cal. App.), 84 Pac. 267.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3357-3371, § 2316.

§ 481. —— Construction of Machinery and Appliances.

[a] Nonexperts cannot testify as to sufficiency of construction of a machine wheel. Hoult v. Baldwin, 78 Cal. 414, 20 Pac. 864.

[b] Practical machinist familiar with requirements of harvesting machine may testify whether it was so made as to successfully do work it was intended to do.—Greenleaf v. Stockton C. H. & A. Works, 78 Cal. 610, 21 Pac. 369.

[c] Where plaintiff was injured by the breaking down of a harvester manufactured for him by defendant, expert testimony is proper on the question whether the bolt and nut which separated and caused the accident were sufficient.—Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311.

[d] An expert may testify with respect to the comparative strength of a solid timber of a specified size and stringers bolted together to form timber of the same size.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

§ 482. —— Management and Operation of Machinery.

[a] It is not proper to admit the testimony of expert witnesses as to what appliances were safe, and what were unsafe. A master is not bound to furnish the safest appliances. The jury is the proper judge of the safety of the appliances actually used; and the safety of other appliances is immaterial. Hanley v. California Bridge etc. Co., 127 Cal. 232, 59 Pac. 577.

[b] Where the issue in an action for injuries to a miner is whether a hoisting appliance was defective, an objection to plaintiff's question, put to his expert witness, as to whether the appliance was at the time of the accident a safe machine for the work being done, is properly sustained.—Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

§ 483. —— Management and Operation of Street-cars.

[a] The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is a proper subject for expert evidence, and not a matter of such common knowledge that the jury can judge as intelligently as one skilled in their use.—Howland v. O. C. S. Ry. Co., 110 Cal. 513, 42 Pac. 983.

§ 484. Custom or Usage and Construction of Writings.

[a] The rule that courts are to give construction to contracts is frequently departed

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from, where the contract relates to the scientific or mechanic arts. In such cases, it is common and prudent to admit the opinions of experts to explain the contract.—Reynolds v. Jourdan, 6 Cal. 108.

[b] In an action to recover the value of marble sold and delivered to defendant to be used by him in the erection of a building under a contract providing that the marble should be delivered, "finished and ready for setting," the meaning of these words, as used by marble cutters, may be proved by testimony of competent witnesses.—Myers v. Tibbals, 72 Cal. 278, 13 Pac. 695.

[c] A question asking a witness, in an action based on the contention that defendant was negligent in operating an electric car with but one person in charge, to state from his experience what the general custom was among electric roads, as to the number of men found necessary to manage a car under similar circumstances, does not call for the opinion of witnesses as an expert, but practically for the opinion of others as inferred from their conduct.—Redfield v. Oakland Consol. St. Ry. Co., 112 Cal. 220, 43 Pac. 1117.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3371, 3372, § 2325.

§ 485. Nature, Condition and Relation of Objects.

[a] Where an employee was injured by machinery claimed to be defective, and the question of relative strength of wrought and cast iron is material in determining whether or not the machine was defective, a witness qualified as an expert may give his opinions with reference thereto, as provided in Code of Civil Procedure, section 1870, subdivision 9.—McFaul v. Madera Flume etc. Co., 134 Cal. 313, 66 Pac. 308.

[b] Testimony as to the quality of old wire rope sold by sample, that the outer wires were broken into short pieces; that the rope was "rotten, and a little broken, instead of being as the sample"; that much of it was "broken, rusty, and rotten"—relates to facts open to common observation, and not requiring expert knowledge.—Grumwald v. Freese, 34 Pac. 73.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3378-3381, § 2328.

§ 486. Value.

[a] Testimony of persons dealing in real estate concerning the value of certain property as affected by a lawsuit contesting the validity of a will is to be inadmissible to prove the value.—Collins v. Sullivan, 54 Cal. 238.

[b] In proceedings to condemn a right of way over oil fields, certain expert testimony as to valuation held proper.—Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 90, 79 Pac. 961.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 128-130; 20 Cent. Dig., cols. 3382-3386, §§ 2330-2333.

§ 487. Cause and Effect.

[a] In an action by one mining claimant to enjoin another from tunneling, etc., to the injury of the plaintiff's ditch, the opinions of persons of learning and experience in mining, who have examined the premises, are admissible to prove the cause of an alleged cracking and settling of plaintiff's premises.—Clark v. Willett, 35 Cal. 534.

[b] In an action for personal injuries, where plaintiff had testified to the fracture of the tenth rib, two inches from the spine, by the accident, it was proper for defendant to show by a medical expert the necessary force to produce such injury, and that it could not have been caused by the accident. Yaeger v. Southern California Ry. Co., 51 Pac. 190.

[c] That the running of trains over a trestle will produce such a vibration as will loosen the nails with which the timbers in the trestle are put together held a subject of expert testimony.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3386-3401, §§ 2334-2338.

§ 488. Damages.

[a] In an action for damages for injuries to plaintiff's wife, the character of the medical attendance which she would require in the future was a proper subject for the opinion of an expert.—Martin v. Southern Pac. Co., 130 Cal. 285, 62 Pac. 515.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3401-3407, §§ 2339-2342.

C. COMPETENCY OF EXPERTS.

KNOWLEDGE, EXPERIENCE AND SKILL—IN GENERAL, § 489.
—— INFORMATION DERIVED FROM BOOKS, § 490.
MECHANICAL DEVISES, § 491.
PHYSICAL FACTS, § 492.
CAUSE AND EFFECT, § 493.
VALUE, § 494.
DAMAGES, § 495.
PRELIMINARY EVIDENCE AS TO COMPETENCY, § 496.
DETERMINATION OF QUESTION OF COMPETENCY, § 497.

§ 489. Knowledge, Experience and Skill in General.

[a] Mere opportunity for observation will not qualify an expert.—Reed v. Ybarra, 50 Cal. 465.

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[b] Persons who have acquired experience or peculiar knowledge are experts, though not professional scientists.—Estate of Loomes, 54 Cal. 514, 35 Am. Rep. 83.

[c] A practical miner who has used blasting powder for years, and used a large amount of a certain powder, can be asked his opinion, based upon his experience, as to the safety of that powder, by virtue of the provisions of subdivision 9 of section 1870 of the Code of Civil Procedure.—Sowden v. Idaho Quartz Min. Co., 55 Cal. 443.

[d] Witness having ordinary knowledge as "farmer and logger" of land and its qualities may testify as to cost of clearing land. Barnum v. Bridges, 81 Cal. 607, 82 Pac. 924.

[e] Proof of any amount of familiarity with earth dams will not qualify witness to testify as expert in regard to wooden dams. Wiedekind v. Tuolumne etc. Co., 83 Cal. 200, 23 Pac. 311.

[f] A civil engineer, with eight years of experience in charge of a government snag boat, and of observation and study of river currents, and with knowledge of the locality in question, is qualified to give an opinion as to whether a river can be safely navigated at all times at a point where a steamer collided with a bridge.—Chico Bridge Co. v. Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780.

[g] One who has been a civil and hydraulic engineer for several years is qualified to testify as an expert in matters touching civil and hydraulic engineering.—Egger v. Rhodes, 37 Pac. 1037.

[h] A general qualified medical practitioner held as competent to testify to the sanity or insanity of a person as skilled alienists.—Dolbeer's Estate, In re (Cal. Sup.), 86 Pac. 695; Schander v. Gray (Cal. Sup.), 86 Pac. 695.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 3407-3412, §§ 2343, 2344.

§ 490. —— Information Derived from Books.

[a] Although medical books themselves cannot be read in evidence, yet a physician who testifies as an expert witness may state not only his opinion but the grounds of his opinion, although in some degree founded on books as a part of his general knowledge, and the reference of such witness to "cases on record" in connection with his opinion is not incompetent, nor in effect permitting the introduction of medical books to the jury. Healy v. Visalia etc. R. R. Co., 101 Cal. 585, 36 Pac. 125.

§ 491. Mechanical Devices.

[a] Under Code of Civil Procedure, section 1870, subdivision 9, which provides that a witness may give his opinion "on a question of science, art, or trade, when he is skilled therein," it is error to allow a witness, who for about two years has been a driver and conductor on the railway, to testify whether in his opinion the pin was "safe."—Sappenfield v. Main St. etc. R. Co., 91 Cal. 48, 27 Pac. 590.

[b] A witness held competent as an expert to testify that the principal timbers in a trestle should be joined by bolts.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

§ 492. Physical Facts.

[a] An expert trestle builder is competent to testify as an expert that the timbers decay first where they come in contact with each other.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

[b] Where an expert trestle builder testified that he knew something about the life of red fir timber, he was competent to testify as to the average life of such timber in a trestle.—Bowen v. Sierra Lumber Co. (Cal. App.), 84 Pac. 1010.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 3430-3432, § 2355.

§ 493. Cause and Effect.

[a] Where a person is shown to have been engaged in measuring and selling water to miners for four or five years, he is sufficiently an expert to render admissible his opinion of the effect that a dam, crossing a stream, will have in raising the water in the channel above it.—Blood v. Light, 31 Cal. 115.

[b] There is no error in rejecting the testimony of one asked to give his opinion as an expert as to the effect of irrigation on lands in the mountains of Santa Cruz, it appearing that his experience had been confined to the southern part of Santa Clara county, and that he had never been on the lands under consideration except for a day in the winter.—City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197.

FOR AUTHORITIES FROM OTHER STATES:
See 20 Cent. Dig., cols. 3433-3436, § 2356.

§ 494. Value.

[a] A witness who is not an attorney is incompetent to prove the value of an attorney's services.—Hart v. Vidal, 6 Cal. 56.

[b] One who had been in the sheep business for twenty-six years, and was familiar with sheep husbandry, was competent to testify as to the probable average annual increase in a certain flock of sheep.—More's Estate, In re, 121 Cal. 609, 54 Pac. 97.

[c] Merchants and clerks of merchants in a foreign country who deal in a certain article are competent to testify as to the

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market value of the article in such foreign country.—Grunwald v. Freese, 34 Pac. 73.

[d] Where a witness testifies that he has been in the dairy business for seven years, and is familiar with the value of cattle for that business, his testimony as to the value of the cattle in suit is admissible, although he has not seen them for a year previous to the execution.—Paden v. Goldbaum, 37 Pac. 759.

[e] Where a lawyer engaged for twenty years as an examiner of titles and as attorney for leading loaning companies in a city testifies that he is acquainted with the value of certain lots therein, he should be permitted to testify as to such value.—Norris v. Crandall, 133 Cal. xix, 65 Pac. 568.

[f] In an action to recover for certain concrete work performed by plaintiff for defendant, a witness held qualified to testify as to the value of the work.—Camp v. Behlow (Cal. App.), 84 Pac. 251.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3435-3448, §§ 2356½-2359.

§ 495. Damages.

[a] A stockraiser is a competent witness to estimate damage done to cattle by falling through a wharf.—Polk v. Coffin, 9 Cal. 56.

§ 496. Preliminary Evidence as to Competency.

[a] Witness called upon to give opinion as to value of land must lay proper foundation by showing that he possesses the means to form an intelligent opinion; but it is not essential that his knowledge should be derived from any peculiar skill in a particular pursuit or branch of business or department of science.—Reed v. Drais, 67 Cal. 491, 8 Pac. 20.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3449-3453, §§ 2360-2362.

§ 497. Determination of Question of Competency.

[a] Whether one offered as an expert is qualified to speak as such is a fact preliminary to his testifying to be determined by the court at the trial and it is error to refer it to the jury.—Fairbank v. Hughson, 58 Cal. 314.

[b] The qualification of a witness as an expert is largely within the discretion of the trial judge.—Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 42 Pac. 983.

[c] In an action to recover for personal services in nursing and caring for defendant's testator, plaintiff introduced as an expert witness as to the value of the services a woman of experience in the same kind of work, and who had seen the nature of plaintiff's services on the ranch where they were performed. In answer to the question, "From your experience, and what you saw on the ranch, are you able to say what such services are reasonably worth?" she replied. "Well, I am able to tell what I think." Held, that the court erred in excluding the testimony on the ground that witness had admitted her incompetency.—Cowdery v. McChesney, 125 Cal. xix, 58 Pac. 62.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 258-261; 20 Cent. Dig., cols. 3453-3455, § 2363.

D. EXAMINATION OF EXPERTS.

IN GENERAL, § 498.
QUESTIONS AND ANSWERS BASED ON PERSONAL KNOWLEDGE OF EXPERT, § 499.
QUESTIONS AND ANSWERS BASED ON TESTIMONY OF OTHERS, § 500.
HYPOTHETICAL QUESTIONS AND ANSWERS, § 501.
—— FACTS UNSUPPORTED BY EVIDENCE, § 502.
FACTS FORMING BASIS OF OPINION, § 503.
REFERENCE TO AUTHORITIES, § 504.
CROSS-EXAMINATION AND RE-EXAMINATION, § 505.

§ 498. In General.

[a] Where witnesses as to the value of land were qualified to give an opinion, the question what was the value of the land as "between a party who wished to buy and one who wished to sell" was not objectionable as to form.—Fowler v. Carne, 132 Cal. xviii, 64 Pac. 581.

§ 499. Questions and Answers Based on Personal Knowledge of Expert.

[a] Upon an issue as to the unsoundness of mind of a testator at the time of making his will, testimony of his attending physician, in answer to an hypothetical question as to his opinion, as an expert, of the patient's mental soundness, based upon a state of facts describing the deceased's physical condition, as testified to by the doctor himself, is properly admitted in evidence; and the fact that the condition of the patient, as described in the question, was personally known to the witness, is immaterial.—Flint, In re, 100 Cal. 391, 34 Pac. 863.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3459-3463, § 2365.

§ 500. Questions and Answers Based on Testimony of Others.

[a] Plaintiff, a miller, had a dam, by which he turned water in the flume which ran his mill. The stream above his dam was filled with slum and other debris, thrown into it by miners; whereupon he built another dam,

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in a different position, to avoid this. The latter dam defendants cut away, and threatened to continue to cut away if plaintiff should rebuild. Suit was brought for damages and perpetual injunction. Held, that the question to a witness, "What effect did the running of the slum, etc., by defendants and other miners above, have upon plaintiff's race?" was proper, as the rights of defendants could be protected by proper instructions from the court.—Bell v. Shultz, 18 Cal. 449.

[b] Where the opinion of an expert is asked on facts not detailed in the question itself, but appearing in the testimony of another, to which the expert is referred, it must appear that he heard such testimony.—Howland v. Oakland Consol. St. Ry. Co., 115 Cal. 487, 47 Pac. 255.

FOR AUTHORITIES FROM OTHER STATES:

39 L. R. A. 310, note. See, also, 20 Cent. Dig., cols. 3463-3471, §§ 2366, 2367.

§ 501. Hypothetical Questions and Answers.

[a] Form of hypothetical question propounded to physician herein held objectionable.—Valensin v. Valensin, 73 Cal. 108, 14 Pac. 397.

[b] Question calling for legal opinion of witness, which erroneously supposes that the law is as stated in it, is properly ruled out. Shadburne v. Daly, 76 Cal. 358, 18 Pac. 403.

[c] It seems that where an expert witness has heard a statement of facts testified to by another witness, it is sufficient, in putting to him a hypothetical question, to direct his attention to the testimony heard as the basis upon which his opinion is desired, without repeating the testimony.—Howland v. O. C. S. Ry. Co., 110 Cal. 513, 42 Pac. 983.

[d] Expert evidence of attorneys as to the value of the professional services rendered by the plaintiff as attorney for the defendant may be properly admitted in answer to hypothetical questions based upon the admitted allegations of the complaint, and the evidence given for the plaintiff. Whether the evidence given for the plaintiff is true is a question for the jury to determine.—Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940.

[e] A hypothetical question is properly refused where it does not conform to the facts proven.—Rowe v. Such, 134 Cal. 573, 66 Pac. 862.

[f] It is not improper to incorporate in the hypothetical question to experts testifying to the value of an attorney's services in a case the expressions used by the attorney in describing the work done by him, "accumulated papers," "number of letters written," "generally familiarized himself with the case," etc., with statements of a more specific nature.—Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956.

[g] It is proper to propound a hypothetical question to an expert, based on any facts of which there is evidence, though the weight of evidence may be strongly against the truth of the facts assumed, and it is for the jury to disregard the opinion if the evidence fail to establish the facts thus assumed.—People v. Bowers, 18 Pac. 660.

[h] Where plaintiff's evidence tended to show that one of his ribs had been fractured by the accident, and that inflammation of the nerves was the result, defendant's theory that fractured ribs could not have been caused by the accident, and that the condition of the nerves came from alcoholism, exposure, or another accident, did not present a case for hypothetical questions.—Yaeger v. Southern California Ry. Co., 51 Pac. 190.

[i] In an action for injuries to a miner, a hypothetical question describing the stope in which he was injured held not objectionable because it did not appear that the stope was opened throughout its entire length, breadth, and height at the time of the accident.—Bird v. Utica Gold Min. Co. (Cal. App.), 84 Pac. 256.

FOR AUTHORITIES FROM OTHER STATES:

Hypothetical questions which may be put: 53 Am. Rep. 307, note; 39 L. R. A. 313, note. See, also, 17 Cyc. 242-252; 20 Cent. Dig., cols. 3471-3486, §§ 2368-2375.

§ 502. —— Facts Unsupported by Evidence.

[a] Where plaintiff introduced two witnesses to prove value of his services in going twice to Europe to negotiate the purchase of an estate, etc., but it was not shown that he undertook these voyages at the request of the defendant, or in what capacity he went, the testimony was admissible as the question was hypothetical, and assumed a state of facts not in proof.—Dopman v. Hoberlin, 5 Cal. 413.

[b] The trial court erred in permitting a hypothetical question to be put to a medical expert, in which it was assumed that when the testator said he had a sister, and if he knew where she lived he would visit her, he referred to a sister whom he knew to have been dead for 30 years, rather than to his living sister, where no mention of the dead sister was made in the evidence on which the question was based.—Carpenter v. Bailey, 94 Cal. 406, 29 Pac. 1101.

[c] Hypothetical questions to experts assuming facts not in evidence are improper.—Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956.

§ 503. Facts Forming Basis of Opinion.

[a] An opinion of the value of corporation stock if issued cannot be given when not based on facts, real or hypothetical.—Eisenmayer v. Leonardt (Cal. Sup.), 84 Pac. 43.

FOR AUTHORITIES FROM OTHER STATES:

39 L. R. A. 319, note. See, also, 20 Cent. Dig., cols. 3486-3489, § 2376.

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§ 504. Reference to Authorities.

[a] On trial of an action for damages for negligence and unskillfulness of a physician in setting plaintiff's broken arm, it is error to permit plaintiff to read to her medical witnesses, in their examination in chief, extracts from a standard work on surgery, and then to ask them if what was so read corresponds with their own judgment.—Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091.

FOR AUTHORITIES FROM OTHER STATES:

See 20 Cent. Dig., cols. 3489, 3490, § 2377.

§ 505. Cross-examination and Re-examination.

[a] The testimony of defendant's medical expert was confined to a contradiction of the theory adopted by plaintiff's medical experts. Plaintiff, upon the cross-examination of defendant's medical expert, propounded a hypothetical question similar to that put by him to his own witnesses. Held inadmissible. Gridley v. Boggs, 62 Cal. 190.

[b] Grounds on basis of opinion or estimate can always be tested on cross-examination.—Razzo v. Varni, 81 Cal. 293, 22 Pac. 848.

[c] Reading of extracts from medical works, and asking an expert medical witness if he agrees with the author, is not permissible on cross-examination, where the extracts do not contradict the evidence of the witness and are evidently intended as evidence for the cross-examining party to sustain his theory of the case. Questions as to extracts from such works, on cross-examination, should be strictly limited to the one purpose of testing the competency of the witness as an expert, or the value of his opinions.—Fisher v. Southern Pac. R. R. Co., 89 Cal. 399, 26 Pac. 894.

[d] A physician testifying to the mental sanity of the testator at the time of the testamentary act may be cross-examined not only as to his qualifications, but also as to his knowledge of the character of the patient's afflictions, and as to all the facts or circumstances within his knowledge and acquaintanceship with the patient, upon which his judgment was exercised and his conclusion reached.—Estate of Mullin, 110 Cal. 252, 42 Pac. 645.

[de] Real estate dealers who testify to the value of land may be cross-examined as to the basis of their estimates.—Jack's Estate, In re, 115 Cal. 203, 46 Pac. 1057.

[e] Where, on an application for the appointment of a guardian for an alleged incompetent, her expert witnesses testified as to her competency, they were properly allowed to testify on cross-examination as to her ability, unassisted, to properly care for herself and her property.—Daniels, In re, 140 Cal. 335, 73 Pac. 1053.

[f] Where an expert witness for the buyer in an action for the rejection of goods sold testifies to their inferior quality, it is proper cross-examination to show that he afterward, on the seller's offering the goods for resale, made written offers therefor in the buyer's behalf.—Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

FOR AUTHORITIES FROM OTHER STATES:

39 L. R. A. 326, note. See, also, 20 Cent. Dig., cols. 3490-3494, § 2379.

E. COMPARISON OF HANDWRITING AND EFFECT OF OPINION EVIDENCE.

WRITINGS TO BE PROVED, § 506.
COMPETENCY OF EXPERT, § 507.
STANDARD OF COMPARISON, § 508.
EFFECT OF OPINION EVIDENCE, § 509.

§ 506. Writings to be Proved.

[a] An expert witness cannot testify as to the genuineness of a disputed writing, upon a comparison of a genuine writing with a press copy of the writing whose genuineness is disputed.—Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381.

FOR AUTHORITIES FROM OTHER STATES:

Se 20 Cent. Dig., col. 3501, § 2382.

§ 507. Competency of Expert.

[a] In order to render one a competent witness, as an expert, to the genuineness of a signature, he must have been educated in the business about which he testifies, or he must have acquired actual skill and knowledge upon the subject. It is not enough that he has sometimes compared signatures of other persons when disagreements as to their genuineness had risen in the course of business.—Goldstein v. Black, 50 Cal. 462.

[b] The opinion of a witness as to the genuineness of a signature, derived from comparing it with other signatures, is not admissible when the witness is not an expert.—Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

FOR AUTHORITIES FROM OTHER STATES:

63 L. R. A. 937, 963, note. See, also, 17 Cyc. 171; 20 Cent. Dig.. cols. 3501-3504, §§ 2383, 2384.

§ 508. Standard of Comparison.

[a] The defendant, having testified that his signature to the instrument in question was a forgery, was asked, on cross-examination, with reference to another document purporting to have been signed by him, and which had been used for comparison, if his signature to that was genuine. Held, that the question should have been allowed.—Neal v. Neal, 58 Cal. 287.

[b] Signature proved to satisfaction of judge to be genuine may be compared with disputed one.—Marshall v. Hancock, 80 Cal. 85, 22 Pac. 61.

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[c] Evidence tending to prove the signature to a lost deed by its similarity to one alleged to have been affixed by the same person to another deed is not admissible unless the alleged signature has been proved to be genuine.—Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

FOR AUTHORITIES FROM OTHER STATES:

63 L. R. A. 427, note. See, also, 17 Cyc. 177; 20 Cent. Dig., cols. 3504-3513, §§ 2385-2389.

§ 509. Effect of Opinion Evidence.

[a] When an expert is called by one of the parties to an action, his evidence should be received with great caution by the jury, and should never be allowed except upon subjects which require unusual scientific attainments or peculiar skill.—Grigsby v. Clear Lake Water Co., 40 Cal. 396.

[b] Estimates of minute periods of time by ordinary observers are extremely unreliable.—Laughlin v. McGarvey, 50 Cal. 169.

[c] The law receives the testimony of qualified medical experts; and, in arriving at a conclusion, the jury may consider such testimony, and award to it such value as in their judgment it deserves.—Blake's Estate, In re, 136 Cal. 306, 68 Pac. 827.

[d] A jury is not bound to follow the opinion of experts as to the genuineness of handwriting.—Castor v. Bernstein (Cal. App.), 84 Pac. 244.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDINGS.

IN GENERAL, § 510.
GROUNDS FOR ADMISSION, § 511.
—— ABSENCE OF WITNESS, § 512.
IDENTITY OF PARTIES, § 513.
PRELIMINARY EVIDENCE, § 514.
MODE OF PROOF, § 515.

§ 510. In General.

[a] A referee was appointed to take and report the testimony in a cause. A witness called before him was first sworn on his voir dire, but the referee did not take down what the witness said in his voir dire. Held, that in another action in which the witness was a party the opposite party might prove by the referee what the witness said on his voir dire. Hobbs v. Duff, 43 Cal. 485.

§ 511. Grounds for Admission.

[a] The testimony of a witness, since deceased, in a former suit, is admissible in a subsequent suit between the same parties or their privies in reference to the same subject matter.—Fredericks v. Judah, 11 Pac. 133.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1088-1091; 20 Cent. Dig., cols. 3531-3550, §§ 2401-2413.

§ 512. —— Absence of Witness.

[a] A witness outside of the county, but within the state, is not out of the jurisdiction of the court, so as to authorize the reading of his testimony given at a former trial of the cause.—Meyer v. Roth, 51 Cal. 582; Butcher v. Vaca Val. R. Co., 56 Cal. 598.

[b] When witnesses are out of jurisdiction, reporter's transcript of testimony on a former trial is admissible.—Chidester v. Consol. Ditch Co., 59 Cal. 197.

[c] The testimony of a witness at a former trial is admissible when at the time he is out of the jurisdiction of the court.—Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1096-1099; 20 Cent. Dig., cols. 3335, 3536, § 2406.

§ 513. Identity of Parties.

[a] To entitle testimony of witnesses at a former trial or in another proceeding to be admitted, the subsequent suit must be between the same parties or their privies.—Poorman v. Miller, 44 Cal. 269.

[b] Under Code of Civil Procedure, section 1870, subdivision 8, providing that evidence "of the testimony of a deceased witness, ... given in a former action between the same parties, relating to the same matter," is admissible testimony of a deceased witness given in an action brought by the executrix of the estate of which defendants are heirs, against the plaintiff as lessee of the property in question, is admissible in a subsequent action between the plaintiff and the heirs on questions of tenancy and adverse possession, the testimony being exclusively as to whether plaintiff held the property as tenant or as his own.—Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305.

[c] To admit the testimony of witnesses on a former trial, the parties must be the same. Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1091-1093; 20 Cent. Dig., cols. 3545-3550, § 2413.

§ 514. Preliminary Evidence.

[a] Under Penal Code, section 869, subdivision 5, providing that the shorthand reporter shall transcribe into longhand his notes, and certify and file them, and that they shall be certified as a correct statement of the testimony and proceedings in the case to entitle them to be admitted in evidence, a certificate that the document is a "correct transcript of the shorthand notes taken by me herein," without stating that the notes are correct, is insufficient, and the defect cannot be supplied by parol.—People v. Carty, 77 Cal. 213, 19 Pac. 490.

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FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1089; 20 Cent. Dig., cols. 3550-3556, §§ 2414-2418.

§ 515. Mode of Proof.

[a] Under Code of Civil Procedure, section 1870, subdivision 8, providing that the testimony of a witness out of the state, given in a former trial between the parties relating to the same matter, may be given in evidence, there is no error in overruling an objection to the official reporter's transcript of testimony given on a former trial, the only grounds of objection raised being that the testimony was not signed by the witness, that it was not his deposition, and that it was secondary evidence.—Hicks v. Lovell, 64 Cal. 14, 27 Pac. 942.

[b] Former testimony may be proved by official reporter refreshing his memory from his notes.—Watrous v. Cunningham, 71 Cal. 34, 11 Pac. 811.

[c] Longhand notes, as transcribed by a stenographer, of the testimony of a witness at a former trial of the same case, are not admissible.—Reid v. Reid, 73 Cal. 206, 14 Pac. 781; People v. Carty, 77 Cal. 213, 19 Pac. 490.

[d] Code of Civil Procedure, section 273, providing that the report of the official reporter of any court, when written out and certified as a correct transcript of the testimony and proceedings in a case, shall be prima facie correct, does not authorize the introduction of a stenograher's report of the evidence of testator in a divorce suit tried some years before his death, in a subsequent will contest by his widow; the transcript amounting to no more than testator's declarations, which, if admissible at all, might have been proved by the reporter's oral testimony as authorized by Code of Civil Procedure, section 2047.—Benton's Estate, In re, 131 Cal. 472, 63 Pac. 775.

[e] Under Code of Civil Procedure, section 1870, subdivision 8, fact that testimony of deceased witness had been taken in shorthand and transcribed into longhand held not to preclude admission of oral evidence of persons testifying from memory alone as to what deceased's testimony was on former trial.—Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

FOR AUTHORITIES FROM OTHER STATES:

See 16 Cyc. 1106-1110; 20 Cent. Dig., cols. 3556-3563, §§ 2419-2423.

XIV. WEIGHT AND SUFFICIENCY.

WEIGHT AND CONCLUSIVENESS, IN GENERAL, § 516.
—— IMPROBABILITY OF EVIDENCE, § 517.
—— UNCONTRADICTED EVIDENCE, § 518.
—— RESEMBLANCE BETWEEN PERSONS AS PROVING RELATIONSHIP, § 519.
INFERENCES FROM EVIDENCE, § 520.
DEGREE OF PROOF AND SUFFICIENCY, IN GENERAL, § 521.
—— PREPONDERANCE OF EVIDENCE, § 522.

In criminal cases. See Criminal Law, §§ 274-285.
In homicide cases. See Homicide, VI, E.
Weight and effect of evidence as question for jury. See Trial, §§ 61, 83.

§ 516. Weight and Conclusiveness in General.

[a] Estimate of value by witness who has examined wheat must control estimate of one who has not seen it.—Paige v. O'Neal, 12 Cal. 499.

[b] Incompetent evidence is entitled to no weight.—Hutchings v. Castle, 48 Cal. 153.

[c] Evidence of a conversation resting in the memory of a single witness is ordinarily the most unsatisfactory of all evidence.—Thompson v. Toland, 48 Cal. 115.

[d] Intention is to be inferred from facts and circumstances, and evidence of a party as to his intention is not conclusive.—Myers v. Spooner, 55 Cal. 260.

[de] Where evidence erroneously admitted against objection tends to prove something, full effect must be given to it on question of sufficiency of evidence to support decision. Wraight v. Roseberry, 81 Cal. 87, 22 Pac. 336.

[df] Inadmissible evidence, admitted without objection, is sufficient proof of fact to which it relates.—Prentice v. Miller, 82 Cal. 572, 573, 23 Pac. 189.

[e] Evidence admitted without objection must be taken as correct.—Schurtz v. Kerkow, 85 Cal. 278, 24 Pac. 609.

[f] Testimony on behalf of plaintiff partially contradicted by defendant but corroborated in substance by other portions of defendant's testimony cannot be disregarded.—Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962.

[fg] Oral testimony in contradiction of the plain terms of written instruments, or of written admissions, should be clear, full and precise; and the weight to be given to such testimony diminishes from the date of the instrument which it purports to contradict or overcome.—Estate of Irvine, 102 Cal. 606, 36 Pac. 1013.

[g] The evidence must be very clear as to how an illegal voter voted, before his vote can be deducted from the total of any candidate. Where a voter declined to answer for whom he voted, his mere statement that if he had voted he supposed he would have voted for the defendant, and that he did not know but he would have voted for the office in controversy, if he had voted at all, does not amount to evidence as to the person voted for, notwithstanding other evidence tending to show that he had voted, and that he was not a legal voter.—Smith v. Thomas, 121 Cal. 533, 54 Pac. 71.

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[h] Evidence which is addressed to no issue in the case, if admitted, is without weight or value.—Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537.

[i] The objection that declarations of the plaintiff as to the intended marriage were made to other than intimate acquaintances or friends, goes to the weight and not to the admissibility of the evidence.—Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098.

[j] The positive statement of a witness that an instrument was signed by a given person is not overcome because it incidentally appears that he was not present when it was signed.—Bauer v. State, 144 Cal. 740, 78 Pac. 280.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 753, 754, 798, 818; 20 Cent. Dig., cols. 3565-3571, §§ 2424-2427.

§ 517. —— Improbability of Evidence.

[a] A witness may be disbelieved for the improbability of his testimony, although he has not been contradicted or impeached.—Blankman v. Vallejo, 15 Cal. 638.

[b] Court may reject most positive testimony though witness be not directly impeached. Inherent improbability of statement may deny to it all claims of belief.—Baker v. Fireman's Fund Ins. Co., 79 Cal. 41, 42, 21 Pac. 357.

§ 518. —— Uncontradicted Evidence.

[a] Weight of evidence is not increased by the fact that it is not rebutted.—Matter of Romaine, 23 Cal. 585.

[b] Evidence is not necessarily conclusive because uncontradicted.—McLennan v. Bank of California, 87 Cal. 574, 25 Pac. 760.

§ 519. —— Resemblance Between Persons as Proving Relationship.

[a] Resemblance between persons is of little weight in proving relationship.—Jessup, In re, 81 Cal. 419, 22 Pac. 742.

§ 520. Inferences from Evidence.

[a] The fact that an alleged grantor of land stated that he had sold out his interest in it, and that other parties assumed to own it without any apparent objection on his part, does not authorize a finding that such grantor executed a deed of the land.—Thompson v. Lynch, 29 Cal. 189.

[b] When the situation of a witness is such that he probably would have known or heard of a fact, from the parties themselves, if it had existed, and he had never heard of it, it affords some slight ground for the inference that the fact did not exist.—McFadden v. Wallace, 38 Cal. 51.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 820; 20 Cent. Dig., cols. 3596-3601, §§ 2444, 2445.

§ 521. Degree of Proof and Sufficiency in General.

[a] It is error to instruct a jury, in a civil case of imputed fraud, that if they have a doubt of the guilt of the party charged, they must find in his favor. Issues of fact in civil cases are determined by a preponderance of testimony, and this rule applies as well to cases of fraud as to any other.—Ford v. Chambers, 19 Cal. 143.

[b] Competent evidence is sufficient proof in absence of rebutting evidence, provided it tends to prove the whole act.—Pearson v. Pearson, 46 Cal. 634.

[c] When the court instructs the jury that the plaintiff must prove the fault or negligence of the defendant to the satisfaction of the jury by a preponderance of evidence, it is not error to refuse further to instruct them that the plaintiff must make such proof to a moral certainty. The "moral certainty" required by section 1826 of the Code of Civil Procedure is produced when a matter is proved to the satisfaction of a jury by a preponderance of evidence.—Treadwell v. Whittier, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266.

[d] Rule is uniform that general character cannot be proved by a single act.—Rea v. Wood, 105 Cal. 314, 38 Pac. 899.

[e] For purposes of evidence, no weight attaches to a sworn denial of a fact based on a statement that the party making the denial "has no information or belief" as to the fact.—Menke v. Lyndon, 124 Cal. 160, 56 Pac. 883.

[f] Under section 1835 of the Code of Civil Procedure, only such evidence as "ordinarily produces moral certainty or conviction in an unprejudiced mind," is "deemed satisfactory," or "will justify a verdict." "Slight evidence" is insufficient; and where there is not even a slight evidence to support the verdict, it must be set aside.—Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 Pac. 480.

[g] Where plaintiff testified as to the value of goods wrongfully attached by defendant constable, and offered in evidence without objection an invoice taken a short time prior to the attachment, without contradictory evidence as to the value, a verdict for a less amount is supported by the evidence.—Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313.

[h] The testimony of the defendant, in contradiction of that of the plaintiff, is sufficient to support findings for the defendant. Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208.

[i] Plaintiff made a written agreement to transfer two thousand dollars, "part of my

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money in the H. bank," to his wife, "the interest to be drawn every six months for family use," and she agreeing not to draw the principal before his death without his consent. On the same day he drew out the sum of two thousand dollars, and his wife deposited that amount. She had no other money on deposit with the bank. Plaintiff's daughter testified that the wife admitted she had signed the contract, but stated, "That don't amount to anything." Witness also told the wife that plaintiff showed her the contract, and she stated its purport to the wife. Held sufficient to support a finding that the money deposited by the wife was the money referred to in the contract.—Dirks v. California Safe Deposit etc. Co., 136 Cal. 84, 68 Pac. 487.

[j] Where plaintiff in an action to rescind a contract for the purchase of land alleged that it was not worth more than six thousand dollars, but introduced no evidence of its value, and defendant and several witnesses testified it was worth from fourteen thousand dollars to sixteen thousand dollars, and that the shares of stock in a water company sold plaintiff was sufficient to water twenty acres in a year of ordinary rainfall, it cannot be contended that findings that it was worth fifteen thousand dollars, and that the shares of water stock were sufficient to irrigate twenty acres, were not supported by the evidence.—Fowler v. Carne, 132 Cal. xviii, 64 Pac. 581.

[k] The evidence of plaintiff in trespass as to the extent of damages resulting therefrom is sufficient to support a finding of a less sum as the damages sustained.—Durkee v. Moulton, 133 Cal. xix, 65 Pac. 469.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 753, 754; 20 Cent. Dig., cols. 3601-3610, §§ 2446-2448.

§ 522. —— Preponderance of Evidence.

[a] While a plaintiff is required to establish his case by a preponderance of evidence, a preponderance of evidence does not necessarily mean a preponderance of the number of witnesses; and, in such a case, the appellate court cannot say that, on the issues thus presented, the evidence of two or three witnesses testifying to a certain state of facts must overthrow the evidence of a witness testifying to the contrary.—Grant v. McPherson, 104 Cal. 165, 37 Pac. 864.

[ab] In a civil case, it is error to charge the jury that there must be evidence sufficient "to convince their minds" of any fact necessary to be shown by either party, since the weight of evidence, or preponderance of probability is sufficient.—Murphy v. Waterhouse, 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866.

[b] Under Code of Civil Procedure, section 2061, a preponderance of evidence does not necessarily depend upon a numerical preponderance of witnesses.—McNeill v. Stitt (Cal. App.), 82 Pac. 1121.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 754-770; 20 Cent. Dig., cols. 3617-3626, §§ 2450-2452.

EVIDENCES OF DEBT.

Liability to seizure under writ of attachment. See Attachment, § 28.
Necessity for change of possession on sale of by insolvent. See Fraudulent Conveyances, § 65.

EXAMINATION.

Of applicants for admission to practice law. See Attorney and Client, § 13.
Preliminary examination of persons accused of crime. See Criminal Law, §§ 57-59.
Of fugitive from justice. See Extradition, § 6.
Of witness to determine competency. See Witnesses, § 25.

EXAMINATION OF DEBTORS.

In proceedings to enforce attachment. See Attachment, § 127.
At supplementary proceedings. See Execution, § 203.

EXAMINATION OF GARNISHEE.

See Garnishment, § 24.

EXAMINATION OF TITLE.

Before performance of contract to convey land. See Vendor and Purchaser, § 51.

EXAMINATION OF WITNESSES.

See Witnesses, §§ 102-131.
Review of discretion of court as to. See Appeal and Error, § 1199.
Necessity for exception in lower court to obtain review of questions to witnesses. See Appeal and Error, § 320.
Right to object to, for first time on appeal. See Appeal and Error, § 280.
At taking of deposition. See Depositions, § 23.
Examination of experts. See Evidence, §§ 498-505.
Before grand jury. See Grand Jury, § 30.

EXAMINERS.

Bank examiners. See Banks and Banking, §§ 12, 13.
Compensation of state board of examiners. See California, § 34.

EXAMINERS OF TITLES.

See Abstracts of Title.

EXCAVATIONS.

Liability of master for injury to servant from defects in. See Master and Servant, § 31.

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EXCEPTIONS.

Sufficiency of. See Appeal and Error, § 332.
Errors deemed excepted to. See Appeal and Error, § 311.
Necessity for exception in lower court to save question for review. See Appeal and Error, § 307 et seq.
To award of arbitrators. See Arbitration and Award, § 43.
Bill of. See Bill of Exceptions.
Necessity for exception in lower court to obtain consideration of questions on appeal. See Criminal Law, §§ 642-644.
To evidence. See Criminal Law, § 348.
From operation of statute of limitations in criminal cases. See Criminal Law, § 43.
To preliminary proceedings. See Criminal Law, § 62.
In deeds. See Deeds, §§ 128-131.
To order for sale of property of decedent. See Executors and Administrators, § 406.
To account of executor or administrator. See Executors and Administrators, § 530.
To proceedings to open default. See Judgment, § 131.
To competency of jurors or proceedings to determine. See Jury, § 116.
Necessity for exception at trial to obtain new trial. See New Trial, §§ 18, 23, 27, 44.
To report of referee. See Reference, § 18.
Construction of exceptions, provisos and saving clauses in statutes. See Statutes, § 87.
To verdict. See Trial, § 143.
To special verdict. See Trial, § 156.
To instructions. See Trial, §§ 118-120.
To argument of counsel. See Trial, § 58.
To findings of court. See Trial, § 198.
To evidence. See Trial, § 54.
To place of bringing civil action. See Venue, § 10.

EXCESSIVE CONSIDERATION.

For conveyance by one in failing circumstances. See Fraudulent Conveyances, § 37.

EXCESSIVE DAMAGES.

See Damages, VII.
For wrongful death. See Death, § 52.

EXCESSIVE EXERCISE OF JURISDICTION.

As ground for writ of prohibition. See Prohibition, § 17.

EXCESSIVE FEES.

See Extortion.

EXCESSIVE FINE.

See Fines, § 6.

EXCESSIVE FORCE.

Liability of officer using excessive force in making arrest. See Arrest, § 25.

EXCESSIVE LEVY.

Of execution. See Execution, § 60.

EXCESSIVE PUNISHMENT.

For crime. See Criminal Law, §§ 826, 827.

EXCESSIVE SPEED.

Liability of carrier for injuries to passenger from. See Carriers, § 113.

EXCESSIVE TAXATION.

See Taxation, § 17.

EXCESS OF JURISDICTION.

Effect of acts in excess of jurisdiction. See Courts, § 41.
As ground for relief by writ of habeas corpus. See Habeas Corpus, § 11.

EXCHANGE OF PROPERTY.

Include mutual transfers of ownership of property by way of interchange without fixed price or valuation; contracts for such transfers, executory or executed; rights and liabilities of parties to such transfers or contracts; and remedies relating thereto.

IN GENERAL, § 1.
REQUISITES AND VALIDITY, § 2.
CONSTRUCTION OF CONTRACT, § 3.
RESCISSION AND ACTIONS THEREFOR, § 4.
—— LIMITATION OF ACTIONS, § 5.
—— EVIDENCE, § 6.
—— TRIAL, § 7.

See, also, Contracts; Deeds; Sales; Vendor and Purchaser.
Necessity that agreement for, be in writing. See Frauds, Statute of, § 18.

§ 1. In General.

[a] Where two parties agree to exchange their lands, and, under the contract, take possession of the parcels exchanged, each becomes the vendee and equitable owner of the parcel received by him; the legal title is retained by the seller, but it is held in trust for the buyer to be thereafter conveyed at the stipulated time and on the stipulated conditions.—Gilbert v. Sleeper, 71 Cal. 290, 293, 12 Pac. 172.

[b] Exchange of one currency for another is not a sale.—Sanderson, In re, 74 Cal. 214, 15 Pac. 753.

[c] Under a proposition for the exchange of property, and for a deed to a third party in settlement of accounts against the proposer of the exchange, a delivery of the deed to the latter and his record thereof as agent of the grantee, while acting in his own interest, and without the knowledge or consent of the grantee or his subsequent approval, cannot operate as delivery to the

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grantee, and upon his repudiation of the transaction and refusal to accept the deed, no change of ownership is effected thereby. Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 829-847; 21 Cent. Dig., cols. 203-234, §§ 1-30.

§ 2. Requisites and Validity.

[a] Agreement in writing for mutual conveyance of land in exchange is not void under the statute of frauds.—Brennan v. Ford, 46 Cal. 7.

[b] Equality of right or interest required to render exchange valid.—Bixby v. Bent, 59 Cal. 522.

[c] Delivery of possession is essential to validity of an exchange. If either party dies before entry, the exchange is void.—Bixby v. Bent, 59 Cal. 522.

[d] An attempted exchange of ranches is invalid, when one ranch had no existence in fact, and neither was vendible by the parties to the exchange, neither having any proprietary transferable title, and no possession having been given. Such an exchange is invalid, both by the Spanish and the common law.—Bixby v. Bent, 59 Cal. 522.

[e] No such relation of principal and agent held to have existed between the parties to an exchange of real estate for stock as could have affected the validity of the exchange.—Spinks v. Clark, 147 Cal. 439, 82 Pac. 45.

[f] An agreement for the exchange of property belonging to a married woman executed by her husband without authority is unenforceable by either party, in the absence of a tender of conveyance by her.—Shanks & March v. Michael (Cal. App.), 88 Pac. 596.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 829-847; 21 Cent. Dig., cols. 205-223, §§ 3-18.

§ 3. Construction of Contract.

[a] When a contract for the mutual exchange of lands contains no provision from which it can be inferred that one conveyance was to precede the other, the law implies that the conveyances are to be made concurrently.—Brennan v. Ford, 46 Cal. 7.

[b] A contract for the conveyance of land construed.—Messer v. Hibernia Savings etc. Soc. (Cal. Sup.), 84 Pac. 835.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 831-833; 21 Cent. Dig., cols. 205-206, § 3.

§ 4. Rescission and Actions Therefor.

[a] It does not lie in the mouth of one party to a trade, when the other party, seeking to rescind the contract of exchange, has placed him in statu quo, to say that the trade had to do with a lease of real estate for more than five years, and that the rescission of the contract was required by law to be in writing.—Hart v. Kimball, 72 Cal. 283, 13 Pac. 852.

[b] Though defendant, for the purpose of escaping judgments against him, transferred to his father land which he had previously agreed to convey to plaintiff in exchange for other land, and the transfer to defendant's father was subsequently set aside as in fraud of creditors, plaintiff cannot, by tendering a deed of his land, insist on having the cash value of defendant's land and rescind the contract for refusal to pay the same, unless defendant was unable to satisfy the judgment against him, and therefore unable to perform.—Royal v. Dennison, 109 Cal. 558, 42 Pac. 39.

[c] From the fact that defendant had not paid said judgment before the conclusion of the action, it should not be presumed that he was unable to do so when there was no finding that such was the fact.—Royal v. Dennison, 109 Cal. 559, 42 Pac. 39.

[d] Where plaintiff and defendant agreed to exchange certain land, and defendant, before the conveyances were executed, conveyed his land to another, plaintiff cannot, by tendering a conveyance to defendant, demand the cash value of defendant's land, and rescind the contract for refusal to pay, without specifying the reason for declining to accept a conveyance of the land from defendant's grantee.—Royal v. Dennison, 109 Cal. 558, 42 Pac. 39.

[e] Where plaintiff and defendant agreed to exchange certain land, and, before the conveyances thereof were executed, plaintiff borrowed money from defendant, and orally agreed that the loan was to be secured upon the lots which defendant was to convey, plaintiff could not, on defendant's default, rescind the contract without offering to repay the loan.—Royal v. Dennison, 109 Cal. 558, 42 Pac. 39.

[f] Where conditions to be performed under a contract for the exchange of land are mutual and concurrent, neither party can be put in default except by a bona fide offer to perform on the part of the other; and an offer to perform by one of the parties by tendering a deed coupled with a condition of payment in cash, unauthorized by the contract, and which he had no right to impose, is insufficient to give to him a right of action.—Royal v. Dennison, 109 Cal. 558, 42 Pac. 39.

[g] Under a contract for the exchange of stocks on the demand of one party, his demand and offer to produce the stocks on his part—his ability to do so being shown—is a sufficient tender of performance, where the other party refuses the exchange and denies the contract.—Eames v. Haver, 111 Cal. 401, 43 Pac. 1120.

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[h] Plaintiffs and defendants, who each owned lands, exchanged deeds thereof, and on the night prior to the exchange of the deeds a house on defendants' land was destroyed by fire, which fact was unknown to the parties at the time of the exchange. Defendants collected insurance on the house, and in a suit for rescission it was held that plaintiffs were estopped. Held, that plaintiffs could not complain of a decree requiring defendants to pay to them the insurance money before the entry of final decree for defendants.—Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175.

[i] Whether plaintiffs rescinded promptly does not depend alone on the lapse of time, but on all the circumstances.—Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175.

[j] The plaintiff was not guilty of laches where an action was brought to rescind the exchange on the same day on which the plaintiff first ascertained that defendant would not pay the note to the mortgagee. Such action, though afterward dismissed, operated as a demand for rescission, and where the present suit was brought on the day of such dismissal, there was no intervening laches.—Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149.

[k] Plaintiff and defendant agreed to exchange lands. Plaintiff's land was subject to a mortgage, which defendant was to assume. Defendant knew when the deed was executed that the mortgage was barred by limitations; that plaintiff did not know this, and understood defendant would pay it, as defendant represented he would, though in fact not intending to do so. Plaintiff would not have made the exchange, had he known the facts. Held, that plaintiff was entitled to rescission on the ground of fraud.—Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149.

[l] Civil Code, section 1577, provides that mistake of fact is a mistake not caused by the neglect of a legal duty on the party of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of a thing which has not existed. Held, that plaintiff was entitled to relief on the ground of mistake.—Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149.

[m] Plaintiff was equally entitled to relief whether the mistake was one of law or fact. Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149.

[n] Objection that plaintiff was not injured, and therefore not entitled to relief, was untenable.—Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149.

[o] Plaintiff, on discovering fraudulent representations, was entitled to rescind the ratification as well as the original transaction, under Civil Code, section 2314, providing that a ratification may be rescinded when made with an imperfect knowledge of the material facts of the transaction ratified.—Willey v. Clements, 146 Cal. 91, 79 Pac. 850.

[p] Where, in a suit to set aside an exchange of real estate for fraud, the court found that K. acted in the transaction as defendant's agent, though he represented to plaintiff that he was acting in her behalf, plaintiff was not required to return a sum paid K. by defendant, as a condition to her right to rescind the exchange.—Willey v. Clements, 146 Cal. 91, 79 Pac. 850.

[q] Where plaintiff, after making an exchange of properties, signed an instrument expressing her satisfaction with the exchange, knowing of defendant's fraudulent representations concerning a deficiency in the quantity of the land conveyed to her and concerning an encumbrance thereon, but without notice of the falsity of other representations concerning the quality of the land, its productiveness, and water rights appurtenant thereto, which would not be disclosed by a mere examination of the property, she was not estopped by her ratification from subsequently rescinding the exchange therefor.—Willey v. Clements, 146 Cal. 91, 79 Pac. 850.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 836-847; 21 Cent. Dig., cols. 208-215, §§ 5-10.

§ 5. —— Limitation of Actions.

[a] When two parties enter into contract for exchange of lands the facts that one of the parties has performed on his part by conveying the land, which he agreed to convey, in exchange for the tract to be conveyed by the other, and that the grantee has entered into possession and sold portions of the land thus conveyed, do not prevent the statute of limitations from running as to the right of the party who has performed, to a conveyance from the other.—Brennan v. Ford, 46 Cal. 7.

§ 6. —— Evidence.

[a] Evidence as to the value of lands exchanged at the time of the exchange is admissible and relevant to an issue of fraud connected with the exchange, and also as a circumstance to be considered in construing the contract.—Beverly v. Blackwood, 102 Cal. 83, 36 Pac. 378.

[b] In a suit to set aside an exchange of property for fraud, evidence held to justify a finding that K., who was active in furthering the exchange, and who deceived plaintiff with reference thereto, represented defendant, and was not plaintiff's agent.—Willey v. Clements, 146 Cal. 91, 79 Pac. 850.

[c] In an action to rescind an exchange of real estate for corporate stock, held, that there was no error in limiting plaintiff, in the

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introduction of evidence as to the value of the shares, to proof of the market value as fixed by sales on a neighboring market. Spinks v. Clark, 147 Cal. 439, 82 Pac. 45.

[d] In an action to rescind an exchange of plaintiff's real estate for corporate stock, evidence considered, and held sufficient to show that the exchange was not brought about by plaintiff acting on any false representations of defendants.—Spinks v. Clark, 147 Cal. 439, 82 Pac. 45.

[e] In an action to rescind an exchange of plaintiff's real estate for corporate stock, held, that there was no error in sustaining an objection to a question to a witness as to whether he had any arrangements for manipulating the price of the shares of the corporation.—Spinks v. Clark, 147 Cal. 439, 82 Pac. 45.

[f] In an action to rescind an exchange of real estate for corporate stock, evidence as to the amounts expended in exploration for oil on the lands of a corporation prior to its formation was properly excluded.—Spinks v. Clark, 147 Cal. 439, 82 Pac. 45.

§ 7. —— Trial.

[a] In an action to rescind an exchange of land for foundry stock, fraud justifying the rescission was established by findings that plaintiffs were induced to make the exchange solely by reliance upon materially false and fraudulent representations of fact by the defendants as to the solvency, profits, and assets of the corporation owning the foundry, and that the value of the stock could have been approximately ascertained only by a thorough investigation by experts of the value of the assets, property, books, and business of the corporation and that the plaintiffs were ignorant of the falsity of the representations, and acted upon them as true.—Dow v. Swain, 125 Cal. 674, 58 Pac. 271.

[b] Where, in an action to rescind an exchange, the court found that defendant represented his property as worth four thousand dollars, and believed it worth that, while it was worth only two thousand dollars, the exchange should not be rescinded when the representation was made and relied on as an opinion, and not as a statement of fact. Norris v. Crandall, 133 Cal. xix, 65 Pac. 568.

[c] Where plaintiff sought to rescind an exchange of property on the ground of fraud, and the court finds there was no fraud, a failure to find as to all the facts alleged in the complaint is not error.—Norris v. Crandall, 133 Cal. xix, 65 Pac. 568.

EXCHANGES.

Include bodies formed by the incorporation or association of persons engaged in business of the same nature for the purpose of facilitating and regulating the transaction of such business among the members.

NATURE OF STOCK EXCHANGE, § 1.
PROCEEDINGS BY SUSPENDED OR EXPELLED MEMBERS FOR REINSTATEMENT, § 2.
PROPERTY IN SEAT AND TRANSFER OR ENCUMBRANCE THEREOF, § 3.
—— TITLE OF PURCHASER, § 4.
MUTUAL DEALINGS AND LIABILITIES OF MEMBERS, § 5.
—— ARBITRATION, § 6.
ACTIONS BY OR AGAINST, § 7.

Market quotations as evidence. See Evidence, § 345.

Liability of seat in stock exchange to execution sale. See Execution, § 10.

§ 1. Nature of Stock Exchange.

[a] San Francisco stock and exchange board is not a partnership.—Swift v. San Francisco etc. Board, 67 Cal. 570, 571, 80 Pac. 94.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 849; 21 Cent. Dig., col. 235, § 1.

§ 2. Proceedings by Suspended or Expelled Members for Reinstatement.

[a] In a proceeding by a debtor to compel the board to restore him to membership from which he had been suspended, it appeared that on his failure to pay an account the creditor requested a committee of investigation; that two days thereafter the committee reported the amount of the indebtedness; that two days afterward such creditor reported the claim unpaid; that such member was then suspended; and that six months thereafter, the claim remaining unpaid, his seat of membership in the board was sold to pay his debts. Held, that such member was properly suspended, and was not entitled to be restored to membership.—Rorke v. San Francisco Stock etc. Board, 99 Cal. 196, 33 Pac. 881.

[b] Suspended member's cause of action for reinstatement accrues at time of suspension and is barred by laches in six years. Meherin v. San Francisco Produce Exch., 117 Cal. 217, 218, 48 Pac. 1074.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 853-858; 21 Cent. Dig., cols. 237-245, §§ 5-7.

§ 3. Property in Seat and Transfer or Encumbrance Thereof.

[a] Seat may be mortgaged or pledged. Clute v. Loveland, 68 Cal. 261, 9 Pac. 133.

[b] Power to dispose of seat in exchange includes power to dispose of it absolutely or conditionally.—Clute v. Loveland, 68 Cal. 259, 9 Pac. 133.

[c] Seat in stock exchange is property. Habenicht v. Lissak, 78 Cal. 357, 12 Am. St. Rep. 63, 20 Pac. 874.

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[d] Where the validity of a transfer to a representative of the board of trade is involved, the court should admit evidence to explain the custom of the board of trade in demanding indorsed notes, and all matters connected with the purchase of the property, and payment therefor.—Levy v. Scott, 115 Cal. 39, 46 Pac. 892.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 864, 865; 21 Cent. Dig., cols. 245-249, §§ 8-10.

§ 4. —— Title of Purchaser.

[a] Purchaser of seat takes interest of seller subject to conditions imposed by rules of exchange.—Clute v. Loveland, 68 Cal. 259, 9 Pac. 133.

§ 5. Mutual Dealings and Liabilities of Members.

[a] The constitution and by-laws of a stock exchange provide that any member failing to meet his engagements shall be suspended; that if he does not settle within six months his seat shall be sold for the payment of creditors; that the board will take no cognizance of contracts that remain unsettled five days after due, "unless continued by mutual consent"; and that where a member fails to comply with his stock contracts his creditors must report said default to the president of the board within forty-eight hours. No claim, unless so reported, shall ever after be recognized or enforced by the board. Held, that the forty-eight hour limitation applies only to contracts for purchase or sale of stocks in the board, and not to open accounts, where stocks are carried for the debtor for months, assessments paid thereon, interest charged, and dividends credited to the account, etc.—Rorke v. San Francisco Stock etc. Board, 99 Cal. 196, 33 Pac. 881.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 865-868; 21 Cent. Dig., cols. 249-253, §§ 12, 13.

§ 6. —— Arbitration.

[a] The constitution and by-laws of a stock exchange provide that all differences as to claims between members shall be referred by the president, unless otherwise ordered, to committees for arbitration, which shall report in writing within fifteen days after their appointment, and their report shall stand as the award of the board. Held that, though there was no dispute between the parties to such account, it was properly referred to such committee for "investigation" or "settlement."—Rorke v. San Francisco Stock etc. Board, 99 Cal. 196, 33 Pac. 881.

§ 7. Actions by or Against.

[a] The constitution of a voluntary association, formed to carry on a stock exchange, provided for a trust fund from which, on a member's death, a certain sum was to be paid to such person as he might have designated, or, if no designation was made, to certain specified persons. It was also provided that one applying for the benefit of such trust fund must file a medical certificate that he was fit to participate in the "life insurance fund." Held, that the association was not engaged in the business of life insurance, so as to be suable under a common name, under Code of Civil Procedure, section 388, by a beneficiary of such fund.—Swift v. San Francisco Stock etc. Board, 67 Cal. 567, 8 Pac. 94.

FOR AUTHORITIES FROM OTHER STATES:

See 21 Cent. Dig., col. 256, § 17.

EXCISE TAX.

See Taxation, § 16.

EXCITEMENT.

As affecting capacity to commit crime. See Criminal Law, § 11.
As affecting admissibility of confession. See Criminal Law, § 258.

EXCLUSION.

Of aliens. See Aliens, III.
of lewd persons from state. See Lewdness, § 3.
Of paupers from state. See Paupers, § 2.

EXCLUSION OF EVIDENCE.

Harmless and prejudicial error in. See Criminal Law, § 788.
Exclusion of improper or immaterial evidence during criminal trial. See Criminal Law, § 341.

EXCLUSION OF JURY.

Pending investigation of attempt to bribe juror. See Criminal Law, § 331.

EXCLUSION OF WITNESSES.

During criminal trial. See Criminal Law, § 335.

EXCLUSION FROM FISHING.

Action for exclusion from fishing privileges. See Fish, § 8.

EXCLUSIVE FRANCHISE.

Power to grant. See Franchises, § 4.

EXCLUSIVE JURISDICTION.

See Courts, § 161.
Of courts of equity. See Equity, § 27.

EXCLUSIVE POSSESSION.

Necessary to found title by prescription. See Adverse Possession, §§ 61-64.

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EXCLUSIVE REMEDIES.

Exclusiveness of remedy for forcible entry and detainer. See Forcible Entry and Detainer, § 24.
For foreclosure of mortgage. See Mortgages, § 181.
Exclusiveness of remedy of new trial. See New Trial, § 1.

EXCUSABLE HOMICIDE.

See Homicide, IV.

EXCUSABLE NEGLECT.

As ground for opening judgment. See Judgment, § 252 et seq.

EXCUSE.

For premature appeal. See Appeal and Error, § 507.
For delay in filing record on appeal. See Appeal and Error, §§ 839-843.
For failure to file brief in time. See Appeal and Error, § 979.
For failure of presentment, demand and notice. See Bills and Notes, § 211.
For nonperformance of contract. See Contracts, § 227.
For delay in performance of contract. See Contracts, § 224.
For breach of condition in deed. See Deeds, § 146.
Excuse or provocation as defense to action for divorce. See Divorce, § 21.
For delay in seeking equitable relief. See Equity, §§ 59-64.
For failure to present claim to executor or administrator. See Executors and Administrators, § 310.
For default. See Judgment, §§ 91-101.
For nonpayment of taxes. See Taxation, § 113.
For failure to make tender. See Tender, § 9.
For nonpayment of purchase money in performance of contract to purchase land. See Vendor and Purchaser, § 67.

EXCUSING JURORS.

Grand jurors. See Grand Jury, § 10.
Petit jurors. See Jury, § 63.

EXECUTED CONTRACTS.

Effect of illegality of. See Contracts, § 96.

EXECUTION.

Include enforcement of judgments and orders in civil actions and proceedings in general, by final process, against property or against the person; nature of such process in general and of different forms of writs of execution; property subject to execution in general; issuance, requisites, and validity of executions, and correction and amendment thereof; levy or service, and lien of executions; quashing or setting aside executions, affidavits of illegality, restraining enforcement or stay of execution, discharge of poor debtors, and other relief from executions; claims of third persons to property levied on, and trial of right of property; sales under execution, redemption of property sold, or conveyance thereof by officer to purchaser; return of executions, satisfaction and discharge thereof, and distribution of proceeds; proceedings supplementary to execution; and liabilities of persons other than officers for wrongful procuring, issuance, levy, etc., of executions.

I. NATURE AND ESSENTIALS IN GENERAL, §§ 1-5.
II. PROPERTY SUBJECT TO EXECUTION, §§ 6-26.
III. ISSUANCE, FORM AND REQUISITES OF WRIT, §§ 27-44.
IV. LIEN, LEVY OR EXTENT AND CUSTODY OF PROPERTY, §§ 45-63.
A. Lien, §§ 45-52.
B. Levy and Custody of Property, §§ 53-63.
V. STAY, QUASHING, VACATING AND RELIEF AGAINST EXECUTION, §§ 64-85.
VI. CLAIMS BY THIRD PERSONS, §§ 86-91.
VII. SALE, §§ 92-182.
A. Manner, Conduct, Validity and Confirming or Vacating, §§ 92-114.
B. Title and Rights of Purchaser, §§ 115-144.
C. Redemption, §§ 145-164.
D. Conveyance and Proceeds, §§ 165-182.
1. Conveyance, §§ 165-177.
2. Proceeds, §§ 178-182.
VIII. RETURN, §§ 183-192.
IX. PAYMENT, SATISFACTION AND DISCHARGE, §§ 193-197.
X. SUPPLEMENTARY PROCEEDINGS, §§ 198-214.
XI. EXECUTION AGAINST THE PERSON, §§ 215-217.
XII. WRONGFUL EXECUTION, §§ 218-225.

See, also, Attachment; Exemptions; Garnishment; Judicial Sales; Replevin.

Appealability of order setting aside or enjoining. See Appeal and Error, § 150.
Appealability of order refusing to quash. See Appeal and Error, § 151.
Right to levy execution after assignment for benefit of creditors. See Assignments for Benefit of Creditors, § 31.
Rights of execution purchaser of commercial paper. See Bills and Notes, §§ 162, 169.
Interference with execution of process, as contempt of court. See Contempt, § 17.
To collect fine imposed as punishment for contempt. See Contempt, § 72.
Execution sale of corporate stock. See Corporations, § 149.
Execution for costs. See Costs, § 100.
Against county. See Counties, § 185.
Execution and return as condition precedent to prosecution of creditor's suit. See Creditor's Suit, § 7.

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Right to prosecute proceedings supplementary to execution as bar to prosecution of creditor's bill. See Creditor's Suit, § 3.
Execution of judgment in criminal case. See Criminal Law, § 598.
In ejectment suit. See Ejectment, §§ 182-191.
To collect fine. See Fines, § 5.
In action of forcible entry and detainer. See Forcible Entry and Detainer, § 75.
Levy on property fraudulently transferred by debtor. See Fraudulent Conveyances, § 116.
Right to garnish proceeds of levy in hands of sheriff. See Garnishment, § 10.
Execution sale of homestead. See Homesteads, § 194.
Of death sentence. See Homicide, § 230.
In actions by or against husband and wife. See Husband and Wife, § 121.
Effect of release of levy, on judgment. See Judgment, § 579.
Execution, levy and sale as satisfaction of judgment. See Judgment, § 579.
Continuance of judgment by issuance and levy of. See Judgment, § 534.
Conclusiveness of judgments in supplementary proceedings. See Judgment, § 445.
Return of execution as evidence of satisfaction of judgment. See Judgment, § 580.
On judgment of justice of the peace. See Justices of the Peace, § 96.
Mandamus to compel issuance. See Mandamus, § 35.
On foreclosure decree. See Mortgages, § 262.
For deficiency on foreclosure of land mortgage. See Mortgages, § 311.
Against firms or partners. See Partnership, § 88.
Levy and satisfaction of execution against principal as discharging surety. See Principal and Surety, § 28.
In replevin suit. See Replevin, § 36.
Duties of sheriffs and constables as to levy on property and care and custody thereof. See Sheriffs and Constables, § 13.
Of accord and satisfaction. See Accord and Satisfaction, § 5.
Of appeal bond. See Appeal and Error, § 423.
Of written assignment. See Assignments, § 30.
Of bills and notes. See Bills and Notes, § 17 et seq.
Of bonds. See Bonds, § 1.
Of contracts. See Contracts, § 25.
Of deed. See Deeds, §§ 37-43.
Of writing required by statute of frauds by agent or auctioneer. See Frauds, Statute of, § 44.
Of leases. See Landlord and Tenant, § 8.
Of real estate mortgage. See Mortgages, §§ 28-32.
Of agency. See Principal and Agent, § 21.
Of search-warrant. See Searches and Seizures, § 3.
Of will. See Wills, §§ 43-53.

I. NATURE AND ESSENTIALS IN GENERAL.

STATUTORY PROVISIONS, § 1.
JUDGMENT, DECREE OR ORDER, § 2.
EFFECT OF ACTS OR PROCEEDINGS SUBSEQUENT TO JUDGMENT AND BEFORE ISSUANCE OF EXECUTION, § 3.
PERSONS ENTITLED TO EXECUTION, § 4.
PERSONS AGAINST WHOM EXECUTION MAY ISSUE, § 5.

§ 1. Statutory Provisions.

[a] Where the right to an execution on a judgment in ejectment had expired by the lapse of more than five years on April 2, 1866, when the act of that date was passed authorizing the issuance of such execution after five years, the passage of the act did not revive plaintiff's right to have execution issued on such judgment, since the statute could not revive a right which did not exist at the time of its passage.—Mann v. McAtee, 37 Cal. 11.

[b] Acts of 1895 (Stats. 1895, p. 38, c. 33), authorizing execution without notice after five years, held constitutional as to judgments rendered subsequent to its passage. Water Supply Co. v. Sarnow (Cal. App.), 82 Pac. 689.

§ 2. Judgment, Decree or Order.

[a] Where the appellate court affirms the judgment below, and remands the case, but the court below erroneously enters a new judgment, such judgment, though erroneous, will be valid, so as to support an execution issued thereon.—Mulford v. Estudillo, 23 Cal. 94.

[b] A sale under judgment against tenants in common is void as to any of the tenants, on whom it does not appear that a summons was served in the original action, and in whose behalf no appearance was made.—Wiseman v. McNulty, 25 Cal. 230.

[c] If, after execution has been levied on sufficient property to satisfy judgment, the court orders that the judgment be not enforced, the order releases the levy, and it will not have the effect of satisfying the judgment.—Mulford v. Estudillo, 32 Cal. 131.

[d] Act of April 2, 1866, authorizing the issuance of executions on all judgments other than for the recovery of money, though more than five years had elapsed since the rendition of the judgment, is not retroactive, and applies only to judgments rendered after the passage of the act.—Mann v. Atee, 37 Cal. 11.

[e] The sheriff in making a sale of property under an execution acts under a naked statutory power dependent for its existence upon the existence of the judgment which he is attempting to execute; and if there is no judgment in support of the writ of execution under which he makes the sale the power to make the sale is wanting, and no title to the property pases, even to an innocent purchaser. Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

[f] Where judgment in existence at execution has been vacated or satisfied in any way, directly or indirectly, before any sale has been made, the power to make the sale has also been destroyed.—Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

[g] It is immaterial whether a levy on a note which could be taken on execution and

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sold, was made by an order of court or otherwise.—Hoxie v. Bryant, 131 Cal. 85, 63 Pac. 153.

§ 3. Effect of Acts or Proceedings Subsequent to Judgment and Before Issuance of Execution.

[a] If a note which is given in satisfaction of a judgment is void, because obtained by fraud on the part of defendants in the judgment, plaintiff may enforce his execution on such judgment before returning the note. Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151.

[b] A motion for new trial does not operate per se as a stay of execution.—People v. Loucks, 28 Cal. 68.

[c] A party who has recovered a judgment for possession of lands may enforce it on execution, notwithstanding he has, since the judgment, made a contract to convey the land to defendant, if there was no agreement respecting that judgment in the contract. Troy v. Clarke, 30 Cal. 419.

[d] The fact that the statement on motion for new trial has not been settled constitutes no ground for quashing the execution. So held in a case where the delay in the settlement was occasioned by plaintiff's attorney. Jones v. Spears, 56 Cal. 163.

[e] A sale of land under execution issued upon satisfied judgment is void, and does not affect the title.—Reynolds v. Lincoln, 71 Cal. 183, 12 Pac. 449.

[f] Execution may issue, although satisfaction has been executed and acknowledged by an alleged assignee of judgment.—Ferrugeard v. Superior Court, 5 Pac. 612.

§ 4. Persons Entitled to Execution.

[a] Commissioner in partition awarded fee is "party in whose favor judgment was given" and may have execution to enforce it.—Cortez v. Superior Court, 86 Cal. 278, 21 Am. St. Rep. 37, 24 Pac. 1011.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 937-939; 21 Cent. Dig., cols. 316-318, §§ 41-43.

§ 5. Persons Against Whom Execution may Issue.

[a] Where a judgment was recovered against two defendants for damages caused by their own negligent act, and on appeal by one of defendants the judgment as to him was reversed, plaintiff was entitled to execution against the other defendant.—Nichols v. Dunphy, 58 Cal. 605.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 939; 21 Cent. Dig., cols. 318-320, §§ 44, 45.

II. PROPERTY SUBJECT TO EXECUTION.

IN GENERAL, § 6.
BOATS CARRYING MAIL, § 7.
MONEY OF DEBTOR, § 8.
CROPS, § 9.
SEAT OF STOCK EXCHANGE, § 10.
FRANCHISES, § 11.
JUDGMENTS, § 12.
PATENT RIGHTS, § 13.
REAL PROPERTY, § 14.
—— PURCHASED ON EXECUTION SALE, § 15.
PARTICULAR ESTATES OR INTERESTS, § 16.
—— JOINT PROPERTY, § 17.
PLEDGED PROPERTY, § 18.
PROPERTY CONVEYED IN FRAUD OF CREDITORS, § 19.
PROPERTY MORTGAGED OR CONVEYED TO SECURE PAYMENT OF DEBTS, § 20.
INTEREST UNDER CONTRACTS, § 21.
BILLS OR NOTES, § 22.
OWNERSHIP OR POSSESSION OF PROPERTY, § 23.
—— PUBLIC PROPERTY, § 24.
—— PROPERTY OF CITIZEN ON EXECUTION AGAINST MUNICIPALITY, § 25.
—— CORPORATE PROPERTY USED FOR PUBLIC PURPOSE, § 26.

Liability of property of convicts to execution. See Convicts, § 4.
Liability of corporate franchise to sale under. See Corporations, § 49.
Property exempt from execution. See Exemptions; Homestead.
Liability of ferry franchise to execution. See Ferries, § 9.

§ 6. In General.

[a] In all cases when mere lien exists the legal estate must be in some other party than the mortgagee. This legal estate and the consequent right to discharge the lien and save the estate is of value, and can be sold. Knight v. Fair, 9 Cal. 117.

[b] The equitable lien held by a vendor of real estate, after absolute conveyance thereof, is not subject to levy and sale on execution; nor is it the subject of private transfer.—Ross v. Heinzten, 36 Cal. 313.

[c] Sheriff can only seize and sell such title and interest as judgment debtor had in land at the time of the levy, and such as he acquired between the time of the levy and the sale, under an execution issued on a judgment, which is not a lien.—Kenyon v. Quinn, 41 Cal. 325.

[d] Mere evidences of debt are not subject to execution.—Dore v. Dougherty, 72 Cal. 234, 235, 1 Am. St. Rep. 48, 13 Pac. 621.

[e] One to whom an offer for the sale of land is made—the offer to be kept open only on certain conditions—has not, in the absence both of a compliance with such conditions and an acceptance of the offer, an interest in the land, which is subject to sale on execution.—Chadbourne v. Stockton Savings etc. Soc., 36 Pac. 127.

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FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 940-984; 21 Cent. Dig., cols. 324-446, §§ 49-143.

§ 7. Boats Carrying Mail.

[a] A ferryboat is not exempt from execution because the ferry is on a mail route and the boat is to be used to convey mail. Lathrop v. Middleton, 23 Cal. 257, 83 Am. Dec. 112.

§ 8. Money of Debtor.

[a] One cannot claim to exempt from execution a bag of gold coin held in his hand, as he might, perhaps, in the case of money on his person.—Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492.

[b] After distribution of a decedent's estate has been decreed, money in the hands of the executor or administrator belonging to a distributee may be reached on execution or proceedings supplementary thereto by a judgment creditor of the distributee, though the latter is in prison under a sentence for a term of years.—Nerac's Estate, In re, 35 Cal. 392, 95 Am. Dec. 111.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 940, 941; 21 Cent. Dig., cols. 329-331, § 57.

§ 9. Crops.

[a] Crop raised by lessor on leased land as employee of lessee, is not subject to creditors of lessor.—Ralph v. Lockwood, 61 Cal. 155.

[b] Crops grown on land by a person in actual, adverse possession cannot be attached as the property of the holder of the legal title to the land.—Smith v. Cunningham, 67 Cal. 262, 7 Pac. 679.

FOR AUTHORITIES FROM OTHER STATES:

Crops or growths which are subject to execution as personalty: 55 Am. Dec. 161, note. See, also, 17 Cyc. 941-943; 21 Cent. Dig., cols. 331-335, §§ 59, 60.

§ 10. Seat in Stock Exchange.

[a] Seat in stock exchange is subject to execution.—Habenicht v. Lissak, 78 Cal. 354-358, 12 Am. St. Rep. 63, 20 Pac. 874.

[b] A "seat" in the San Francisco Stock & Exchange Board, which is a voluntary association, without capital stock or shares, and membership of which can only be secured, under its constitution and by-laws, by a vote of the members, is not subject to levy and sale under execution, and a purchaser at such sale acquires no title to such seat.—Lowenberg v. Greenebaum, 99 Cal. 162, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399.

§ 11. Franchises.

[a] Franchise cannot be seized or sold under execution.—De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

[b] The interest of a defendant in execution in a ferry is a franchise, not the subject of levy, sale or delivery under execution. Munroe v. Thomas, 5 Cal. 470.

[c] A ferry license, being a franchise, is not the subject of levy and sale under execution.—Thomas v. Armstrong, 7 Cal. 286.

[d] The franchise of a turnpike corporation does not pass to the purchaser of the turnpike road at a sheriff's sale.—Wood v. Truckee Turnpike Co., 24 Cal. 474.

[e] The franchise of an individual to collect tolls cannot be levied on, there being no statutory provision therefor, though Civil Code, section 388, provides that, for the satisfaction of a judgment against a corporation authorized to receive tolls, its franchise, and all its rights and privileges, may be levied on and sold under execution.—Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199.

FOR AUTHORITIES FROM OTHER STATES:

Franchises, whether subject to execution: 15 Am. Dec. 595, note. See, also, 17 Cyc. 947; 21 Cent. Dig., cols. 338, 339, § 64.

§ 12. Judgments.

[a] A judgment cannot be levied on and sold under execution.—(Cal. 1884) McBride v. Fallon, 65 Cal. 301, 4 Pac. 17.

[b] Judgment is not subject to levy and sale under execution.—Dore v. Dougherty, 72 Cal. 234, 1 Am. St. Rep. 48, 13 Pac. 621.

[c] Judgment cannot be levied upon, and sold as such, under execution, but may be attached under subdivision 5, section 542, Code of Civil Procedure.—Latham v. Blake, 77 Cal. 654, 655, 18 Pac. 150, 20 Pac. 417.

§ 13. Patent Rights.

[a] The provision of the act of Congress that a patent right may be transferred by assignment is exclusive, so that a creditor of the patentee can have such right subjected to the satisfaction of his judgment only by an application to a court of equity to compel the patentee to make an assignment. The right is not subject to sale on execution. Peterson v. Sheriff of City and County of San Francisco, 115 Cal. 211, 46 Pac. 1060.

[b] A patent right cannot be sold under a common execution, since it is neither "personal property capable of manual delivery," within Code of Civil Procedure, section 542, subdivision 3, providing that such property may be attached by taking it into custody, nor "debts and credits, and other personal property not capable of manual delivery," which can be attached by leaving notice with a third person owing such debts, or having such credits or personal property in his possession.—Peterson v. Sheriff of City and County of San Francisco, 115 Cal. 211, 46 Pac. 1060.

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FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 943; 21 Cent. Dig., col. 341, § 67.

§ 14. Real Property.

[a] Lands not subject to the lien of a judgment may be levied on by virtue of an execution thereon.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 949; 21 Cent. Dig., cols. 341-343, §§ 68-75.

§ 15. —— Purchased on Execution Sale.

[a] The purchaser of real estate upon execution sale, both before and after the period for redemption expires, has an estate in the land purchased which may be levied on and sold on an execution running against his property.—Page v. Rogers, 31 Cal. 293.

§ 16. Particular Estates or Interests.

[a] The interest of a miner in his mining claim is property, and may be taken and sold under execution.—McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642.

[b] The interest of a joint tenant may be sold on execution.—(Cal. 1858) Waldman v. Broder, 10 Cal. 378.

[c] Trust property is not subject to execution sale for debts of trustee.—Hart v. Burnett, 15 Cal. 578.

[d] A pre-emption claim cannot be sold on execution.—(Cal. 1872) Moore v. Besse, 43 Cal. 511.

[e] If a deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on an execution against him.—Kennedy v. Nunan, 52 Cal. 326.

[f] Equitable title of beneficiary may be sold under execution.—Le Roy v. Dunkerly, 54 Cal. 452, 460.

[g] The term "land" embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract, those executory as well as those executed. Any interest in land, therefore, legal or equitable, is subject to attachment or execution.—Fish v. Fowlie, 58 Cal. 373.

[h] Trustor's interest in trust estate may be sold under execution.—King v. Gotz, 70 Cal. 241, 11 Pac. 656.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 951-956; 21 Cent. Dig., cols. 344-358, §§ 76-87.

§ 17. —— Joint Property.

[a] Where the execution debtor owns property jointly with another, sheriff may levy on such property, and take it into possession for the purpose of subjecting it to sale.—Waldman v. Broder, 10 Cal. 378.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 954, 955; 21 Cent. Dig., cols. 355-358, § 87.

§ 18. Pledged Property.

[a] Pledged property is not subject to execution.—Dalrymple v. Hanson, 1 Cal. 124.

[b] Execution of pledged property must be by garnishment of pledgee which creates lien upon surplus.—Edwards v. Beugnot, 7 Cal. 162; Treadwell v. Davis, 34 Cal. 601.

[c] Interest of pledgor of stock is subject to execution sale.—Farmers' etc. Bank v. Wilson, 58 Cal. 600.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 967, 968; 21 Cent. Dig., cols. 391-392, § 103.

§ 19. Property Conveyed in Fraud of Creditors.

[a] Land conveyed in fraud of creditors is subject to execution as if no conveyance had been made.—Bull v. Ford, 66 Cal. 176, 4 Pac. 1175.

§ 20. Property Mortgaged or Conveyed to Secure Payment of Debts.

[a] A, being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterward levied upon by the defendants under an execution in their favor, against A as his property. Held, that the lumber was not subject to seizure under an execution against A without payment in the first place of his indebtedness to B.—Swanston v. Sublette, 1 Cal. 123.

[b] Interest of mortgagor is liable to attachment and execution.—Halsey v. Martin, 22 Cal. 645.

[bc] Where a valid chattel mortgage exists upon a growing crop prior to a levy of execution, and there is no valid attachment lien prior to the chattel mortgage to which a sale under execution can relate, there can be no valid levy of execution upon the crop, without paying off the chattel mortgage as provided by section 2969 of the Civil Code.—Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619.

[c] Where a debtor assigns accounts for collection and application to certain debts, he has an interest remaining which is subject to execution.—Lackman v. Kearney, 142 Cal. 112, 75 Pac. 668.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 961-967; 21 Cent. Dig., cols. 326, 327, § 51; cols. 373-392, §§ 95-103.

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§ 21. Interests Under Contracts.

[a] A delivered to B oxen and a wagon, which B was to pay for in drawing wood. While B was still in process of paying, the sheriff attached and took the property on execution against A, to which B was not a party. Held that, until B's neglect or refusal to complete his payment, a seizure by the sheriff was illegal, unless the transaction were in delay of creditors, and even then the judgment must be produced.—Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204.

FOR AUTHORITIES FROM OTHER STATES:

21 L. R. A. 623, note. See, also, 17 Cyc. 968-971; 21 Cent. Dig., col. 327, § 53; cols. 392-402, §§ 104-116.

§ 22. Bills or Notes.

[a] Promissory notes are subject of levy on execution.—(Cal. 1867) Davis v. Mitchell, 34 Cal. 81.

[b] Code of Civil Procedure, section 17, subdivision 3, includes notes in its definition of personal property. Section 688 provides that property may be attached or taken on execution in like manner as on writ of attachment; and by section 542, subdivision 3, personal property capable of manual delivery must be attached by taking it into custody. Held, in view of these provisions, that a note of which the sheriff may peaceably take actual possession may be levied on and sold under execution.—Hoxie v. Bryant, 131 Cal. 85, 63 Pac. 153.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 971; 21 Cent. Dig., cols. 404, 405, § 118.

§ 23. Ownership or Possession of Property.

[a] An execution justifies a sheriff in seizing the debtor's property in his own possession, or in that of an agent or parties holding for his benefit.—Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204.

[b] If an officer, holding an execution against A, wishes to levy it on property in the possession of B, the test of his right to do so is whether B's right to the possession is such as would prevent A's retaking it.—Knox v. Marshall, 19 Cal. 617.

[c] Where A made a verbal contract with B to sell him a tract of land and put B in possession, judgment creditors of B acquired a right to the land which may be enforced by sale under execution.—Logan v. Hale, 42 Cal. 645.

FOR AUTHORITIES FROM OTHER STATES:

23 L. R. A. 258, note. See, also, 17 Cyc. 973-980; 21 Cent. Dig., cols. 406-430, §§ 119-136.

§ 24. —— Public Property.

[a] All the public streets of the city of San Francisco running into the water, as laid down on the official map of the city, were, by operation of the act of March 26, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public, and exempt from executions against the city.—Wood v. San Francisco, 4 Cal. 190.

[b] City's right to wharfage cannot be sold under execution.—Wood v. San Francisco, 4 Cal. 194.

[c] Execution levy upon county's revenues in the hands of the treasurer is illegal and void.—Gilman v. Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

[d] The municipal lands to which the city of San Francisco succeeded were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution.—Hart v. Burnett, 15 Cal. 530.

[e] Property held by city in trust for its citizens is not subject to forced sale for debts of city.—Hart v. Burnett, 15 Cal. 578; Oakland v. Oakland W. F. Co., 118 Cal. 195, 196, 50 Pac. 277.

[f] Under act of March 26, 1851, granting to the city of San Francisco the use and occupation of the beach and water lots described therein for the period of ninety-nine years, on condition that the city shall pay into the state treasury twenty-five per cent of all money derived from the sale of such property, within twenty days after receipt of the selling price, such property is liable to sale under execution against the city, and the purchaser takes the whole estate of the city, subject to no trust.—Wheeler v. Miller, 16 Cal. 124.

[g] The city of San Francisco has succeeded to the rights of the pueblo of Yerba Buena, but in trust for the public use of the city, and the lands are not the subject of seizure and sale under executions against the city.—Fulton v. Hanlow, 20 Cal. 450.

[h] The levy upon and sale of a road, by virtue of an execution, gives to the purchaser no right or title to the same, for, being the property of the public, the defendant in the execution has no interest therein which can be conveyed by the officer.—Wood v. Truckee Turnpike Co., 24 Cal. 474.

§ 25. —— Property of Citizen on Execution Against Municipality.

[a] The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment rendered against the county.—Emeric v. Gilman, 10 Cal. 404, 70 Am. Dec. 742.

§ 26. —— Corporate Property Used for Public Purpose.

[a] A turnpike road cannot be taken in execution on a judgment against the company.—(Cal. 1864) Wood v. Truckee Turnpike Co., 24 Cal. 474.

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[b] Movables of a street railroad company, even though necessary to operation under the company's franchise, are not exempt from forced sale.—Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529.

[c] Since a reclamation district has no right to acquire property except to carry on the work of reclamation and matters incidental thereto, property devoted to such use is not subject to levy to satisfy judgments against the district.—San Francisco Sav. Union v. Reclamation Dist. No. 124, 144 Cal. 639, 79 Pac. 374.

FOR AUTHORITIES FROM OTHER STATES:

20 L. R. A. 737, note. See, also, 17 Cyc. 948; 21 Cent. Dig., cols. 428-430, §§ 135, 136.

III. INSURANCE, FORM, AND REQUISITES OF WRIT.

JURISDICTION AND AUTHORITY TO ISSUE, § 27.
—— WRIT OF VENDITIONI EXPONAS, § 28.
—— WHO MAY DIRECT ISSUANCE, § 29.
COUNTIES TO WHICH EXECUTION MAY ISSUE, § 30.
OFFICER TO WHOM WRIT MAY BE DIRECTED, § 31.
DEATH OF PARTIES BEFORE ISSUANCE OF WRIT, § 32.
LEAVE OF COURT, § 33.
TIME FOR ISSUANCE, § 34.
—— BEFORE SIGNING OF JUDGMENT BY JUDGE, § 35.
—— COMPUTATION OF TIME, § 36.
FORM AND REQUISITES, § 37.
—— SIGNATURE, § 38.
—— SEAL, § 39.
—— DIRECTIONS AS TO PROPERTY TO BE TAKEN, § 40.
—— AMOUNT, § 41.
DELIVERY TO AND RECEIPT BY SHERIFF, § 42.
AMENDMENT, § 43.
ALIAS WRITS, § 44.

§ 27. Jurisdiction and Authority to Issue.

[a] Where a clerk of the district court improperly refuses to issue execution on a judgment rendered in a court of which he is clerk, on the ground that the judgment has been attached at the suit of another party, a bill in equity cannot be sustained to release the attachment and compel the clerk to issue the execution, as the injured party has his remedy at law by an action on the official bond of the clerk.—Miller v. Sanderson, 10 Cal. 489.

[b] Where the clerk of a court refuses to issue an execution on a small money judgment, plaintiff's remedy is by motion in the proper court for an order authorizing its issuance, or by action against the clerk, and not by application for mandamus.—Fulton v. Hanna, 40 Cal. 278.

[c] The clerk of the superior court, succeeding to a district court, may, without an order, issue execution on a judgment of the district court.—Dorn v. Howe, 59 Cal. 129.

[d] Court has jurisdiction of subject matter of motion for order to issue execution on judgment, and incidentally to determine whether or not the apparent satisfaction of the judgment is void as claimed by the plaintiff.—McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 985; 21 Cent. Dig., cols. 448, 449, § 145.

§ 28. —— Writ of Venditioni Exponas.

[a] The clerk of the court has power to issue a writ of venditioni exponas, either at common law or by virtue of the act of 1850, to regulate proceedings in the district courts. Smith v. Morse, 2 Cal. 524.

§ 29. —— Who may Direct Issuance.

[a] The issuing of an execution on the judgment is not such an act as requires the direct agency of the attorney in the case, but may be ordered by the plaintiff himself.—Jones v. Spears, 56 Cal. 163.

§ 30. Counties to Which Execution may Issue.

[a] In order to sell real estate of a judgment debtor under a justice's judgment, if the property lies in a different county, a transcript of the judgment must be filed in the recorder's office of that county, in order to fix the lien; otherwise, no such proceedings are necessary, but the course for enforcement of the execution is the same as if it had issued from the district court.—Campbell v. Wickware, 19 Cal. 145.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 987-991; 21 Cent. Dig., col. 325, § 49½; cols. 462-470, §§ 151, 152.

§ 31. Officer to Whom Writ may be Directed.

[a] An execution may be directed to the sheriff or to any constable in the county, and each officer is vested with full power to serve the writ, and it is an indifferent matter to whom it is issued.—Ross v. Wellman, 102 Cal. 1, 36 Pac. 402.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1018, 1019; 21 Cent. Dig., cols. 470-472, § 133.

§ 32. Death of Parties Before Issuance of Writ.

[a] An execution issued on a judgment after the death of defendant is void.—(Cal. 1877) Smith v. Reed, 52 Cal. 345.

FOR AUTHORITIES FROM OTHER STATES:

61 L. R. A. 353, note. See, also, 17 Cyc. 991-997; 21 Cent. Dig., cols. 472-476, § 154.

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§ 33. Leave of Court.

[a] No notice to the opposite party is required on an application for execution on a judgment more than five years old under the two hundred and fourteenth section of the Practice Act.—Bryan v. Stidger, 17 Cal. 270.

[b] When questions as to the existence and validity of a judgment more than five years old are submitted to a referee, with power to make out a judgment upon his finding in the matter referred to him, and he reports that the judgment is good and valid, and makes out a judgment that execution issue, but states that he has not passed upon the question whether the judgment is unsatisfied, and the court confirms the referee's report and judgment, execution cannot issue under section 214 of the Practice Act, which provides that execution on a judgment more than five years old cannot issue unless the court is satisfied that some portion of the judgment remains unsatisfied.—Solomon v. Maguire, 29 Cal. 227.

[c] The clerk of the superior court which succeeded a district court is authorized, without an order of the court, to issue an execution upon a judgment of the district court.—Dorn v. Howe, 59 Cal. 129.

[d] Upon a motion for an order that execution issue upon a judgment apparently satisfied, upon an affidavit that the judgment had not been satisfied in fact, and that the entry of satisfaction thereof had been fraudulently procured, it is proper and regular practice for the court, of its own motion, to order the defendant to show cause why plaintiff's motion should not be granted, thus giving the defendant an opportunity to be heard in answer to the motion.—McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730.

[de] The action of the trial court in denying a motion under Code of Civil Procedure, section 685, authorizing execution by leave of court on motion, after five years from the date of the judgment, will not be reversed on appeal unless the trial court abused its discretion.—Wheeler v. Eldred, 137 Cal. 37, 69 Pac. 619.

[e] Under Code of Civil Procedure, section 685, providing that a judgment may be enforced after the lapse of five years from its entry by leave of court upon motion, the issuance of an order for execution is not invalid because made without notice of motion, in the absence of circumstances making the issuance of such order without notice an abuse of discretion, or making it imperative to vacate or reverse the order.—Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038.

[f] An order for an execution on a money judgment amounts to an order for its enforcement, and is authorized by Code of Civil Procedure, section 685.—Water Supply Co. v. Sarnow (Cal. App.), 82 Pac. 689.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1027-1032; 21 Cent. Dig., cols. 486-496, §§ 160-162.

§ 34. Time for Issuance.

[a] The clerk of the county court, in which the judgment of a justice of the peace is filed and docketed, has no power to issue execution upon such judgment after the expiration of five years from the rendition of the judgment.—Kerns v. Graves, 26 Cal. 156.

[b] Plaintiff is entitled to execution immediately after judgment, unless stayed by the court.—Carpentier v. Loucks, 28 Cal. 69.

[c] Under code, section 209, providing that a party in whose favor judgment is rendered may, at any time within five years after the entry thereof, issue a writ of execution, a writ of execution issued prior to the entry of the judgment is unauthorized, though issued after the rendition of the judgment.—Gray v. Palmer, 28 Cal. 416.

[d] Every process which may be required to completely enforce a judgment must be taken out within five years after its entry.—Bowers v. Crary, 30 Cal. 621.

[e] The judgment-roll is not required to be made up by the clerk until after the entry of the judgment. Execution may lawfully be issued and enforced as soon as the judgment is entered, and before the filing of the roll.—Sharp v. Lumley, 34 Cal. 611.

[f] Up to April 8, 1861, a party in whose favor a judgment was rendered was entitled to an execution at any time within five years, and after five years had elapsed he was entitled to an execution on obtaining leave of the court. Between April 8, 1861, and April 2, 1866, an execution could issue only within five years after the entry of the judgment. Since April 2, 1866, an execution in all cases other than for the recovery of money may issue after five years, upon leave of the court. Mann v. McAtee, 37 Cal. 11.

[g] Though Practice Act, sections 204, 210, 217 provide that the docketing of a judgment creates and preserves a lien for two years, an execution may issue and real estate be levied on and sold thereunder, though the judgment has not been docketed.—Hastings v. Cunningham, 39 Cal. 137.

[h] An execution may be issued on a judgment which has not been docketed.—Los Angeles County Bank v. Raynor, 61 Cal. 145.

[i] Judgment requiring party against whom it is rendered to do some specific act may be enforced after lapse of five years by leave of court.—Dorland v. Hanson, 81 Cal. 204, 15 Am. St. Rep. 44, 22 Pac. 552.

[j] Execution sale under judgment entered after affirmance of judgment rendered upon a premature and ineffectual appeal is valid, and passes title.—Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

[k] The trial court has no authority or power to make an order for the issuance of a writ of execution upon a judgment for the recovery of money after the lapse of five years from the entry of the judgment; and a writ issued

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after such time is void.—Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

[1] A judgment debtor who received no notice of application for an order for the issuance of execution after five years cannot be presumed to have waived objection thereto by failure to complain of the order.—Dorland v. Smith, 93 Cal. 120, 28 Pac. 812.

FOR AUTHORITIES FROM OTHER STATES:

49 L. R. A. 233, note, See, also, 17 Cyc. 1002-1008; 21 Cent. Dig., cols. 497-511, §§ 164-170.

§ 35. —— Before Signing of Judgment by Judge.

[a] An execution issued upon a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void.—Wells v. Stout, 9 Cal. 479.

§ 36. —— Computation of Time.

[a] The time during which execution is stayed constitutes a part of the five years within which execution must issue in accordance with section 209 of the Practice Act.—Solomon v. Maguire, 29 Cal. 227.

[b] Under Code of Civil Procedure, section 681, allowing five years from the entry of a judgment to issue execution thereon, the running of a statute is not suspended pending an injunction staying execution.—Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

§ 37. Form and Requisites.

[a] If an execution correctly refers to a judgment in such manner as to identify it, this is sufficient to justify the sheriff in enforcing it, notwithstanding it contains an error in reciting the day on which the judgment was rendered.—Franklin v. Merida, 50 Cal. 289.

[b] Under Code of Civil Procedure, section 128, subdivision 8, an execution which does not clearly set out the amount due thereon is voidable, but not void.—Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954.

[c] Where an execution states that the judgment was recovered "in the superior court of the county of L.," it is not void for failing to state the county where the judgment-roll was filed, as required by the Code of Civil Procedure, section 682, as it will be presumed that the clerk of the court did his duty, and filed the same in the county where the judgment was recovered, as provided by Code of Civil Procedure, section 670.—Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1009; 21 Cent. Dig., cols. 514-518, § 174.

§ 38. —— Signature.

[a] An execution signed by a deputy clerk for a clerk of the court, whose term expired several months prior to the issuance of the execution, is void, under Code of Civil Procedure, section 682, declaring that an execution shall be sealed with the seal of the court and subscribed by the clerk; and a purchaser at a sale had under a levy based on such execution acquires no title to the property, so as to enable him to question a conveyance thereof by the judgment debtor as fraudulent.—(1900) O'Donnell v. Merguire, 60 Pac. 981, judgment affirmed (1901), 131 Cal. 527, 63 Pac. 847.

[b] Code of Civil Procedure, section 682, provides that a writ of execution must be subscribed by the clerk of the court. Held, that an execution signed in print with the name of a former clerk of the court, and in writing by a deputy of the present clerk, was void, and sale thereunder conveyed no title. Judgment (1900) 60 Pac. 981, affirmed.—O'Donnell v. Merguire, 131 Cal. 527, 63 Pac. 847.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1024; 21 Cent. Dig., col. 543, § 188.

§ 39. —— Seal.

[a] Whether the seal of the court is or is not essential to the writ is not determined; but the seal alone, without the subscription of the clerk, is sufficient to authenticate the execution.—O'Donnell v. Merguire, 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847.

FOR AUTHORITIES FROM OTHER STATES:

Omission of seal from execution: 35 Am. Dec. 153, note.

§ 40. —— Directions as to Property to be Taken.

[a] Court cannot order sheriff to levy upon particular property.—Fraser v. Thrift, 50 Cal. 476.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1020, 1021; 21 Cent. Dig., cols. 534-539, §§ 182-184.

§ 41. —— Amount.

[a] Execution is not void because for larger sum than judgment authorized.—Reeve v. Kennedy, 43 Cal. 643.

§ 42. Delivery to and Receipt by Sheriff.

[a] The fact that the execution upon the judgment was retained by the attorney of the plaintiff until after an order was procured from the school trustee, and a requisition from the school superintendent for a payment of the debt due from the school district to the execution defendant, is not material, if before the money was paid the sheriff took the execution and received the money from the treasurer.—Skelly v. Westminster School District, 103 Cal. 652, 37 Pac. 643.

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FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1033, 1034; 21 Cent. Dig., cols. 512-514, § 173.

§ 43. Amendment.

[a] An execution will not be set aside because it calls for more money than is called for by the judgment, but will be amended upon due application of the parties, so as to agree with the judgment.—Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.

[b] An execution which is neither issued in the name of the people, nor directed to the sheriff, is amendable, and therefore not void, but only voidable, and a sale under it is valid.—Hibberd v. Smith, 50 Cal. 511.

[c] If the writ commands the sheriff to make a specified sum by levy, distress, and sale out of defendant's property, without showing specifically the amount of the judgment or the amount due upon the judgment, it is not void, but amendable.—Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954.

[d] The power to amend a writ of execution is limited to the amendment of the writs of the court, which can only be authenticated, under a law such as ours, by the subscription of the clerk, which subscription is an essential part of the writ, without which there is no execution to be amended.—O'Donnell v. Merguire, 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847.

FOR AUTHORITIES FROM OTHER STATES:

Amendment of executions: 101 Am. St. Rep. 550, note. See, also, 17 Cyc. 1043-1047; 21 Cent. Dig., cols. 548-557, §§ 192-194.

§ 44. Alias Writs.

[a] If writ is not fully executed, alias writ may issue under special order as to mode of execution.—Tevis v. Hicks, 38 Cal. 241.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1034-1043; 21 Cent. Dig., cols. 557-575, §§ 195-202.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

A. Lien, §§ 45-52.

B. Levy and Custody or Property, §§ 53-63.

A. LIEN.

NATURE OF LIEN, § 45.
CREATION AND EXISTENCE OF LIEN, § 46.
COMMENCEMENT OF LIEN, § 47.
PRIORITIES BETWEEN EXECUTIONS, § 48.
PRIORITIES BETWEEN EXECUTIONS AND OTHER LIENS OR CLAIMS, § 49.
—— UNRECORDED MORTGAGES, § 50.
DURATION OF LIEN, § 51.
—— EFFECT OF EXPIRATION OF JUDGMENT LIEN, § 52.

§ 45. Nature of Lien.

[a] Levy of execution operates as a lien if there is no judgment lien.—Low v. Adams, 6 Cal. 277.

[b] Levy of execution, while judgment lien exists, does not create a new lien, nor extend judgment lien.—Bagley v. Ward, 37 Cal. 122, 99 Am. Dec. 256-n.

[c] Levy of execution creates no lien, except for purpose of appraisement and sale. Barret v. Sims, 59 Cal. 615.

[d] Levy cannot extend lien beyond lien of judgment.—Sanders v. Russell, 86 Cal. 121, 21 Am. St. Rep. 26, 24 Pac. 852.

[e] The lien of the levy of execution is not that of the judgment, and it neither creates a judgment lien, nor extends a judgment lien once created.—Beaton v. Reid, 111 Cal. 484, 44 Pac. 167.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1049, 1050; 21 Cent. Dig., cols. 582-583, § 208.

§ 46. Creation and Existence of Lien.

[a] Service of a copy of an execution, and notice of garnishment on a third person, without a levy constitute no lien on property of the debtor in his hands capable of manual delivery.—Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501.

FOR AUTHORITIES FROM OTHER STATES:

See 21 Cent. Dig., cols. 583-586, §§ 209-212.

§ 47. Commencement of Lien.

[a] Execution affects property only from time of levy under our statute.—Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501.

[b] When there is no judgment or attachment lien, levy constitutes a lien from its date.—Bagley v. Ward, 37 Cal. 122, 99 Am. Dec. 256-n.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1050-1052; 21 Cent. Dig., cols. 587-593, §§ 213-215.

§ 48. Priorities Between Executions.

[a] If the execution creditor permits personal property levied on to remain in the hands of the debtor, the levy will not defeat subsequent executions.—Dutertre v. Driard, 7 Cal. 549.

[b] Where there are no judgment or attachment liens on real estate levied on under executions, the execution first levied is entitled to priority.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

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FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1054-1063; 21 Cent. Dig., cols. 602-645, §§ 226-240.

§ 49. Priorities Between Executions and Other Liens or Claims.

[a] A person who has acquired a lien on real property by virtue of judicial process occupies no better position as regards subsisting adverse claims to the ownership than does a purchaser with notice.—O'Rourke v. O'Connor, 39 Cal. 442.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1064-1067; 21 Cent. Dig., cols. 645-661, §§ 241-248.

§ 50. —— Unrecorded Mortgage.

[a] Mortgagee of defendant in execution, who has failed to record his mortgage until after the sale, has no lien or intervening rights as against the purchaser. He can redeem under the statute; if he fails to do so a court of equity will not interpose.—Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

§ 51. Duration of Lien.

[a] The time during which an execution is stayed forms no part of the two years during which a judgment remains a lien, but any period of time between the docketing of the judgment and the stay of the proceedings is to be included in the computation.—Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193.

[b] A judgment debtor perfecting an appeal in giving the usual stay bond held entitled to convey the real estate owned by him at the time of the docketing of the judgment.—Austin v. Union Paving etc. Co. (Cal. App.), 88 Pac. 731.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1071-1076; 21 Cent. Dig., cols. 690-707, §§ 266-275.

§ 52. —— Effect of Expiration of Judgment Lien.

[a] If an execution be issued and levied on real estate during the existence of a judgment lien on such property, and the execution is returned without sale, and after the judgment lien expires another execution is issued and levied, and a sale is made, such a sale takes effect by relation at the time when the second execution was levied.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

[b] The levy of an execution on real estate, during the time that the judgment on which the execution issued was a lien on the same, neither extends this lien of the judgment, nor does it create a new lien on the property.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

B. LEVY AND CUSTODY OF PROPERTY.

LEVY, IN GENERAL, § 53
—— TIME FOR LEVY, § 54.
MODE AND SUFFICIENCY OF LEVY, § 55.
—— RIGHT OF DEFENDANT TO DESIGNATE PROPERTY TO BE LEVIED ON, § 56.
—— ON PERSONAL PROPERTY, § 57.
—— EXHAUSTION OF PERSONALTY BEFORE LEVY ON REALTY, § 58.
—— ON REAL PROPERTY AND INTERESTS THEREIN, § 59.
—— AMOUNT OF PROPERTY TAKEN AND EXCESSIVE LEVY, § 60.
—— IRREGULARITIES AND OBJECTIONS AS TO LEVY, § 61.
CUSTODY OF PROPERTY, § 62.
DELIVERY OF PROPERTY ON FORTHCOMING OR DELIVERY BOND, § 62½.
EFFECT OF LEVY, § 63.

§ 53. Levy in General.

[a] The fact that an execution issued to the constable of a township was served by the sheriff does not render the service void, where it might have been issued to either the sheriff or constable.—Ross v. Wellman, 102 Cal. 1, 36 Pac. 402.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1077, 1078; 21 Cent. Dig., cols. 711, 712, § 277.

§ 54. —— Time for Levy.

[a] Levy and sale under execution must both be made within the period of two years limited by statute.—Isaac v. Swift, 10 Cal. 71.

[b] Where it appeared by the sheriff's return on an execution that a levy under it was not made until after the expiration of the life of the execution, such levy by a sheriff is without jurisdiction.—Tower v. McDowell, 31 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1081; 21 Cent. Dig., cols. 719-723, §§ 280, 281.

§ 55. Mode and Sufficiency of Levy.

[a] Where judgment is taken jointly against two defendants it makes no difference, so far as they are concerned, whether the sheriff first levied on joint property or not.—Low v. Adams, 6 Cal. 277.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1082-1112; 21 Cent. Dig., cols. 724-823, §§ 282-358.

§ 56. —— Right of Defendant to Designate Property to be Levied on.

[a] Officer may not deny right to designate property to be levied on if claimed.—Frink v. Roe, 70 Cal. 301, 11 Pac. 820.

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[b] Defendant waives right to designate property by neglect or refusal to do so.—Frink v. Roe, 70 Cal. 301, 302, 11 Pac. 820.

[c] Defendant's right to designate property to be levied on is personal to himself and may be waived.—Frink v. Roe, 70 Cal. 301, 11 Pac. 820.

[d] Defendant cannot defeat levy by neglect or refusal to designate property to be levied.—Frink v. Roe, 70 Cal. 301, 11 Pac. 820.

[e] If debtor be absent, officer need not hunt for him nor await his return to designate property.—Frink v. Roe, 70 Cal. 301, 11 Pac. 820.

[f] Plaintiff's attorney may direct sheriff as to what property he shall seize and may receive and receipt for proceeds of sale thereof.—Carter v. Green Mountain etc. Co., 83 Cal. 225, 23 Pac. 317.

§ 57. —— On Personal Property.

[a] Where a judgment debtor is walking the street with a bag of coin in his hand, a seizure of the coin on execution by a sheriff is valid.—Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492.

[b] A levy made by a constable on goods which he does not see or have in his possession is void.—Herron v. Hughes, 25 Cal. 555.

[c] A levy on a judgment of an execution issued by a justice of the peace, by delivering to the judgment debtor a copy of the writ, with notice in writing that the levy was upon all the right, title, and interest in and to the judgment, describing it, and upon all moneys, goods, credits, effects, debts due or owing, or in his possession, or under his control, and requesting him not to pay or transfer the same except to the officer making the levy, is a sufficient levy on the debt itself, and not on the mere judgment, which is not subject to execution under Code of Civil Procedure, section 542, subdivision 5, providing that the debt itself, and not the mere evidence thereof, shall be liable to execution.—Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621.

[d] Code of Civil Procedure, section 688, provides that shares of stock in a corporation may be levied on, on execution, in the same manner as on writs of attachment. Section 542, subdivision 4, declares that shares of stock may be attached by leaving a copy of the writ, and a notice stating that defendant's stock, or interest therein, is attached in pursuance thereof, with the principal officer of the corporation. Held that, for the purposes of levy under execution and attachment, the debtor's interest in shares is treated as personal property not capable of manual delivery, and hence it was not necessary to the validity of an execution sale of corporate shares that they should be in the hands of the sheriff in order that they might be personally delivered to the purchaser.—West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

FOR AUTHORITIES FROM OTHER STATES:

Levy on property in the use or possession of the debtor: 38 Am. Dec. 709, note. See, also, 17 Cyc. 1085-1087; 21 Cent. Dig., cols. 732-751, §§ 290-307.

§ 58. —— Exhaustion of Personalty Before Levy on Realty.

[a] The sheriff may, on the request of the defendant in execution, levy on real estate, though there be personal property present sufficient to satisfy the execution.—Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1090-1092; 21 Cent. Dig., cols. 751-757, §§ 308-310.

§ 59. —— On Real Property and Interests Therein.

[a] Under Statutes of 1850, chapter 25, section 172, providing that the filing of a judgment creates a lien on the debtor's real estate; and under section 181 et seq., providing that an execution shall create no lien on personal property except such as actually levied on, and that no personal property shall be sold except in the presence of a purchaser, and that the sale of realty shall be at the county seat of the county in which it is situated—a sale of realty was valid without an actual seizure by the officer.—Smith v. Morse, 2 Cal. 524.

[b] It is not necessary when an execution is levied on real estate that a copy of the same with the levy indorsed thereon should be filed in the recorder's office.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256-n.

[c] Any act on the part of the officer showing the intent to sell the specific land, and to subject it to the satisfaction of the judgment, constitutes a levying of the execution as against defendant in the execution, within the meaning of Practice Act, section 217, which provides that, "until a levy, property shall not be affected by the execution."—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441.

[d] When the judgment debtor has, or claims, an interest in only a small, well-defined parcel of a much larger tract of land it is extremely irregular, to say the least, to levy the execution upon his interest in the general tract, instead of the particular parcel he claims.—Logan v. Hale, 42 Cal. 645.

[e] To make proper levy on lands already subject to lien of judgment upon which writ was issued officer need only give statutory notice of sale and is not required to take possession of the land.—Lehnhardt v. Jennings, 119 Cal. 193-197, 51 Pac. 195.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1092-1095; 21 Cent. Dig., cols. 757-768, §§ 311-317.

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§ 60. —— Amount of Property Taken and Excessive Levy.

[a] Where there was great uncertainty at the time of the levy as to the value of the property attached, and it is subsequently ascertained that its value was greatly in excess of the demand sued for, it does not follow that the levy was therefore excessive.—Sexey v. Adkison, 40 Cal. 408, 91 Am. Dec. 698.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1112-1114; 21 Cent. Dig., cols. 823-827, §§ 359-363.

§ 61. —— Irregularities and Objections as to Levy.

[a] Under Practice Act of 1850, section 189, giving defendant in execution the right of designating the property to be levied on, defendant cannot raise objections to the regularity of the levy, in the absence of a showing that such right was exercised by him and disregarded by the officer; nor can a stranger to the writ question the regularity of the levy for such cause.—Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

[b] A judgment provided that a note and mortgage filed in the case should be delivered to defendant on his payment of the judgment, but he failed to pay the same, and made no attempt to prevent the note becoming barred by the statute of limitations. Held, that he could not object to a levy on and sale of the note and mortgage under the judgment. Hoxie v. Bryant, 131 Cal. 85, 63 Pac. 153.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1114; 21 Cent. Dig., col. 328, § 55; cols. 828-831, §§ 364-369.

§ 62. Custody of Property.

[a] Where a stranger to an execution is in possession of the property, claiming to own it by virtue of a transfer to him from the debtor which would prevent the latter from retaking the possession, the sheriff cannot justify without producing both the execution and the judgment authorizing its issue.—(1861) Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204; (1862) Knox v. Marshall, 19 Cal. 617.

§ 62½. Delivery of Property on Forthcoming or Delivery Bond.

[a] An undertaking exacted by a sheriff before releasing property which he has ascertained to be exempt from execution is void for want of consideration.—Servanti v. Lusk, 43 Cal. 238.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1124-1135; 21 Cent. Dig., cols. 871-908, §§ 406-433.

§ 63. Effect of Levy.

[a] Levy of execution has no further effect than to fix date or commencement of sheriff's title, as against all persons who are not parties to the writ under the provision of the statutes of this state.—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441.

FOR AUTHORITIES FROM OTHER STATES:

27 L. R. A. 374, note. See, also, 17 Cyc. 1116, 1117; 21 Cent. Dig., cols. 836-841, §§ 376-380.

V. STAY, QUASHING, VACATING AND RELIEF AGAINST EXECUTIONS.

STAYING EXECUTION, IN GENERAL, § 64.
—— GROUNDS, § 65.
—— ORDER AND NOTICE, § 66.
—— EFFECT, § 67.
—— BOND OR UNDERTAKING, § 68.
—— LIABILITIES ON STAY BONDS, § 69.
QUASHING OR VACATING WRIT, § 70.
—— JURISDICTION, § 71.
—— GROUNDS, § 72.
—— PERSONS ENTITLED TO RELIEF, § 73.
—— TIME WITHIN WHICH APPLICATION FOR RELIEF MUST BE MADE, § 74.
—— NOTICE, § 75.
—— EFFECT OF QUASHING, § 76.
NATURE AND GROUNDS OF RELIEF, § 77.
—— IRREGULAR EXECUTION, § 78.
—— DELAY IN ISSUING EXECUTION, § 79.
—— EFFECT OF EXECUTION AND SALE SOUGHT TO BE RESTRAINED, § 80.
—— LEVY ON PROPERTY CLAIMED BY THIRD PERSON, § 81.
—— PROTECTION OF RIGHTS OF OTHER CREDITORS OR LIENHOLDERS, § 82.
ACTIONS TO RESTRAIN EXECUTION, § 83.
—— PARTIES, § 84.
—— PLEADING, § 85.

§ 64. Staying Execution in General.

[a] Where a remittitur is sent to the lower court, with the bill of costs annexed as taxed in the supreme court, neither the supreme court nor the judge thereof has a right to stay the execution for costs.—City of Marysville v. Buchanan, 3 Cal. 212.

[b] Court will not, on motion, order perpetual stay of execution on an erroneous judgment if it had jurisdiction of the subject matter, and of the person of defendant.—Chase v. Christianson, 41 Cal. 253.

[c] A justice of the peace has power to recall an execution issued on a void judgment rendered by him, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and the execution has been issued by the clerk.—Gates v. Lane, 49 Cal. 266.

FOR AUTHORITIES FROM OTHER STATES:

Constitutionality of stay laws: 13 Am. Dec. 493, note.

Power of courts to grant stay: 49 Am. Dec. 513, note. See, also, 17 Cyc. 1135-1151; 21 Cent. Dig., cols. 922-955, §§ 442-465.

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§ 65. —— Grounds.

[a] Court may grant perpetual stay of execution on judgment discharged in insolvency. Imlay v. Carpentier, 14 Cal. 173.

[b] Where a judgment was reversed by the supreme court, and the case remanded for further proceedings, and the clerk of the court below issued an execution for all costs, including those of the appeal and those accruing before notice of the appeal was filed, the judge of the court below had power to stay the execution in the hands of the sheriff until an application could be made to the court to retax and adjust the costs.—Burrill, Ex parte, 24 Cal. 350.

[c] If a judgment upon which an execution issues, and the execution itself are void upon their face, the court has power on motion to afford relief, and can arrest the process.—Sanchez v. Carriaga, 31 Cal. 170.

§ 66. —— Order and Notice.

[a] An order by a district judge, ex parte, and without notice, reciting that one of the defendants had commenced an action to vacate the judgment, and directing a recall and stay of execution until that action be determined, or until further order, held to be unauthorized.—Livermore v. Hodgkins, 54 Cal. 637.

§ 67. —— Effect.

[a] A suspension of proceedings under the judgment will fully protect the losing party. Hutchinson v. Bours, 13 Cal. 50.

[b] The necessary consequence of an order of court directing that a certain judgment be not enforced is that process issued for its enforcement falls with it, and property then held by the marshal for the satisfaction of the execution is released from the execution. Mulford v. Estudillo, 32 Cal. 131.

§ 68. —— Bond or Undertaking.

[a] The question whether the judgment has been executed by the sheriff by a delivery of the possession of the property should not be considered by the judge as a ground of refusal to fix the amount of the undertaking to stay proceeding, but the judge should determine the sufficiency of those matters, when presented upon a direct issue in which the right to an actual stay of proceedings is involved.—Gutierrez v. Hebbard, 104 Cal. 103, 37 Pac. 749.

§ 69. —— Liabilities on Stay Bonds.

[a] Where an execution is issued against the sureties on a stay bond, it may be set aside on a showing that the original judgment has been satisfied.—Meredith v. Santa Clara Min. Assn. of Baltimore, 60 Cal. 617.

[b] Unauthorized bond to stay execution cannot be enforced against sureties for want of jurisdiction.—Powers v. Crane, 67 Cal. 65, 7 Pac. 135.

§ 70. Quashing or Vacating Writ.

[a] Proper remedy to prevent enforcement of execution on void judgment is by motion to set it aside.—Luco v. Brown, 73 Cal. 5, 6, 2 Am. St. Rep. 814, 14 Pac. 368.

[b] Order allowing execution without authority may be vacated on motion, though appealable.—Dorland v. Hanson, 81 Cal. 205, 15 Am. St. Rep. 234, 28 Pac. 443.

[c] Where the court has improperly made an order directing execution to issue, it may, on motion, recall the execution, though the order is appealable.—(1891) Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

[d] Court has power of its own motion to declare void an execution which clearly appears to be so on face of records.—Winrod v. Wolters, 141 Cal. 403, 74 Pac. 1037.

FOR AUTHORITIES FROM OTHER STATES:

Effect of quashing writ upon sale: 15 Am. Dec. 92, note. See, also, 17 Cyc. 1152-1163; 21 Cent. Dig., cols. 956-973, §§ 466-483.

§ 71. —— Jurisdiction.

[a] Where the court below has, without authority, made an order authorizing the issuance of an execution, the same court may, on motion, vacate and set aside said execution, though the order is appealable.—Dorland v. Hanson, 81 Cal. 202, 22 Pac. 552.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1157; 21 Cent. Dig., col. 963, § 472.

§ 72. —— Grounds.

[a] An execution for costs will not be recalled by reason of the fact that the judgment therefor included items which are not properly taxable.—Meeker v. Harris, 23 Cal. 285.

[b] If, after a judgment recovered by an attaching creditor has been satisfied, he is proceeding to sell attached property under execution, the defendant in the execution may move to quash the writ, and need not go into equity for relief.—Domec v. Stearns, 30 Cal. 114.

[c] A defendant in execution cannot have the execution recalled, when valid, on the ground that it was levied on exempt property.—Roth v. Insley, 86 Cal. 134, 24 Pac. 853.

[d] An execution on a default judgment will not be quashed because the complaint was defective, as the remedy therefor is by appeal.—Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

[e] On a motion to quash an execution, errors and irregularities in the rendition of

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the judgment cannot be inquired into.—(Cal. 1895) Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545.

[f] Void amendment of judgment is ground for quashing execution.—Scammon v. Bonslett, 118 Cal. 99, 62 Am. St. Rep. 226-n, 50 Pac. 272.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1152-1156; 21 Cent. Dig., cols. 957-963, §§ 467-471.

§ 73. —— Persons Entitled to Relief.

[a] A purchaser from the defendant, who purchased after rendition of the judgment foreclosing the lien, and before the levying of an execution thereunder, has the right to move the court to vacate a void order for the issuance of execution, and to set aside a void sheriff's sale thereunder, though not a party to the action.—Dorland v. Smith, 93 Cal. 120, 28 Pac. 812.

§ 74. —— Time Within Which Application for Relief Must be Made.

[a] Where third parties have purchased at execution sale it is too late to move to set aside execution.—Bryan v. Berry, 8 Cal. 130.

§ 75. —— Notice.

[a] If, upon a petition after issue of execution, a supersedeas is issued, or an order staying execution had, or an order quashing it, such order will be affectual without notice to the sheriff holding the execution, and without joining him as a party in the proceedings for obtaining such orders.—Buffandeau v. Edmondson, 17 Cal. 436, 79 Am. Dec. 139.

[b] A notice of motion to recall the execution, specifying the grounds of the motion to be "for the reason that the said execution was wrongfully and unlawfully and improperly issued," is sufficient to raise the question of the authority of the court to issue the execution.—Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

[c] A motion to recall an execution is an original proceeding, and may be made by attorneys, other than those who appeared in the original action, without substitution. It is therefore no objection that notice of such motion was signed by such other attorneys.—Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

§ 76. —— Effect of Quashing.

[a] Where a sheriff holding an execution levied it on goods of the judgment debtor, and placed them in the hands of a keeper, a purchase by the keeper of such goods, made between the quashing of the execution on which they were held and the issuance of a second execution, is valid, since the lien of the levy was destroyed by the quashing of the execution.—Wellington v. Sedgwick, 12 Cal. 469.

§ 77. Nature and Grounds of Relief.

[a] Equity will not grant relief against an execution, if the party can equally well be relieved, upon motion, in the court that issued the execution or has control of it.—Imlay v. Carpentier, 14 Cal. 173.

[b] A sufficient remedy against an execution, issued on a judgment claimed to have been discharged by a decree in insolvency, may be had by motion, and therefore the defendant is not entitled to an injunction.—Green v. Thomas, 17 Cal. 86.

[c] Whether the application for relief against a voidable execution sale should be presented by motion to the court or by bill in equity depends on the special circumstances of each case.—City and County of San Francisco v. Pixley, 21 Cal. 56.

[d] One who purchases land subject to lien of judgment obtained by fraud against his grantor is not entitled to have a court of equity remove the judgment lien, and enjoin a sale of the land under the judgment, unless he shows affirmatively that he will be injured by an enforcement of the lien by a sale of the land on execution.—Marriner v. Smith, 27 Cal. 649.

[e] Injunction will be granted restraining sale on execution of homestead claimed under the laws of the United States if the judgment on which the execution issues was recovered for a debt contracted before the homestead claim was patented.—Miller v. Little, 47 Cal. 348.

[f] The party who comes into a court of equity to enjoin a sheriff from selling real estate on an execution against the plaintiff's grantor cannot obtain relief if his purchase is tainted with fraud.—San Francisco etc. R. R. Co. v. Bee, 48 Cal. 398.

[g] Where defendants consent to waive all defenses, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it.—(1890) Moulton v. Knapp, 85 Cal. 385, 24 Pac. 803; (1891) 88 Cal. 446, 26 Pac. 210.

§ 78. —— Irregular Execution.

[a] The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.—Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639.

§ 79. —— Delay in Issuing Execution.

[a] Injunction does not lie to restrain execution sale, because period for enforcing judgment has expired. Remedy is by motion to quash execution.—Mayo v. Bryte, 47 Cal. 626.

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§ 80. —— Effect of Execution and Sale Sought to be Restrained.

[a] Equity will entertain a bill to enjoin the sale of lands on execution, for the purpose of preventing the creation of a cloud upon the complainant's title.—(Cal. 1860) Pixley v. Huggins, 15 Cal. 127; (1890) Roth v. Insley, 86 Cal. 134, 24 Pac. 853.

[b] It is discretionary with a court to grant an injunction to restrain an execution sale because it will cast a cloud on title.—Goldstein v. Kelly, 51 Cal. 301.

[c] A sheriff's deed, made on execution sale under a judgment in an attachment suit, conveyed to plaintiff all the interest which the judgment debtor had at the date of the docketing of the judgment or thereafter. Defendant, who had obtained judgment in an attachment suit wherein the attachment was levied upon the same land, after the attachment but before the judgment in the former suit, caused a special execution to be issued to the ex-sheriff, who had levied his attachment, requiring him to sell the interest which the judgment debtor had in the land at the date of the levy of the attachment. Held, that the sale under the defendant's execution would have cast a cloud upon the plaintiff's title, and was therefore rightly enjoined. Porter v. Pico, 55 Cal. 165.

§ 81. —— Levy on Property Claimed by Third Person.

[a] A. leased furniture to B.; during the lease F. bought the furniture of A., B. remaining in possession and acknowledging F.'s title. Sheriff, having an execution against A., levied on the furniture as the property of A. Held, that the remedy by injunction to F. is proper.—Ford v. Rigby, 10 Cal. 449.

[b] A stranger to an execution, whose goods have been levied on under it, cannot have an injunction on the ground that the judgment was erroneous. It is not to be thus collaterally impeached, and he has a good remedy at law.—Markley v. Rand, 12 Cal. 275.

[c] An injunction against the sheriff will not lie, at the instance of a purchaser of a partner's interest, to restrain a sale on execution of a partner's interest in firm stock, unless the injury be irreparable, which can only appear upon a clear showing of the plaintiff's right and of the defendant's insolvency.—More v. Ord, 15 Cal. 204.

[d] A executed to plaintiff a deed of real estate, which was subsequently levied on by an execution creditor of A. Plaintiff sought to restrain the sheriff's sale, as casting a cloud upon his title, but plaintiff's deed was adjudged to be in effect a mortgage; and it was held that there was no ground to sustain plaintiff's bill, since the sale passed only the interest of A, whatever it might be.—Purdy v. Irwin, 18 Cal. 350.

[e] If owner of large tract of land contracts to sell part of it, and the judgment creditors of the party with whom he contracts attempt to sell the whole tract on execution, the court intimates that the owner may enjoin the sale, except as to the part contracted to be sold.—Logan v. Hale, 42 Cal. 645.

[f] Equity will not interfere to enjoin the sale of land under execution issued on a judgment in which the owner of the land was not a party nor privy, inasmuch as such a judgment is absolutely void so far as the rights of the owner are concerned, and casts no cloud on his title.—Roman Catholic Archbishop of San Francisco v. Shipman, 69 Cal. 586, 11 Pac. 343.

[g] Injunction is the proper remedy where one claiming to be the owner of a tract of land, purchased in good faith for a valuable consideration, in the actual possession thereof, seeks to prevent its sale under execution against his grantor; and a dissolution of a restraining order in such case does not follow from an answer denying the equities of the complaint. Such dissolution is an abuse of discretion.—Porter v. Jennings, 89 Cal. 440, 28 Pac. 681.

[h] Where land is levied on under execution against one other than the holder of the legal title, the latter may have a temporary injunction restraining a sale.—Einstein v. Bank of California, 137 Cal. 47, 69 Pac. 616.

§ 82. —— Protection of Rights of Other Creditors or Lienholders.

[a] One who has purchased mortgaged property at a foreclosure sale, but who has not yet received the sheriff's deed, is not entitled to maintain a bill for an injunction to restrain a sale of the mortgagor's remaining equity of redemption, ordered in a suit brought to enforce a mechanic's lien, to which suit he was not made a party.—Macovich v. Wemple, 16 Cal. 104.

[b] An injunction will not be granted at the suit of a junior attaching creditor, restraining a prior attaching creditor, after judgment obtained, from selling on execution personal property of the defendant upon which he has levied an attachment, unless he has bound himself to such junior creditor for a sufficient consideration not to do so, but to pursue some other course, a departure from which will work irreparable mischief to the plaintiff.—Domec v. Stearns, 30 Cal. 114.

[c] The complaint alleged that defendant A levied attachments on B's land; that B was adjudged an insolvent, and A proved her claims against him; that thereafter, by consent, the insolvency proceedings were dismissed, and B executed to plaintiffs an assignment for the benefit of his creditors of all his property, including said land; that plaintiffs accepted the trust; that said levies were dissolved; that A obtained judgments in said attachment suits, and executions were issued, and the sheriff had levied on the land, and, unless restrained by injunction, would sell it, and prevent plaintiffs executing their trust. Held, that the complaint was not de

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murrable as not stating a cause of action, as, even if the debtor had an attachable interest by reason of his right to any residue, the complaint alleged a threatened sale not of such interest, but of the land; and, under Civil Code, section 3457, where an assignment for benefit of creditors is made, the creditors must avail themselves of the assets without preference, or not at all.—Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675; Sargent v. Cunningham, 25 Pac. 677.

§ 83. Actions to Restrain Execution.

[a] If a bill in equity is filed to restrain the enforcement of an execution, on the ground that the judgment has been paid, the defendant, if he would avail himself of the defense that the plaintiff had a remedy at law by motion in the court from which the execution issued, must do so by motion to dismiss the bill, or by some other proper means, before answering on the merits. If he answers on the merits, he waives such defense.—Wood v. Currey, 49 Cal. 359.

[b] In an action to restrain the sheriff from selling certain real estate on execution against plaintiff's grantor, the court did not err in denying a nonsuit, where plaintiff rested on the introduction in evidence of the deed to him, and it appeared that the execution creditor made no claim to the property, except such as was derived from such grantor subsequent to the date of such deed.—Fitzgibbon v. Laumeister, 51 Pac. 1078.

FOR AUTHORITIES FROM OTHER STATES:

30 L. R. A. 119, note. See, also, 17 Cyc. 1184-1196; 21 Cent. Dig., cols. 1029-1056, §§ 519-539.

§ 84. —— Parties.

[a] The court will not by injunction restrain the sale of land on execution at the instance of a claimant under a tax title which clearly is invalid.—Hall v. Theisen, 61 Cal. 524.

§ 85. —— Pleading.

[a] If a judgment is not void, but merely irregular, because of the defects, and the defects can be reached by motion before judgment or on appeal, then the complaint to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same.—Logan v. Hillegass, 16 Cal. 200.

[b] Complaint to enjoin sale of property under execution and issuance of another execution on judgment is devoid of equity, if it only avers that the judgment and execution are void on their face, and insolvency of one of defendants.—Sanchez v. Carriaga, 31 Cal. 170.

[c] A complaint in an action to enjoin an execution sale, which simply alleges that plaintiff had no knowledge of the judgment until more than thirty days after its rendition, is insufficient.—Farrington v. Brown, 65 Cal. 320, 4 Pac. 26.

[d] A complaint alleged that judgment had been entered against plaintiffs in a claim and delivery suit against defendant, commanding them to return to defendant certain trays and sweat boxes, or eighteen hundred and eighty-five dollars, the value thereof, in case return could not be made; that plaintiffs appealed therefrom, and the same was affirmed in the supreme court; that plaintiffs tendered to defendant, and offered to return to him, the trays and sweat boxes, and are now ready and willing to return them, and to comply in every particular with the terms of the judgment, but that defendant refused to accept the same, and caused execution to issue on his judgment; that plaintiffs moved the superior court to recall the execution, but the motion was denied; and that, despite the pendency of an appeal from such ruling, defendant threatens to sell plaintiffs' property, to plaintiffs' irreparable injury, etc. Held to state a cause of action entitling plaintiffs to an injunction. Eppinger v. Scott, 130 Cal. 275, 62 Pac. 460.

[e] A complaint in an action to restrain a judgment creditor from selling land under an execution against a former owner held to show prima facie plaintiff's right to be protected from cloud that would be cast on his title by a sale under the execution.—Austin v. Union Paving etc. Co. (Cal. App.), 88 Pac. 731.

VI. CLAIMS BY THIRD PERSONS.

RIGHTS OF CLAIMANT, IN GENERAL, § 86.
DEMAND BY CLAIMANT AND AFFIDAVIT OF CLAIM, § 87.
ACTIONS BY CLAIMANT FOR RECOVERY OF POSSESSION, § 88.
—— EVIDENCE, § 89.
OPERATION AND EFFECT OF DETERMINATION, § 90.
—— EFFECT OF VERDICT OF SHERIFF'S JURY, § 91.

§ 86. Rights of Claimant in General.

[a] If claimant of property levied on fails to make his claim known, and thus influences conduct of officer, he is estopped from afterward asserting it, provided facts and circumstances relating to his claim were then known to him.—Bleven v. Freer, 10 Cal. 172.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1199-1201; 21 Cent. Dig., cols. 1059-1067, §§ 544-547.

§ 87. Demand by Claimant and Affidavit of Claim.

[a] Where property is levied on by execution as the property of the execution defendant, but is found in the possession of a third person, such third person need not make a demand on the officer for the same as a condition precedent to an action for its recovery.—Ledley v. Hayes, 1 Cal. 160.

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[b] A claim to property about to be levied on, stating that claimant is owner, and had delivered it for purposes of sale, and that it was so held when seized, and not otherwise, complies with Code of Civil Procedure, section 689, as to the manner of "setting out the title."—Vermont Marble Co. v. Brow, 109 Cal. 236, 50 Am. St. Rep. 37-n, 41 Pac. 1031.

[bc] A notice of claim upon a constable who has wrongfully seized wood in possession of the claimant, which states that the claimant is entitled to the possession under a bill of sale, is sufficiently explicit, although the possession under the bill of sale, was given by way of security, and the notice did not state that the plaintiff had taken the wood in pledge.—Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95.

[c] A written claim of property in goods about to be levied on under execution, which states the claimant's "grounds of title," pursuant to Code of Civil Procedure, sections 549, 689, to be by purchase from S. and the judgment debtor, is not defective, as indicating a purchase from said persons jointly. Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1201-1203; 21 Cent. Dig., cols. 1068-1074, §§ 549-551.

§ 88. Actions by Claimants for Recovery of Possession.

[a] The owner of property seized has his remedy and the right of recovery against any one, whether sheriff or not, unless it be held by legal process against himself.—Rhodes v. Patterson, 3 Cal. 469.

FOR AUTHORITIES FROM OTHER STATES:

Actions for possession of chattels levied on under execution: 20 Am. Dec. 696, note.

Liability of officer to actions of replevin for goods levied on: 25 Am. St. Rep. 256, note. See, also, 17 Cyc. 1206-1209; 21 Cent. Dig., cols. 1086, 1087, § 561.

§ 89. —— Evidence.

[a] The burden is on the execution creditor to prove that goods levied on under execution were the property of the debtor.—Newell v. Desmond, 74 Cal. 46, 15 Pac. 369.

[b] In an action to recover the proceeds of personal property, evidence held to sustain a finding that the sale was made before the levy and accompanied by delivery and actual change of possession, required by Civil Code, section 3440.—Castle v. Sibley (Cal. App.), 82 Pac. 1067.

[c] Where certain property levied on had been transferred by the debtor in violation of Civil Code, section 3440, the sheriff was not bound, as against the transferee, to prove the debtor's insolvency in order to entitle him to maintain his levy.—Calkins v. Howard (Cal. App.), 83 Pac. 280.

§ 90. Operation and Effect of Determination.

[a] Legal effect of finding for defendants, on question of plaintiff's right to property, was to entitle the defendants, from whom the property was taken, to its restoration.—Waldman v. Broder, 10 Cal. 378.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1226-1228; 21 Cent. Dig., cols. 1130-1135, §§ 585-588.

§ 91. —— Effect of Verdict of Sheriff's Jury.

[a] Verdict of a sheriff's jury does not estop the claimant of property.—Perkins v. Thornburgh, 10 Cal. 189.

VII. SALE.

A. Manner, Conduct, Validity and Confirming or Vacating, §§ 92-114.

B. Title and Rights of Purchaser, §§ 115-144.

C. Redemption, §§ 145-164.

D. Conveyance and Proceeds, §§ 165-182.

1. Conveyance, §§ 165-177.
2. Proceeds, §§ 178-182.

Judicial sales other than execution sales. See Judicial Sales, §§ 1-11.

Mandamus to compel execution of deed to purchaser. See Mandamus, § 36.

A. MANNER, CONDUCT, VALIDITY AND CONFIRMING OR VACATING.

STATUTORY PROVISIONS, § 92.
VENDITIONI EXPONAS, § 93.
CONDUCT OF SALE, § 94.
—— NOTICE OF SALE, § 95.
—— SALE IN PARCELS, § 96.
—— RIGHT OF JUDGMENT DEBTOR TO DESIGNATE MANNER IN WHICH PROPERTY SHALL BE SOLD, § 97.
—— REPRESENTATIVE CAPACITY OF SHERIFF IN MAKING SALE, § 98.
—— EFFECT OF CONSPIRACY TO DETER BIDDERS, § 99.
PERSONS WHO MAY PURCHASE, § 100.
BIDS AND PAYMENT THEREOF, § 101.
—— FAILURE TO COMPLY WITH BID, § 102.
—— ACTIONS ON BIDS, § 103
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§ 92. Statutory Provisions.

[a] Statute is directory so far as it deals with manner in which writ is to be executed. Frink v. Roe, 70 Cal. 303, 11 Pac. 820.

[b] Failure of officer to comply with directory provisions of statute does not avoid sale.—Frink v. Roe, 70 Cal. 303, 11 Pac. 820.

[c] Civil Code, section 3440, making void sales of chattels against the seller's creditors, where there is no continued change of possession, does not apply where a purchase is made at an execution sale by a stranger to the proceedings, in view of Code of Civil Procedure, section 698, providing that an execution sale conveys to the purchaser all the rights which the debtor had.—Matteucci v. Whelan, 123 Cal. 312, 69 Am. St. Rep. 60, 55 Pac. 990.

FOR AUTHORITIES FROM OTHER STATES:

See 21 Cent. Dig., cols. 1145-1390, §§ 600-742.

§ 93. Venditioni Exponas.

[a] Writ of venditioni exponas is a simple order of the court to sell property already levied on under execution. It confers no power to levy.—Welch v. Sullivan, 8 Cal. 165.

[b] When sheriff who levies fieri facias on land goes out of office before having sold, the court may, by an order, direct his successor to sell the property levied on, and a venditioni exponas may be issued to such successor, and he may then sell and execute a deed to the purchaser.—Clark v. Sawyer, 48 Cal. 133.

[c] There is a distinction between cases where a venditioni exponas is issued for the sale of personal property and where it is issued for the sale of land. A venditioni issued in the former case must go to the officer who made the seizure.—Clark v. Sawyer, 48 Cal. 133.

[d] Code of Civil Procedure, section 681, requiring execution on a judgment to issue within five years after judgment is entered, applies also to an order of sale.—Dorland v. Hanson, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552.

[e] A sale by a sheriff under an execution after the return day of the execution is valid if he has made a levy during the lifetime of the writ, and a sale may likewise be made after the return day of a writ issued under an order of sale, where no levy is required. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 28 Am. St. Rep. 115-n, 29 Pac. 627.

FOR AUTHORITIES FROM OTHER STATES:

Duty of sheriff to inform purchasers of encumbrances: 43 Am. Dec. 143, note. See, also, 17 Cyc. 1236-1238; 21 Cent. Dig., cols. 1156-1164, §§ 613-619.

§ 94. Conduct of Sale.

[a] Contingent and complicated contracts cannot be levied upon and sold without being in possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale.—Crandall v. Blen, 13 Cal. 15.

§ 95. —— Notice of Sale.

[a] Want of due notice of a sheriff's sale is immaterial to affect the validity of the sale or the obligation of the purchaser to pay the amount of his bid.—Harvey v. Fisk, 9 Cal. 93.

[b] In case of a sale en masse under an execution of real estate consisting of several known and distinct parcels a knowledge of the judgment, execution, and advertisement is sufficient to put the judgment debtor on his inquiry, and is in effect equivalent to a knowledge of the sale.—Vigoureux v. Murphy, 54 Cal. 346.

[c] An insufficient description in a notice of sale and in a sheriff's deed of property sold at execution sale is not waived by the failure of the judgment debtor to apply to the court to have the sale set aside.—Cadwalder v. Nash, 73 Cal. 43, 14 Pac. 385.

[cd] Where, before sale of real property on execution, notice thereof must be published "in some newspaper" of the county, if there be one (Code Civ. Proc., sec. 692), and an officer selling without such notice forfeits five hundred dollars to the aggrieved party, besides actual damages (section 693), the sheriff, and not the plaintiff, has the right to select the newspaper in which such notice shall be published.—Northern Counties Inv. Trust v. Cadman, 101 Cal. 200, 35 Pac. 557.

[d] Fact that some of land levied upon stands in name of third parties does not require notice to them other than that given to general public.—Lehnhardt v. Jennings, 119 Cal. 197, 48 Pac. 56.

[e] A notice of sale of personal property under execution, posted on February 20th, and a sale thereof made, as advertised, on February 25th, shows a sufficient compliance with the statute, as to five days' notice.—Bellmer v. Blessington, 136 Cal. 3, 68 Pac. 111.

FOR AUTHORITIES FROM OTHER STATES:

What is proper and sufficient notice: 75 Am. Dec. 704, note.

Failure to give notice of execution sale: 44 Am. Dec. 238, note. See, also, 17 Cyc. 1243-1248; 21 Cent. Dig., cols. 181-1202, §§ 629-633.

§ 96. —— Sale in Parcels.

[a] Where the land sold under execution consisted of separate but adjoining tracts, but

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the sheriff and the purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels, the sale of the land in gross was valid.—Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

[b] If a sheriff, by virtue of an execution levies on and advertises for sale several separate tracts of land, he must sell the tracts separately and not en masse.—Browne v. Ferrea, 51 Cal. 552.

[c] Several ditches and water rights appertaining thereto, constituting but a single connected system of water supply may be sold on execution as a single parcel.—Gleason v. Hill, 65 Cal. 17, 2 Pac. 413.

[d] The complaint is subject to demurrer where it does not show that the proceeds of the sale were less than they would have been had the land been sold in parcels.—Hudepohl v. Liberty Hill Consol. Min. etc. Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1249-1251; 21 Cent. Dig., cols. 1206-1217, §§ 636-639.

§ 97. —— Right of Judgment Debtor to Designate Manner in Which Property Shall be Sold.

[a] Debtor in default has no vested right to have his property sold in a particular way. Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515.

§ 98. —— Representative Capacity of Sheriff in Making Sale.

[a] Sheriff sells as agent of judgment debtor.—Hunt v. Loucks, 38 Cal. 382.

[b] Sale by sheriff is regarded as sale by judgment debtor.—Thresher v. Atchison, 117 Cal. 75, 59 Am. St. Rep. 159, 48 Pac. 1020.

§ 99. —— Effect of Conspiracy to Deter Bidders.

[a] Conspiracy to deter bidders and prevent fair sale renders sale void.—Pekin M. & M. Co. v. Kennedy, 81 Cal. 362, 22 Pac. 679.

§ 100. Persons Who may Purchase.

[a] Partner or tenant in common may purchase joint property at a sale under execution.—Gunter v. Laffan, 7 Cal. 588.

[b] Third persons, not parties to contract, have no vested right to purchase the property of a common debtor sold at the instance of another creditor.—Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515.

[c] A partner may purchase with his own funds and on his own account the interest of his copartner in real estate at sheriff's sale, if there be no circumstances of fraud or of trust, apart from the partnership relation, and hold the property so purchased as a stranger could hold it.—Bradbury v. Barnes, 19 Cal. 120.

[d] The fact that a sheriff's sale is open and public is prima facie proof that no advantage is taken by the partner purchasing of his copartner.—Bradbury v. Barnes, 19 Cal. 120.

[e] The attorney of a defendant in proceedings to subject land to debts owes no such duty to the client's creditors as will debar such attorney from making a valid purchase of the land at the execution sale in such proceedings.—Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622, 907.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1253-1255; 21 Cent. Dig., cols. 1220-1226, §§ 642-647.

§ 101. Bids and Payment Thereof.

[a] Where a party purchased real estate at an execution sale, upon the faith of the representations of the judgment creditor that his judgment was the first on the property, when, in fact, there were prior encumbrances on it of more than its value, the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations.—Webster v. Haworth, 8 Cal. 21.

FOR AUTHORITIES FROM OTHER STATES:

When purchaser may obtain release from bid: 70 Am. Dec. 572, note. See, also, 17 Cyc. 1255-1257; 21 Cent. Dig., cols. 1226-1232, §§ 648-653. See, also, 17 Cyc. 1259, 1260.

§ 102. —— Failure to Comply with Bid.

[a] Upon a motion under Practice Act, section 224, to compel payment by a delinquent purchaser at a judicial sale, the sheriff's statement of the amount bid and the resale at a less specified amount sufficiently states that "loss was occasioned" by the failure to pay the amount bid.—Johns v. Trick, 22 Cal. 511.

FOR AUTHORITIES FROM OTHER STATES:

See 21 Cent. Dig., cols. 1240-1261, §§ 659-666.

§ 103. —— Actions on Bids.

[a] A misrepresentation by a judgment creditor, at the sheriff's sale, that his judgment was the first, entitles the purchaser to relief in an action by the sheriff for the price of the land, there being prior encumbrances to more than its value.—Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287.

[ab] Where a creditor purchases property of his debtor, at an execution sale for a price in excess of the amount of the judgment, before he has reduced his claim to judgment, and the debtor takes the benefit of the insolvency act before the purchaser obtains judgment, the latter cannot set off such claim

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against an action by the assignee in insolvency to recover the excess. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[b] Where an officer who sells property under an execution at a price in excess of the judgment, fails to bring an action to recover such excess from the purchaser, and surrenders a check given in payment thereof to the purchaser, and is insolvent, and his bond exhausted, the assignee in insolvency of the debtor may bring an action against the purchaser to recover such excess, by pleading such facts and making the officer a party thereto. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[c] Such action is not barred by limitations, when brought within four years from the date of the giving of the check. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[d] A purchaser of property at an execution sale who does not pay the entire price will not be heard to question his liability for the remainder on the ground that the sale was illegal because the entire price was not required to be paid in cash. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[e] An execution purchaser of property is not released from liability on his bid by reason of a prior execution sale of the property, since the rule of caveat emptor applies to execution sales. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[f] Where a creditor who has not reduced his claim to judgment purchases the property of his debtor at an execution sale at a price in excess of the judgment debt, and the debtor then takes the benefit of the insolvency act, the filing of his claim by the creditor without deducting the excess in his possession will estop him from setting up such claim as a setoff in an action by the assignee to recover such excess. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[g] A purchaser at an execution sale cannot resist payment of the excess of his bid over the judgment, in a suit brought by the assignee in insolvency of his debtor, on the ground that the latter does not show that he is able or willing to procure a constable's deed to the property, since an execution purchaser must pay when the certificate of sale is issued. Judgment, 56 Pac. 1110, reversed. Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

[h] Under Code of Civil Procedure, section 691, requiring an officer selling property under execution to return any surplus to the execution debtor, the purchaser, who gives his check for such surplus to the officer, and afterward procures the check from the officer and destroys it, is subject to suit by the debtor for the amount thereof, though the latter was never informed of the giving of the check to the officer, since the debtor may be treated as the equitable assignee of the rights of the officer. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

FOR AUTHORITIES FROM OTHER STATES:

Remedies against purchaser at execution sales to recover amount of bid: 69 Am. Dec. 365, note. See, also, 17 Cyc. 1262-1264; 21 Cent. Dig., cols. 1256-1261, §§ 665, 666.

§ 104. Terms and Conditions.

[a] Where a constable sells property on execution under the usual statutory notice, it is a cash sale, and not a sale on credit, though the purchaser does not pay the entire price, and hence the latter cannot escape liability on the ground that the sale was illegal because on credit. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

§ 105. Entry, Record, and Certificate of Sale.

[a] A sheriff's bill of sale of goods sold on execution need not be in form a certificate of sale, if it contains all the essentials of a certificate.—Lay v. Neville, 25 Cal. 545.

[b] A duplicate of a sheriff's certificate of sale of land was deposited by the sheriff with the recorder of the proper county, indorsed "filed" by the latter officer, recorded as a deed in a book of records of deeds, and regularly indexed as a deed, and afterward placed in a file of recorded deeds, but not with a file of certificates of sales, where it remained in said recorder's office till the time of the trial of the case, some ten years afterward. Held, that notice was imparted to subsequent purchasers by the instrument thus deposited and preserved.—Page v. Rogers, 31 Cal. 293.

[c] The filing of a sheriff's duplicate certificate of sale in the office of the county recorder imparts constructive notice of the estate acquired under it to subsequent purchasers and attaching creditors, and such notice continues after the time for redemption has expired and until the sheriff's deed has been delivered and recorded.—Page v. Rogers, 31 Cal. 293.

[d] The purpose of filing a duplicate of a certificate of purchase made at execution sale is to give notice to third persons of its existence and contents.—Page v. Rogers, 31 Cal. 293.

[e] If a recorder has a place in his office where he keeps sheriff's certificates of sale, and a given certificate is not kept in that place but in another and different place, its filing does not give notice to third persons of its existence or contents. (Per Shafter, J.) Page v. Rogers, 31 Cal. 293.

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[f] Under Political Code, section 4237, requiring the recorder to record all certificates of sale of real estate on execution, and not providing for any acknowledgment of the same, such a certificate, filed and recorded, imparts notice to the world although unacknowledged.—Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680.

[g] Sheriff's certificate is an instrument whereby interest or title is created under section 1107, Civil Code.—Foorman v. Wallace, 75 Cal. 556, 557, 558, 17 Pac. 680.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1264; 21 Cent. Dig., col. 1262, § 667½.

§ 106. Persons Who may Question Validity of Sale.

[a] A purchaser at sheriff's sale, on execution, in which the sheriff acted without authority of law, acquires a good title, if the execution defendant consents to such sale, for the latter would be estopped from afterward denying the officer's authority.—Lay v. Neville, 25 Cal. 545.

[b] Where a decree foreclosing a street assessment lien was entered, and the premises afterward sold before execution issued, the vendor could not afterward waive the right of his vendee to object to a sale of the property under a void execution.—Dorland v. Smith, 93 Cal. 120, 28 Pac. 812.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1267-1272; 21 Cent. Dig., cols. 1270-1297, §§ 673-686.

§ 107. Opening or Vacating.

[a] If an execution call for more money than the face of the judgment, the execution is not for that reason void; it is only voidable, and a sale thereunder may be valid. Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1267-1287; 21 Cent. Dig., cols. 1297-1359, §§ 687-722.

§ 108. —— Irregularities or Misconduct Affecting Sale.

[a] If sheriff's sale is irregular, remedy is by motion properly made in the court where the judgment was rendered to set aside the sale.—Boles v. Johnston, 23 Cal. 226, 83 Am. Dec. 111.

[b] If a sheriff on an execution sells separate tracts of land in mass the creditor has his remedy by motion to set aside the sale, even if a stranger becomes the purchaser and pays the money for the property.—Browne v. Ferrea, 51 Cal. 552.

[c] A sale in mass, under an execution, of real estate consisting of several known and distinct parcels, at a price greatly below the actual value, is voidable, and will be set aside upon a proper application of the judgment debtor when made in a reasonable time after the sale; but such a sale is not void, and will not be set aside if the application is not made within a reasonable time.—Vigoureux v. Murphy, 54 Cal. 346.

[d] Mere fact that several separate tracts of land belonging to an execution debtor were sold at the execution sale en masse is not sufficient to render the sale void.—Riddell v. Harrell, 71 Cal. 254, 12 Pac. 67.

[e] A judgment debtor may, by parol, waive a sale of the land in parcels, and give authority to sell en masse; and where it does not appear that the sale was not made in solido by express direction of the judgment debtor, or offered in parcels and no bids received, the execution sale will not be set aside because of the sale of the property en masse.—Hudepohl v. Liberty Hill Water etc. Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

FOR AUTHORITIES FROM OTHER STATES:

18 L. R. A. 88, note. See, also, 17 Cyc. 1274-1276; 21 Cent. Dig., cols. 1313-1326, §§ 697-702.

§ 109. —— —— Want or Insufficiency of Notice.

[a] If sheriff, before sale of real estate, neglects to give proper notice the statute gives an adequate remedy against the officer. There is not sufficient cause to set aside or avoid the sale.—Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

[b] A failure to give the proper notice of a sale of real estate under execution does not invalidate the sale, nor does it afford sufficient cause for setting it aside.—Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

[c] The surprise for which a court will set aside proceedings and sale under execution, fair and regular on their face, which have resulted in vesting rights to real property in a purchaser, must be a legal surprise, without fault or negligence of the party who claims to have been surprised; and the party surprised must act promptly, and offer to return any purchase money he may have received.—Central Pac. R. Co. v. Creed, 70 Cal. 497, 11 Pac. 772.

§ 110. —— Inadequacy of Price.

[a] Inadequacy of price, though a fact admissible in evidence to establish fraud, is never of itself sufficient to annul a sale under execution.—Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.

[b] A sale in mass, under a writ of execution, of realty consisting of several known and distinct parcels, at a price greatly below its actual value, is not void, but voidable,

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and on seasonable and proper application will be set aside, when there is reasonable ground to believe it to have been less beneficial to the creditor or debtor than it would have been if differently conducted.—City and County of San Francisco v. Prixley, 21 Cal. 56.

[c] Inadequacy of consideration is not of itself ground for setting aside an execution sale.—(1886) Central Pac. R. Co. v. Creed, 70 Cal. 497, 11 Pac. 772.

[d] An execution sale of the judgment debtor's property, at which the judgment creditor was the purchaser, will not be held fraudulent, against one whose property is secondarily liable for the judgment, merely because of inadequacy of price.—Mayberry v. Whittier, 144 Cal. 322, 78 Pac. 16.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1276-1278; 21 Cent. Dig., cols. 1326-1337, §§ 703-707.

§ 111. —— What Constitutes Inadequacy.

[a] Under execution against the city of San Francisco the sheriff sold in mass a tract a mile in length by half a mile in breadth, which had long previously been laid out into blocks and streets, marked on an official map, and which also had a natural division by means of a creek. The price brought was three hundred and sixty dollars, and the land was alleged to be worth seventy-five thousand dollars. Held that, on application of the judgment debtor, this sale should be set aside. City of San Francisco v. Pixley, 21 Cal. 56.

[b] Where land worth three thousand five hundred dollars is encumbered of record with mortgages for three thousand two hundred dollars, a bid of twenty-five dollars at an execution sale is not disproportionate to the value of the property, after deducting the apparent liens.—Clark v. Chapman, 98 Cal. 110, 32 Pac. 812, 33 Pac. 750.

[c] In a proceeding by a judgment defendant to set aside a sheriff's sale it appeared that six hundred thousand feet of lumber belonging to the execution defendant were sold to claimant for seven hundred dollars, and that the sale was made in lump for a grossly inadequate sum. Held, that the sale was properly set aside.—Georgeson v. Consumers' Lumber Co., 31 Pac. 257.

§ 112. —— Application, Proceedings, Hearing and Determination.

[a] Notice that a motion will be made to set aside an execution is not a stay of proceedings, but an order to that effect must be obtained to prevent the sale, without which, if the sale be to third parties, the motion to set aside cannot be made.—Bryan v. Berry, 8 Cal. 130.

[b] Where property had been sold on execution, and the decree of sale was thereafter held erroneous on appeal, a motion by defendants to have the sale set aside, and to be restored to the possession of their property, as provided in such case by act of May 19, 1853, section 8, is not too late, where the parties moved as soon as they reasonably could, there being no time limited by the statute in which the motion must be made. Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[c] The fact that the purchaser is absent from the state at the time of the sale, or of the motion to set it aside, does not excuse the service on him of notice to show cause. Where personal service cannot be made it should be made as prescribed in section 520 of the Practice Act.—Eckstein v. Calderwood, 34 Cal. 658.

§ 113. Actions to Set Aside Sale.

[a] Since an execution sale en masse of separate parcels of land is not void, but only voidable, one who seeks to set it aside must show that none of the conditions which would authorize a sale of all the parcels together existed at the time of the sale.—Hudepohl v. Liberty Hill Water etc. Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1282-1285; 21 Cent. Dig., cols. 1359-1376, §§ 723-733.

§ 114. Collateral Attack on Sale.

[a] Regularity of sheriff's sale cannot be impeached by stranger, or in a collateral proceeding.—Kelsey v. Dunlap, 7 Cal. 160.

[b] In a collateral action, a court of equity will not set aside a sheriff's deed on account of irregularities in the levy and sale.—Boles v. Johnston, 23 Cal. 226, 83 Am. Dec. 111.

[c] Title of execution purchaser cannot be collaterally attacked on ground that lots were sold en masse after period of redemption. Gregory v. Bovier, 77 Cal. 123, 19 Pac. 232.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1285, 1286; 21 Cent. Dig., cols. 1377-1387, §§ 736-739.

B. TITLE AND RIGHTS OF PURCHASER.

NATURE AND EFFECT OF TRANSFER, IN GENERAL, § 115.
RIGHT TO ASSUME VALIDITY OF OFFICERS' ACTS, § 116.
PROPERTY PASSING BY SALE AND ESTATE OR INTEREST AND RIGHTS ACQUIRED, § 117.
—— CROPS, § 118.
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—— RIGHTS PASSING AS INCIDENTS, § 124.
LIENS OR ENCUMBRANCES ON PROPERTY, § 125.
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RIGHTS AND REMEDIES ON AVOIDANCE OF SALE, OR FAILURE OF TITLE, § 142.
LIABILITIES OF PURCHASERS, § 143.
PURCHASERS FROM EXECUTION PURCHASERS, § 144.

§ 115. Nature and Effect of Transfer in General.

[a] While it is the duty of the sheriff to make return on his execution of his proceedings under the levy, the purchaser is not responsible for his neglect, and need not show that the return was made, as it is sufficient for the purchaser to show judgment, execution, levy, sale, and deed.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

[b] One who deraigns title to property through a sale under an execution must show not only the execution and sale, but also a valid judgment in support of the execution, and the purchaser must see, at his peril, that there is a valid judgment in existence at the time he made his purchase.—Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1342; 21 Cent. Dig., cols. 1391-1401, §§ 743-746.

§ 116. Right to Assume Validity of Officers' Acts.

[a] Purchaser may assume that acts of officers preceding sale have been duly performed.—Frink v. Roe, 70 Cal. 302, 11 Pac. 820.

§ 117. Property Passing by Sale and Estate or Interest and Rights Acquired.

[a] A sold a tract of land to B. Only part of the purchase money was paid. B sold part of the land to C, who had notice of A's lien, and gave a mortgage for the purchase money. A recovered judgment against B and sold his interest. Held, that the purchaser at sheriff's sale acquired no title in the debt on the mortgage due from C to B.—Bryan v. Sharp, 4 Cal. 349.

[b] The purchaser at an execution sale acquires the right, title, and interest of the debtor.—Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561.

[c] Purchaser of judgment on sale under execution and levy takes as assignee only—assuming that a judgment is the subject of levy and sale. The sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner.—Fore v. Manlove, 18 Cal. 436.

[d] The purchaser of real property at a sheriff's sale who receives the sheriff's certificate of purchase has not a title to the property, but a lien on the same.—Baber v. McLellan, 30 Cal. 135.

[e] A purchaser at a sale under an execution acquires an equitable conditional estate, which continues until the time of redemption has expired; and the judgment debtor then has but a barren legal title, liable to be devested at any time by the execution and delivery to the purchaser of a conveyance by the sheriff who made the sale.—Page v. Rogers, 31 Cal. 293.

[f] A note for the payment of money is liable to seizure and sale on execution, and a purchaser at the sale thereof, when the note is delivered to him, takes the same on the same terms as though it had come to his hands as a purchaser in due course of business.—Davis v. Mitchell, 34 Cal. 81.

[g] All beneficial estates, whether legal or equitable, being liable to be taken on execution, a purchase, under an execution sale, of the interest of San Francisco in water lots, and the sheriff's deed in pursuance thereof made, held to operate as an assignment of the equitable estate remaining in the city after the legal estate vested in the commissioners of the funded debt.—Le Roy v. Dunkerly, 54 Cal. 452.

[h] Interest of debtor at date of sale passes to purchaser, though acquired after levy. Frink v. Roe, 70 Cal. 305, 11 Pac. 820.

[i] Purchaser acquires only real interest of defendant.—Frink v. Roe, 70 Cal. 302, 11 Pac. 820.

[j] Purchaser under execution gets no title save that of the judgment debtor.—Breeze v. Brooks, 71 Cal. 169, 11 Pac. 885.

[k] Purchaser at execution sale has lien on property during redemption period.—Swain v. Stockton S. & L. Soc., 78 Cal. 604, 12 Am. St. Rep. 118, 21 Pac. 365.

[l] A sale of land under execution on a judgment against persons having no title, though in possession, cannot pass the title.

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Pekin Min. etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679.

[m] An execution sale of the possessory right to land, and to the water used as appurtenant thereto, conveys no title to any part of the water flowing thereon which had been abandoned and appropriated and used by an adjoining owner as an appurtenance to his land, to which he had acquired a state certificate of purchase.—Smith v. Green, 109 Cal. 228, 41 Pac. 1022.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1348; 21 Cent. Dig., cols. 1402-1430, §§ 747-760.

§ 118. —— Crops.

[a] A purchaser at an execution sale of an interest in growing crops obtains title in the same as a tenant in common, notwithstanding an agreement in good faith between the cotenant and the execution debtor that the title to the grain should not pass till it was threshed.—Schell v. Simon, 66 Cal. 264, 5 Pac. 238.

[b] Under Civil Code, section 822, giving the lessor of real property any remedies against the assignees of the lessee which he had against the immediate lessee for any cause of action accruing while they are assignees, an execution purchaser of the leasehold is bound by the conditions of the lease for the payment and delivery to the landlord of a proportion of the crops raised by the lessee as rent.—Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889.

[c] A lessor sued defendant for a conversion of crops grown on a leasehold purchased by defendant under execution against the lessee. The lease provided that crops grown on the premises should be the lessor's until the lessee performed certain conditions. Held that, as the conditions had not been performed, the purchaser acquired no right to the crop. Farnum v. Hefner, 16 Pac. 324.

FOR AUTHORITIES FROM OTHER STATES:

Growing crops, execution sale of land, when pass to purchaser: 19 Am. Dec. 752, note.

§ 119. —— Rights Under Contract of Purchase.

[a] R. bought an undivided two-thirds of a mining claim, but had paid only a small part of the purchase money, when the whole claim was attached on a debt of the company contracted prior to the conveyance, and sold, H. receiving the sheriff's deed therefor. In an action by R. against H. brought under section 254 of the Practice Act, it was held that H. acquired only the one-third undivided interest, and R. the two-thirds.—Ross v. Heintzen, 36 Cal. 313.

[b] Defendant contracted to convey land on being paid therefor at the times stated in the contract. The purchaser took possession, and his interest was sold to plaintiff under execution, but before plaintiff obtained possession the purchaser surrendered to defendant. Held, that plaintiff was not entitled to any relief against defendant without showing performance or tender of performance of the contract.—Chase v. Cameron, 133 Cal. 231, 65 Pac. 460.

§ 120. —— Partnership Rights and Interests.

[a] Where partnership property is seized under an execution against one member of a firm for his individual debt, a sale under such execution passes the interest of the debtor partner only in the residuum of the partnership property after settlement of the partnership debts.—Robinson v. Tevis, 38 Cal. 611.

§ 121. —— Trust Estates.

[a] Sale on execution against trustee conveys only his personal interest, and does not affect rights of beneficiaries.—De Celis v. Porter, 59 Cal. 464.

[b] D. conveyed his interest in lands to defendants in trust to be leased, and one-half of the profits applied to his support during his life, and at his death the whole to go to his children. After the execution of the trust deed, plaintiff, whose claim arose prior thereto, levied an execution on D.'s interest in the land, and at the sale bid it in, taking a sheriff's deed. Afterward, plaintiff received the balance due on the judgment, and entered a satisfaction in full. Held, that plaintiff had no other standing than that of a purchaser at execution sale, and that he took nothing but D.'s equitable interest, which ceased on D.'s death.—Judson v. Lyford, 23 Pac. 58.

§ 122. —— Subsequently Acquired Title.

[a] There is no relation of contract between the party acquiring a new title and the purchaser at the sheriff's sale as to constitute the former the trustee of the latter, as to such newly acquired title, nor does such title inure to the benefit of the purchaser at the sheriff's sale.—Montgomery v. Whiting, 40 Cal. 294.

[b] Section 33 of the statute concerning conveyances, which provides that a conveyance of land in fee simple absolute shall convey the legal estate afterward acquired by the grantor, has no application to a sheriff's deed made under execution sale.—Kenyon v. Quinn, 41 Cal. 325.

[c] If, after the levy of an execution by the sheriff on public land, and, before the sale, the judgment debtor, being a pre-emptioner, pays for the land levied on, and obtains a certificate of purchase, the purchaser at sheriff's sale succeeds only to the equitable title of the judgment debtor, who, when he obtains the legal title by means of the patent, holds it in trust for the purchaser at

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the sheriff's sale.—Kenyon v. Quinn, 41 Cal. 325.

[d] After-acquired title of judgment debtor does not pass to purchaser.—Frink v. Roe, 70 Cal. 302, 11 Pac. 820.

§ 123. —— Time as of Which Title Vests in Purchaser.

[a] Statute does not design to invest purchaser with title until six months after the sale.—Duprey v. Moran, 4 Cal. 196.

[b] The effect of an execution sale under a judgment is the same as that of a decreed sale to satisfy a mortgage, so that decisions as to the one apply equally to the other; the sheriff's conveyance, which alone can pass the title, taking effect as from the date of the mortgage or of the lien of the judgment. McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

[c] If execution is levied on real estate while the judgment lien subsists, and the execution is returned without sale, and after the judgment lien has expired another execution is issued and levied, and a sale is made thereunder, the title acquired takes effect by relation from the time when the second execution was levied.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

[d] Title acquired by sheriff's deed relates back to levy of attachment.—Reilly v. Wright, 117 Cal. 80, 49 Pac. 970.

[e] A judgment is not a lien on a leasehold, and, where execution is not levied thereon, the execution purchaser's right takes its inception from the time of sale, or from the giving of notice thereof.—Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889.

FOR AUTHORITIES FROM OTHER STATES:

Effect of execution sale by relation: 15 Am. Dec. 249, note. See, also, 17 Cyc. 1294; 21 Cent. Dig., cols. 1428-1430, § 760.

§ 124. —— Rights Passing as Incidents.

[a] Where master of a vessel was one-third owner, and his interest was sold under execution, the purchaser of his interest is not entitled to supersede the master in command of the vessel, such right not passing as an incident of the sale.—Loring v. Illsley, 1 Cal. 24.

[b] Where an owner of cattle entered into a contract by which A agreed to pasture them for a given number of years, and to secure fulfillment executed a mortgage on his land, and the cattle were thereafter sold on execution on a judgment against the owner, the purchaser at the sale did not thereby acquire title to the contract for pasture and mortgage securing it.—Abadie v. Lobero, 36 Cal. 390.

[c] A purchaser of land at a sheriff's sale under execution does not, by virtue of his purchase, acquire any interest in the judgment on which the execution or order of sale issued, or the debt on which the judgment was rendered.—Abadie v. Lobero, 36 Cal. 390.

[d] Execution purchaser is entitled to be subrogated to superior lien held under prior mortgage.—Swain v. Stockton S. & L. Soc., 78 Cal. 604, 605, 12 Am. St. Rep. 118, 21 Pac. 365.

[e] Under a lease providing that the crop shall be the property of the lessor until it is delivered to him, when he shall immediately redeliver two-thirds of it to the lessee, one who purchases the leasehold interest at execution sale may harvest the crop and fulfill the lessee's agreement.—Farnum v. Hefner, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1293; 21 Cent. Dig., cols. 1430-1433, § 761.

§ 125. Liens or Encumbrances on Property.

[a] The purchaser of property on execution may have a lien on the property prior to that of the one entitled to redeem from the execution purchaser. The fact that he is creditor does not devest his lien. He may be both a creditor and purchaser, and still have a lien prior to that of the redemptioner; but this can only be upon the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed.—Knight v. Fair, 9 Cal. 117.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1294-1297; 21 Cent. Dig., cols. 1433-1456, §§ 762-767.

§ 126. —— Mortgages.

[a] A made a conveyance of real estate to B, leaving part of the purchase money unpaid. B afterward mortgaged the same property to C, with notice of A's claim. A brought an action at law against B, obtained judgment for the balance due, issued execution, and sold B's interest in the property. C afterward foreclosed his mortgage, and advertised the property for sale. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterward dissolved, on the ground that he had bought only B's equity of redemption, as the sale was subject to the rights of C. Held, that this judgment of the court below was correct.—Allen v. Phelps, 4 Cal. 256.

[b] Execution sale takes precedence of an unrecorded mortgage.—Smith v. Randall, 6 Cal. 47.

§ 127. —— Removal of Encumbrance.

[a] F. holding a contract to purchase land from G., his interest was sold under execu-

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tion and purchased by the intervener, who, after receiving his deed in due time, tendered the balance of the purchase money to G. and demanded a deed. G. refused to receive the money or make the deed, and in execution of his contract conveyed the land to the wife of F. and to E. F., the wife of one of the plaintiffs, to whom, also, a tender of the money and demand for a deed was made by the intervener. Afterward E. F. conveyed to F. and his wife, and they executed a mortgage to the plaintiffs to secure the consideration for the conveyance. Held, in an action for foreclosure, that the intervener, upon paying into court, to be applied to the payment of the mortgage debt, the amount of the principal and interest due to the defendants for the purchase money paid under the contract of sale, was entitled to a cancellation of the mortgage.—Fish v. Fowlie, 58 Cal. 373.

§ 128. Bona Fide Purchasers.

[a] A title acquired at sheriff's sale by a bona fide purchaser without notice cannot be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record which showed due service of the defendant was in fact false.—Reeve v. Kennedy, 43 Cal. 643.

[b] An innocent purchaser of property sold under execution, who, as assignee of a redemptioner's right to a sheriff's deed, obtains title under the execution sale without notice of any irregularity in the sale, will be protected therefrom, whether proceeded against by an action or by a motion to set the sale aside.—Hudepohl v. Liberty Hill Water and Min. Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1298-1305; 21 Cent. Dig., cols. 1458-1506, §§ 769-790.

§ 128½. —— Application of Doctrine of Caveat Emptor.

[a] The doctrine of caveat emptor applies only to sales made upon valid judgments, and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment, and that he may possibly acquire nothing.—Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561.

§ 129. —— Notice.

[a] A person who purchases at sheriff's sale stock of a corporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice, and takes such stock subject to the claim of the pledgee.—Weston v. Bear River etc. Min. Co., 6 Cal. 425.

[b] January 26, 1855, judgment against C. became a lien on his land. May 7, 1855, R. purchased the land at sheriff's sale made on an execution issued on the judgment, and received a certificate, and a duplicate was filed in office of the recorder. A judgment in favor of H. against C. became a lien on same land March 1, 1855. November 17, 1855, H. purchased at sheriff's sale made on an execution issued on his judgment the same land, and a certificate of sale was made to him, and a duplicate also filed. July 7, 1858, H. received and recorded a sheriff's deed. November 15, 1861, P., the assignee of R.'s certificate, received and recorded a sheriff's deed. H. had no actual notice of the sale to R. H. was in possession under his purchase, and November 6, 1861, P. sued to recover possession. Held, that H. had constructive notice of the prior sale, and that P. was entitled to recover.—Page v. Rogers, 31 Cal. 293.

[c] The fact that a wife joins her husband in a deed of land is not of itself constructive notice to subsequent purchasers at a sheriff's sale of a prior unrecorded deed to the wife. Vassault v. Austin, 36 Cal. 691.

[d] A purchaser at a sheriff's sale is bound to inquire at his peril whether it sufficiently appears on the face of the record that the court had jurisdiction to render the judgment, and whether the execution was valid; but beyond that he is not bound to inquire, even though the judgment is afterward reversed for error.—Reeve v. Kennedy, 43 Cal. 643.

[e] Where a complaint was filed to set aside an execution sale on account of matters extrinsic to the judgment, and the purchaser was not a party to the judgment, and there was no averment that the purchaser had notice of such matters, he will be deemed a purchaser without notice.—Reeve v. Kennedy, 43 Cal. 643.

[f] If the plaintiff in a judgment bids in real estate sold on execution issued under it in the name of another person, but applies the amount due on the judgment in payment of the bid, and is himself the real purchaser, such other person will be deemed to have notice of all matters affecting the validity of the judgment and sale under it, which were within the knowledge of the plaintiff in the judgment.—Barber v. Reynolds, 44 Cal. 519.

[g] Purchaser of stock sold under execution without notice of a previous assignment by the plaintiff takes free from the assignee's lien where there was no transfer on the books of the corporation.—Naglee v. Pacific Wharf Co., 20 Cal. 529; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600.

[h] A purchaser of shares of corporate stock at execution sale is bound by notice

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of defects in the judgment debtor's title. Blakeman v. Puget Sound Iron Co., 72 Cal. 321, 13 Pac. 872.

[i] Judgment creditor sought to set aside a sale on execution under a prior judgment, on ground that land, consisting of separate parcels, was sold together. Complaint showed that land had been redeemed by a prior judgment creditor, and by him sold. Held that, as the complaint failed to allege that purchaser had notice of the irregularity, a demurrer thereto was properly sustained. Hudepohl v. Liberty Hill Water etc. Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1301-1303; 21 Cent. Dig., cols. 1485-1500, §§ 781-788.

§ 130. —— Defects in Judgment.

[a] Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued.—Wells v. Stout, 9 Cal. 479.

[b] Where a purchaser for value at a sheriff's sale, who is not the judgment creditor, had no notice that service had not been made on the defendant, and the record showed that such service was made, his title cannot be defeated by such failure of service. Reeve v. Kennedy, 43 Cal. 643.

§ 131. —— Encumbrances.

[a] Execution purchaser without notice takes subject to prior mechanic's lien without regard to lis pendens.—Head v. Fordyce, 17 Cal. 149, 151.

[b] A grantee in a sheriff's deed sold on execution land on which there was an unrecorded mortgage, in order to bring himself within the act concerning conveyances (section 16) as purchaser in good faith and for a valuable consideration, must show that his conveyance was recorded before the mortgage was.—Thomas v. Vanlieu, 28 Cal. 616.

§ 132. —— Purchasers from Execution Purchasers.

[a] One who buys land, and takes an assignment of the judgment from the execution plaintiff, who holds only by a sheriff's certificate (not deed), is charged with notice of all that has been done and that can be done in the suit, and stands no better than the plaintiff.—Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

§ 133. —— Judgment Creditor as Purchaser.

[a] Registration act only protects purchasers; creditors, as such, are not included within its provisions. But a judgment creditor, purchasing at his own sale, without notice, is a bona fide purchaser within the act.—Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

[b] Neither the judgment plaintiff nor his assignee are bona fide purchasers without notice of judicial sale, so that they will be protected on reversal of the judgment.—Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[c] One who takes an assignment of an erroneous judgment, and procures an execution to be issued thereon, and purchases land under the execution, is not entitled to protection as a bona fide purchaser, and is liable for the damages caused by the sale.—Reynolds v. Hosmer, 45 Cal. 616.

[d] A judgment creditor of the husband, who purchases property standing in the husband's name at a sale under execution upon his judgment, although he pays no money therefor, but credits the amount of his bid on his judgment, stands in the same position as a third party making a purchase under the execution and paying a money consideration therefor, and is protected against a latent equity arising from a resulting trust in favor of the wife, of which the judgment creditor had no notice.—Riley v. Martinelli, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 597.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1304, 1305; 21 Cent. Dig., cols. 1500-1506, §§ 789, 790.

§ 134. Effect of Defects or Irregularities.

[a] A sale under a void judgment passes no title. If the judgment is merely voidable the sale is good.—Gray v. Hawes, 8 Cal. 562.

[b] The fact that an execution was issued on real property during the pendency of a preliminary injunction restraining the same does not render a sale thereunder invalid, and a deed to the purchaser conveys a valid title, though the same might have been set aside on proper proceedings at the instance of the judgment debtor.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

[c] A sale under an execution issued on a judgment which is voidable only, and which has not been reversed or set aside, is valid, and conveys a good title to the purchaser.—Moore v. Martin, 38 Cal. 428.

[d] The validity of a purchaser's title to property purchased at a sheriff's sale is unaffected by the failure of the officer to make a seizure of the land in the mode or by the steps prescribed by statute. His power to sell comes from the judgment and execution, and is not to be measured by his proceedings under the writ. If he sell the land by a description sufficiently certain, the title of the debtor, as against the parties to the writ, will pass, unless redeemed in time.—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441.

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[e] The title of a purchaser at a sheriff's sale is not affected by the failure of the officer to show in his return that he levied before selling.—McFall v. Buckeye Grangers' Warehouse Assn., 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1306-1308; 21 Cent. Dig., cols. 1506-1525, §§ 791-796.

§ 135. Effect of Modification or Reversal.

[a] Where execution on a judgment for the recovery of money is not stayed by the undertaking on appeal, sale may be made on the execution, and the rights of purchasers are not affected by the subsequent reversal of judgment.—Farmer v. Rogers, 10 Cal. 335.

[b] A sale to an execution plaintiff will be rendered invalid by the reversal of the judgment, as respects the costs of the suit.—Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[c] After reversal of a judgment defendant may, by motion in an action in which the judgment is rendered, obtain an order requiring plaintiff to restore to him land that had been sold to plaintiff under the judgment.—Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[d] Mining claims were sold to a judgment creditor upon an execution issued on a judgment rendered against the owners for the full amount of such judgment. Afterward the judgment was reduced in amount by the court on an appeal taken therefrom by such owners. Held, that such sale was valid when made, but upon such modification of the judgment was liable to be set aside, on the application therefor by the owners, either by the appellate court or the court below upon the return of the case, or by action by the owners against the purchaser; but, except upon such application or action, the validity of the sale would remain unaffected by the modification of such judgment.—Johnson v. Lamping, 34 Cal. 293.

[e] Where a prior judgment creditor was not entitled to a lien on property sold to the whole amount of his judgment, and the judgment was subsequently modified, a subsequent judgment creditor must tender the amount for which the prior judgment was a lien before the expiration of the period of redemption, in order to preserve his rights in the property sold.—Tilley v. Bonney, 123 Cal. 118, 55 Pac. 798.

[f] The rule under which property bid in by the plaintiff at an execution sale under his judgment is restored to the defendant, if the judgment be afterward reversed, has no application to a case where the judgment is modified without causing loss to the appellant by a sale under the judgment; and the relief of causing restitution to be made of property improperly applied in satisfaction of a judgment should be sought in the court out of which the process issued, and not in the appellate court.—Hewitt v. Dean, 91 Cal. 617, 27 Am. St. Rep. 227, 28 Pac. 93.

[g] Where property was sold under a judgment, the amount of which was subsequently reduced on appeal, such modification does not affect the certificate of sale, nor require the judgment creditor to again sell the property under the judgment as modified.—Tilley v. Bonney, 123 Cal. 118, 57 Pac. 798.

[h] Where, in an action to determine the priority of certain judgments, one of them, which was never appealed from, was modified, a subsequent judgment creditor cannot have such judgment set aside, nor a certificate of sale of property thereunder vacated, on motion; especially where he did not offer to redeem, by payment of the amount for which the judgment was a lien, within the statutory period, and did not move until fifteen months after the modified judgment was entered.—Bonney v. Tilley, 123 Cal. 126, 55 Pac. 801.

[i] Under the direct provisions of Code of Civil Procedure, section 957, the measure of damages in an action to recover for property sold under an execution based on a judgment subsequently reversed is limited to the proceeds of the execution sale, less the expenses thereof.—Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167.

[j] Under Code of Civil Procedure, section 957, providing that on the reversal of a judgment the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale, less the expenses thereof, attorney's fees are not recoverable.—Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167.

[k] Where a judgment, under which personal property has been sold upon execution to the judgment creditor, who applied the price upon the judgment, has been reversed upon appeal, the original owner is entitled to restitution of the property, or its value, and may maintain an action therefor against the administratrix of the deceased purchaser. There can be no defense of bona fide purchase in such action, and no equity can be asserted by the defendant.—Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.

[l] Defendant recovered judgment against intestate during his lifetime, levied on his property, and purchased part of it at the sale. The judgment was afterward reversed, and on a new trial plaintiff was nonsuited, the latter judgment being affirmed on appeal. Held, that the fact that the administratrix was present at the sale under the judgment and purchased part of the property did not estop her from asserting her right to restitution.—Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.

[m] The rights of a defendant whose property has been sold on execution, where the judgment has subsequently been reversed, do not depend on Code of Civil Procedure,

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section 957, authorizing the court to make restitution on reversal so far as consistent with the protection of a purchaser at a sale under the judgment.—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419.

[n] Where a stranger to an action purchases defendant's property at execution sale under a judgment for plaintiff, his title so acquired will not be affected by a subsequent reversal of the judgment.—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419.

[o] Where plaintiff, under his judgment, purchases defendant's property at execution sale, his title so acquired will be defeated by a subsequent reversal of the judgment.—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419.

[p] Defendant, on securing a reversal of a judgment under which his property was sold to plaintiff and pending the appeal was sold by plaintiff to a purchaser, does not need an order of restitution from the court to enable him to assert his right against such purchaser to the property.—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419.

[q] Plaintiff claimed title to certain land under execution sale and sheriff's deed to his grantors. After such sale the judgment was reversed in the supreme court as far as it awarded counsel fees, but was in all other respects affirmed. Held, that, since no order for the restitution of the property sold was ever made, as provided by Code of Civil Procedure, section 957, plaintiff's title acquired by the execution sale was not affected by such reversal.—Purser v. Cady, 49 Pac. 180.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1309, 1310; 21 Cent. Dig., cols. 1525-1532, §§ 797-799.

§ 136. Right to Possession.

[a] The purchaser of a mortgagor's interest in a mining claim at an execution sale has the right of possession, as against the mortgagee, until foreclosure.—Halsey v. Martin, 22 Cal. 645.

[b] A purchaser of real estate under execution is not entitled to possession, as against the judgment debtor or his successor in interest in possession, prior to the expiration of the period of redemption.—Mau, Sadler & Co. v. Kearney, 143 Cal. 506, 77 Pac. 411.

FOR AUTHORITIES FROM OTHER STATES:

Defenses available to defendant in execution when used in ejectment by purchaser thereunder: 84 Am. Dec. 570, note.

Execution sale of chattels, retention of possession by judgment debtor after: 15 Am. Dec. 671, note. See, also, 17 Cyc. 1310-1317; 21 Cent. Dig., cols. 1532-1564, §§ 800-814.

§ 137. —— Actions for Recovery.

[a] The plaintiff having purchased property at a sheriff's sale, he has a right to bring his suit for possession; and, if he discovers a fraud after the institution of his suit, he may so shape his action as to include it for the consideration of the court.—Truebody v. Jacobson, 2 Cal. 82.

[b] In an action by a purchaser at an execution sale to recover the premises from one who, previous to the sale, had conveyed them to the execution debtor by a warranty deed, the defendant is estopped from asserting any title thereto, and cannot avail himself of any defect in the description of the property in the sheriff's deed to the plaintiff.—Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61.

[c] An execution defendant cannot defeat an action of ejectment, brought by the purchaser of real estate at an execution sale, for the recovery of such property, by setting up title.—McDonald v. Badger, 23 Cal. 393, 83 Am. Dec. 123.

[d] A sheriff's deed, transferring to a purchaser all the interest which the execution debtor has in land at the date of the levy, will not estop the latter from asserting a subsequently acquired right or interest in the land as against such deed.—Emerson v. Sansome, 41 Cal. 552.

[e] The fact that before the purchaser at a sheriff's sale, or his grantees, has received a deed from the sheriff, a person claiming title through a conveyance from the judgment debtor has entered into possession and made valuable improvements, without objection by the purchaser at the sheriff's sale, or his grantees, is not sufficient to constitute an equitable estoppel against the latter.—Leonard v. Flynn, 89 Cal. 535, 23 Am. St. Rep. 500, 26 Pac. 1097.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1312-1317; 21 Cent. Dig., cols. 1541-1564, §§ 806-814.

§ 138. —— —— Evidence.

[a] Purchaser rests for title upon judgment, execution, levy, sale and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

[b] A certificate of purchase of real estate at execution sale is incompetent to establish a right to the possession thereof.—McMinn v. O'Connor, 27 Cal. 238.

[c] On an application for a writ of assistance to place a purchaser of land sold by a sheriff on execution under a judgment for taxes in possession, such judgment having been rendered by a justice of the peace, the applicant must produce in evidence the execution, and the judgment and proceedings on which the execution was issued.—People v. Doe, 31 Cal. 220.

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[d] On an application for a writ of assistance to place a purchaser of land sold under execution in possession, the purchaser must produce the execution, the judgment and the record of proceedings on which the execution was issued.—People v. Doe, 31 Cal. 220.

[e] In an action for the possession of property bought at an execution sale, the purchaser, in order to establish in himself such title as the defendant in execution had, is only held to show a judgment of a court of competent jurisdiction, no matter if it be erroneous on its face, valid process issued to the sheriff thereon, and a sheriff's deed, made upon a sale thereunder; the proceedings not being open to collateral attack.—Mayo v. Foley, 40 Cal. 281.

[f] A party who relies on a sheriff's deed must offer in evidence not only the deed but the judgment and the execution, by virtue of which the property was sold.—Quirk v. Falk, 47 Cal. 453.

[g] In an action of ejectment on a sheriff's deed against the defendant in execution, the plaintiff is only required to show the judgment of a court of competent jurisdiction, the execution issued thereon, and the sheriff's deed.—Los Angeles County Bank v. Raynor, 61 Cal. 145.

[h] In order to recover possession of property purchased at execution sale, it is necessary to introduce in evidence the judgment as a basis of the execution.—Purser v. Cady (Cal.), 49 Pac. 180.

§ 139. Rents and Profits.

[a] Under Practice Act, section 236, providing that the purchaser at execution sale may receive from the tenant in possession the rents of the property sold, or the value of its use and occupation, a sheriff's sale of lands in possession of the debtor's tenant operates as an assignment of the lease, so far as the vendee's right to rent is concerned.—Reynolds v. Lathrop, 7 Cal. 43.

[b] Where the possessory claim of a settler on public land was sold out on execution, and he afterward entered the same land as a homestead, under act of Congress of May 20, 1862, held that, though the purchaser under the sheriff's deed was not entitled to the possession of the land, he was entitled to the rents and profits for so long as the settler occupied the land intermediate the sheriff's deed and the homestead entry.—Emerson v. Sansome, 41 Cal. 552.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1317, 1318; 21 Cent. Dig., cols. 1564-1572, §§ 815-817.

§ 140. —— During Period for Redemption.

[a] The purchaser at sheriff's sale of a "water ditch" is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant.—Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600.

[b] Where a judgment debtor remains in possession of a "water ditch" after sheriff's sale, and collects the rents and profits during the six months following, he is a trustee of the fund for the purchaser at the sale, and if the fund be in danger of loss, a bill in equity to account will lie.—Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600.

[c] Judgment debtor who redeemed his property within twenty-one days after the sheriff's sale, but who had received from his tenants in possession rent between the day of sale and the redemption, is liable to the purchaser at the sale for the amount so received.—Kline v. Chase, 17 Cal. 596.

[d] In an action to recover land on title acquired by sheriff's deed, plaintiff cannot recover for rents and profits accruing during the six months allowed for redemption after the sale.—Henry v. Everts, 30 Cal. 425.

[e] During the period which elapses between the sale of land on execution and the expiration of the time for redemption the statute regards the purchaser as the owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation—in short, the entire beneficial interest in the property, except the actual possession.—Page v. Rogers, 31 Cal. 293.

[f] Under Practice Act, section 236, providing that the purchaser at sale on execution shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof from the time of the sale until redemption, the occupation of the premises from the time of the sale to the execution of the sheriff's deed renders the occupant prima facie the tenant of the purchaser and liable to him for the rent.—Webster v. Cook, 38 Cal. 423.

[g] A purchaser of real estate under execution is not entitled to the appointment of a receiver to take possession, harvest and sell the crops growing on the land prior to the expiration of the period of redemption.—Mau, Sadler & Co. v. Kearney, 143 Cal. 506, 77 Pac. 411.

§ 141. —— Actions.

[a] A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased.—Reynolds v. Lathrop, 7 Cal. 43.

[b] The damages which a plaintiff can recover in an action of ejectment for the use

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and occupation of the premises are such as arise subsequent to the accruing of his right of possession; and, when his right depends upon a sheriff's deed, he cannot recover, in this form of action, for the use and occupation for the six months intervening the sale and the execution of the deed.—Clark v. Boyreau, 14 Cal. 634.

[c] In an action by a purchaser at sheriff's sale to recover rents and profits during the time allowed for redemption, evidence offered by plaintiff to prove title is irrelevant.—Henry v. Everts, 30 Cal. 425.

[d] Where a purchaser of land under execution brought suit against the tenant in possession for rents accruing during the period allowed for redemption, a complaint alleging that the money agreed to be paid by the tenant to the defendant in the execution as rent for the premises was one hundred and fifty dollars per month, payable monthly, and that payment had been demanded by the purchaser and refused, constitutes a sufficient allegation that the rent is due to the purchaser, who was authorized to recover the same under Practice Act, section 236, entitling the purchaser to rents and profits of lands sold under execution during the period of redemption.—Webster v. Cook, 38 Cal. 423.

§ 142. Rights and Remedies on Avoidance of Sale or Failure of Title.

[a] Code of Civil Procedure, section 708, provides that if the purchaser of property at sheriff's sale fail to recover possession "because the property sold was not subject to execution and sale," the court must, after notice, and on motion of such purchaser, revive the original judgment in his name for the amount paid. A judgment against a party and the sureties on his supersedeas bond was paid partly in cash and partly by execution against the principal debtor, and was satisfied of record. Said debtor's wife then sued and recovered from the purchaser the property sold, as being hers, and not her husband's, at the time of the levy and sale. Held, that the purchaser was entitled to relief under said statute against both principal and sureties.—Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627.

[b] A sale made by the sheriff on an order of the court, and under a void execution, is extremely irregular, and is void "in consequence of irregularity in the proceedings concerning the sale," within the meaning of section 708 of the Code of Civil Procedure, providing for a revival of the judgment in favor of the purchaser or his successor in interest, if he fails to recover possession in consequence of such irregularity.—Merguire v. O'Donnell, 139 Cal. 6, 96 Am. St. Rep. 91, 72 Pac. 337.

[c] Code of Civil Procedure, section 708, provides that, if a purchaser at sheriff's sale "fail to recover possession" in consequence of an irregularity in the sale, the court must revive the original judgment for his benefit. Section 336 limits actions on judgments to five years, and section 343 provides that an action for relief not before provided for must be commenced within four years after the cause of action accrues. Held that, as a "failure to recover possession" was not complete until the determination adversely to the purchaser of the execution debtor's suit to quiet title, proceedings under section 708 within four years from that time were not barred, though more than five years had elapsed since the judgment became final, section 336 being inapplicable.—Merguire v. O'Donnell, 139 Cal. 6, 96 Am. St. Rep. 91, 72 Pac. 337.

For Authorities From Other States:

Purchaser's remedy on failure of title: 14 Am. Dec. 131, note. See, also, 17 Cyc. 1319-1322; 21 Cent. Dig., cols. 1573-1584, §§ 819-822.

§ 143. Liabilities of Purchasers.

[a] In an action of ejectment, the defendants justified under a judgment of a justice's court, an execution, and a sale of the demanded premises thereunder by a constable to them. The constable's deed did not refer to the judgment, nor name the plaintiff in this suit as one of the defendants against whom the execution referred to in the deed was issued; and it showed upon its face that the interest of this plaintiff in the premises was not attempted to be sold and conveyed. Held, that the plaintiff was entitled to a verdict and judgment.—Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78.

For Authorities From Other States:

See 17 Cyc. 1322, 1323; 21 Cent. Dig., cols. 1585-1592, §§ 823-826.

§ 144. Purchasers from Execution Purchasers.

[a] An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside, and the property restored to the defendant, where no loss or injury will be done the assignee.—Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[b] An assignee of a sheriff's certificate of sale of land, who has taken the assignment only as security against liability for debts of the judgment debtor, and agreed to cancel the same and discharge the judgment upon payment of those debts, has only a lien on the land which is satisfied by payment of the debts; and neither he nor his assignee with notice can subsequently acquire any title to the land by obtaining the sheriff's deed.—Baber v. McLellan, 30 Cal. 135.

[c] An assignee of the certificate of sale under execution, when the purchaser was plaintiff in execution, does not acquire any interest in the judgment debt or security therefor, but only the right to compel the issuance of a deed on the expiration of the period of redemption.—Abadie v. Lobero, 36 Cal. 390.

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[d] One who takes a conveyance, before expiration of the time for redemption, from the purchaser at a sale under execution, and afterward receives a deed from the sheriff, acquires a perfect title.—Leonard v. Flynn, 89 Cal. 535, 23 Am. St. Rep. 500, 26 Pac. 1097.

[e] Property was sold under execution, and a judgment lienor redeemed, and demanded a sheriff's deed. A junior judgment lienor redeemed afterward, but before the deed was demanded, and paid the sheriff an amount sufficient to redeem from the prior judgment. Held that, as the prior lienor acquired the title of the purchaser under the execution sale, he had such an interest beyond the right of redemption as he was entitled to protect by showing that the subsequent judgment, though regular on its face, was void.—Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

[f] Under Code of Civil Procedure, section 1049, providing that an action is deemed to be pending from the time of its commencement until its final determination on appeal, where plaintiff obtained a judgment under which he sold defendant's land, and purchased it himself, on the execution sale, but before the execution of the sheriff's deed defendant appealed from the judgment, though without obtaining a supersedeas, a subsequent purchaser of the property from plaintiff, pending the appeal, was charged with notice that the judgment and plaintiff's title thereunder were disputed by the defendant, and would be defeated by a reversal, and on a reversal his title derived from plaintiff was also defeated.—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1323; 21 Cent. Dig., cols. 1592-1599, §§ 827, 828.

C. REDEMPTION.

RIGHT TO REDEEM, § 145.
STATUTORY PROVISIONS, § 146.
—— RETROACTIVE OPERATION OF REDEMPTION LAWS, § 147.
PERSONS ENTITLED TO REDEEM, § 148.
—— CREDITORS, § 149.
—— ASSIGNEES, § 150.
—— REDEMPTION BY PERSON NOT ENTITLED TO REDEEM, § 151.
—— WAIVER, § 152.
TIME OF REDEMPTION, § 153.
—— COMPUTATION OF TIME, § 154.
AMOUNT REQUIRED TO REDEEM, § 155.
TENDER AND PAYMENT, § 156.
—— OVERPAYMENT, § 157.
PROCEEDINGS ON REDEMPTION, § 158.
—— PRODUCTION OF PAPERS, § 159.
—— CERTIFICATE OF REDEMPTION, § 160.
REDEMPTION FROM PRIOR REDEEMING CREDITOR, § 161.
ACTIONS TO REDEEM, § 162.
OPERATION AND EFFECT, § 163.
—— INTEREST ACQUIRED BY REDEMPTIONER, § 164.

§ 145. Right to Redeem.

[a] The grantee of a judgment debtor, whose land has been sold under execution, is not a "redemptioner" in the sense in which that word is used in section 705 of the Code of Civil Procedure, and, in order to redeem from the execution sale, need not comply with the conditions imposed by that section on "redemptioners." Such grantee is a "successor in interest" of the judgment debtor, as that phrase is used in section 701 of that code, and is entitled to redeem in the same manner as the judgment debtor.—Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

[b] The rule that a judgment debtor may confess judgment before expiration of the time for redemption for the purpose of making the judgment creditor a redemptioner is inapplicable to judgments void for fraud as against a prior redemptioner.—Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

[c] Where a judgment creditor sued to have a prior judgment declared subsequent to his, but did not ask to have a certificate of sale under such judgment set aside, and did not tender to such judgment creditor the amount for which the judgment was ultimately held to be a prior lien, he cannot acquire a right to the property sold thereunder by tendering such amount after the redemption period has expired.—Tilley v. Bonney, 123 Cal. 118, 55 Pac. 798.

FOR AUTHORITIES FROM OTHER STATES:

See 21 Cent. Dig., cols. 1599-1607, §§ 829-934.

§ 146. Statutory Provisions.

[a] Law allowing time for redemption upon sale made under a judgment rendered before its passage does not impair obligation of a contract.—Moore v. Martin, 38 Cal. 428.

[b] Statutory provisions for redemption existing at time of sale form part of contract of sale.—Thresher v. Atchison, 117 Cal. 75, 59 Am. St. Rep. 159, 48 Pac. 1020.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1324, 1325; 21 Cent. Dig., cols. 1600, 1601, § 830.

§ 147. —— Retroactive Operation of Redemption Laws.

[a] Statute allowing redemption of lands sold under execution is inoperative as to those cases where the debt upon which judgment and execution was obtained was contracted before the passage of the act.—Seale v. Mitchell, 5 Cal. 401.

[b] A statute decreasing the rate of interest to be paid to redeem land sold on execution is inoperative on a sale made prior to the passage of the act.—Thresher v. Atchison, 117 Cal. 73, 59 Am. St. Rep. 159, 48 Pac. 1020.

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[c] Amendment of February 26, 1897 (Stats. 1897, p. 41, c. 44), to Code of Civil Procedure, section 702, extending period of redemption from sales of land on execution held not applicable to judgments existing at time of its passage.—Welsh v. Cross, 146 Cal. 621, 81 Pac. 229.

§ 148. Persons Entitled to Redeem.

[a] Purchaser at execution sale, before conveyance to him, has right to redeem the property sold in the enforcement of a prior lien; after conveyance to him he has the same right as successor in interest to the debtor or mortgagor.—McMillan v. Richards, 9 Cal. 365.

[b] A defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under execution.—Yoakum v. Bower, 51 Cal. 539.

[c] The right of a judgment debtor to redeem land sold under the judgment is not affected by the fact that he did not have title to the land, nor that he had conveyed part of it after the judgment was entered.—Southern California Lumber Co. v. McDowell, 105 Cal. 99, 38 Pac. 627.

[d] A purchaser of land at sheriff's sale or commissioner's sale acquires at least a qualified title, sufficient to entitle him to redeem from another sale, but this does not necessarily devest the judgment creditor of his right to redeem. Rehearing, 138 Cal. 390, 71 Pac. 454, denied.—Pollard v. Harlow, 138 Cal. 390, 71 Pac. 648.

FOR AUTHORITIES FROM OTHER STATES:

Redemption from sale, who may make: 21 Am. St. Rep. 243, note. See, also, 17 Cyc. 1326-1329; 21 Cent. Dig., cols. 1608-1621, §§ 835-845.

§ 149. —— Creditors.

[a] A creditor of the motgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem.—McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

[b] Judgment creditor is not a redemptioner, unless his judgment is a valid lien.—Bagley v. Ward, 27 Cal. 371.

§ 150. —— Assignees.

[a] One who, after land is sold under judgment, receives from the judgment debtor a conveyance of all his interest in the land, "for the purpose of having the certificate of redemption of said property from said sale issued in his name," is a "successor in interest," within the Code of Civil Procedure, section 701, allowing redemption by such successor, though after the entry of the judgment, and before the sale, the judgment debtor had conveyed part of the land to another person, and had never had title to the rest of the land.—Southern California Lumber Co. v. McDowell, 105 Cal. 99, 38 Pac. 627.

§ 151. —— Redemption by Person not Entitled to Redeem.

[a] If purchaser at sheriff's sale treats one not entitled to redeem as redemptioner, recovers from him the redemption money, and gives a certificate of redemption, the most that such party so claiming to redeem can acquire by the transaction is the interest of the purchaser as purchaser. He acquires no title to the judgment under which the sale took place.—Abadie v. Lobero, 36 Cal. 390.

§ 152. —— Waiver.

[a] Debtor whose land has been sold on execution, and who, before delivery of sheriff's deed, deposits with the sheriff money to redeem the land, to withdraw the deposit after the sheriff has made delivery of the deed, ratifies the delivery, and waives any right the debtor might otherwise have had to enforce his redemption.—Wilkins v. Willson, 51 Cal. 212.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1329; 21 Cent. Dig., cols. 1620, 1621, § 845.

§ 153. Time of Redemption.

[a] Redemptioner may exercise his right to redeem land sold on execution, if no redemption has been made by the judgment debtor, at any time during the six months after the sale; and if, in sixty days thereafter, there is no redemption from him, the right to redeem from him is gone, even as to the judgment debtor, and he is entitled to a sheriff's deed.—Boyle v. Dalton, 44 Cal. 332.

[b] Upon a sale of lands upon execution, where no credit is agreed for, if the purchaser does not pay the price until (in this case) five months after the sale, and receives a deed at the expiration of six months after the sale, the deed vests in him the legal title; but the courts will recognize the former owner as being equitably entitled to redeem at any time during six months from the time of payment of the price.—Maina v. Elliott, 51 Cal. 8.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1329; 21 Cent. Dig., cols. 1622-1631, §§ 846-850.

§ 154. —— Computation of Time.

[a] The "months" allowed by statute for redemption from execution sale are calendar, and not lunar, months.—Gross v. Fowler, 21 Cal. 392.

§ 155. Amount Required to Redeem.

[a] Where land was sold at sheriff's sale, the proceeds of which did not amount to the whole judgment, leaving a balance unpaid, and was afterward redeemed under the stat-

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ute, held, that the party redeeming (who was an assignee of the judgment debtor) was bound to pay the whole of the plaintiff's judgment, and not merely his bid with interest, and eighteen per cent; and that the lien of the judgment continued till the balance was paid.—Vandyke v. Herman, 3 Cal. 295.

[b] Under Practice Act, section 231, providing that a redemptioner may redeem from a purchaser by paying eighteen per cent thereon in addition to the bid, the eighteen per cent covers all claims in the nature of interest on that amount.—McMillan v. Vischer, 14 Cal. 232.

[c] A judgment debtor may redeem by paying the purchaser the amount of his purchase, with twelve per cent thereon, together with the amount of taxes, etc., paid by the judgment creditor. He need not pay other liens which the purchaser may have on the property.—Sharp v. Miller, 47 Cal. 82.

[d] The rule, that when real estate is sold on execution to the judgment creditor, for a sum less than the whole amount of judgment, the judgment creditor continues to have a lien for the unsatisfied portion of the judgment, and that neither the judgment debtor nor a redemptioner having a subsequent lien could redeem without paying the judgment, has been changed by the Code of Civil Procedure.—Simpson v. Castle, 52 Cal. 644.

[e] Debtor may redeem lands sold under execution without paying prior judgment in favor of firm of which purchaser is member. Campbell v. Oaks, 68 Cal. 225, 9 Pac. 77.

[f] A husband contracted to buy land, and thereafter the wife tendered the amount due, and then sued to compel a conveyance to her. In the meantime an intervener had bought the land under an execution in his favor against the husband, and received a certificate of sale. Held, that the intervener could not complain of a decree requiring the wife to deposit with the clerk the amount of such execution, costs, interest, etc., to be paid to him upon his discharging his certificate, as a condition precedent to a conveyance to her by defendant.—Foulke v. De Witt, 52 Pac. 476.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1331, 1332; 21 Cent. Dig., cols. 1631-1638, §§ 851-856.

§ 156. Tender and Payment.

[a] Where a party purchased property at sheriff's sale, and, on an attempt by the owner to redeem from him, he objects that the amount tendered for redemption is not enough, because not including certain taxes he has paid on the property, held, that he must show that the taxes were legally assessed and paid, and were a charge on the property before or at the time of the redemption; and the tax collector's receipts are not sufficient proof.—People ex rel. Seale v. Doane, 17 Cal. 476.

[b] The sheriff, as special agent of the purchaser of land under execution, is authorized to receive on behalf of such purchaser as redemption money whatever is regarded as current money at the time and place, though not strictly a legal tender, unless the judgment under which the sale was made was rendered payable in a particular kind of money.—People v. Mayhew, 26 Cal. 655.

[c] If defendant paid in counterfeit money under an innocent mistake a court of equity will relieve him from the consequences of his mistake, and allow him to perfect the redemption on payment of good money and interest.—Pownall v. Hall, 45 Cal. 187.

[d] While it is immaterial whence the money comes with which a redemption from an execution sale is offered to be made, it must be tendered by a lawful redemptioner.—Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

[e] Facts held not to show a sufficient tender by one seeking to redeem from a mortgage foreclosure and redemption by a subsequent mortgagee. (Code Civ. Proc., secs. 701, 703.)—Youd v. German Savings etc. Soc. (Cal. App.), 86 Pac. 991.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1332, 1333; 21 Cent. Dig., cols. 1638-1643, §§ 857-864.

§ 157. ——Overpayment.

[a] Where a judgment creditor redeems from a prior sale under execution, subsequent suits by attachment and injunction to obtain and secure the amounts alleged to be overpaid in the redemption will not affect the validity of the redemption.—McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

[b] Where a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory.—McMillan v. Vischer, 14 Cal. 232.

[c] Where a redemptioner pays the sheriff an excess of money under protest as to the excess, the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. McMillan v. Vischer, 14 Cal. 232.

§ 158. Proceedings on Redemption.

[a] Certificate of sheriff of purchase of property as that of defendant in execution is not sufficient to entitle the holder to redeem as such successor, at least not until the expiration of the six months.—Haskell v. Manlove, 14 Cal. 54.

[b] If party claim sheriff's deed as having redeemed property, as successor in interest of the judgment debtor, his offer to redeem must have been made in that character.—Haskell v. Manlove, 14 Cal. 54.

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FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1333; 21 Cent. Dig., cols. 1644-1649, §§ 865-873.

§ 159. —— Production of Papers.

[a] To entitle a judgment creditor having a lien to redeem he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient.—Haskell v. Manlove, 14 Cal. 54.

[b] The statute gives certain creditors and others the right to redeem the debtor's property from execution sales only upon the production and tender of certain specified proofs of certain requisite facts. The due production of those particular proofs is as much a prerequisite to his right as the existence of the facts to be proved.—Haskell v. Manlove, 14 Cal. 54.

[c] A purchaser at execution sale, as between himself and redemptioner, may waive the production of the papers required by statute as necessary to entitle one to redeem, and such waiver is good as between himself and the parties thereto; and a creditor, not claiming the right to redeem before selling the property under a subsequent execution, cannot object to the waiver nor to the redemption because such papers were not produced.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

[d] A person claiming the right to redeem from a sheriff's sale as a judgment creditor must produce for the sheriff a copy of the docket of the judgment, and an attempted redemption is ineffectual without such production, and the sheriff's deed is void.—Wilcoxson v. Miller, 49 Cal. 193.

§ 160. —— Certificate of Redemption.

[a] In order to render effectual a redemption of real estate sold under execution, the issuance by the sheriff of a certificate of redemption is not necessary.—Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

§ 161. Redemption from Prior Redeeming Creditor.

[a] Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as asisgnee of other judgments, redeemed from plaintiffs; held, that plaintiffs, did not lose their equitable right of redemption, from the fact that they also asserted their statutory right, the subsequent redemption by D. leaving their claims unsatisfied.—Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515.

[b] Since the passage of act of March 28, 1859, a creditor of the execution debtor, redeeming from another creditor who has redeemed from a sale on execution, is not entitled to claim the payment of judgments which have been assigned to him subsequently to the passage of the act, although rendered before its passage.—Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515.

[c] Under Code of Civil Procedure, section 704, authorizing the sheriff to receive money paid by a subsequent redemptioner from an execution sale for a prior redemptioner, the sheriff is not such an agent in receiving the money as will bind the prior redemptioner to accept it.—Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

See 21 Cent. Dig., cols. 1650-1652, §§ 874-877.

§ 162. Actions to Redeem.

[a] Where property has been redeemed from a purchaser under execution sale, such purchaser is not a necessary party to a suit by his redemptioner to enforce the right of redemption against a subsequent redemptioner. Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

[b] A complaint to establish a right of redemption over another redemptioner by showing that the judgment under which the latter redeemed is void need not allege that there was a defense to such judgment on the merits.—Bennett v. Wilson, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1335-1337; 21 Cent. Dig., cols. 1655-1663, §§ 883-889.

§ 163. Operation and Effect.

[a] At a constable's sale, March 22, 1884, one who volunteered his assistance to the justice to write out the certificate of sale inserted his own name as purchaser, and the certificate was signed by the constable and recorded. Afterward the mistake was discovered, and a new certificate was issued to the real purchaser, which recited the sale as taking place July 12th, and which was filed for record July 19th, and the constable executed a deed to the assignee of this certificate. Held, that no title passed to the assignee as against the persons having the right to redeem from the sale, who in the meantime, without notice of the second certificate, had paid the necessary amount, and received a certificate of redemption from the holder of the first certificate.—Pekin Min. etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679.

FOR AUTHORITIES FROM OTHER STATES:

Redemption from execution sales, effect of: 67 Am. St. Rep. 510, note. See, also, 17 Cyc. 1337-1339; 21 Cent. Dig., cols. 1663-1673, §§ 890-900.

§ 164. —— Interest Acquired by Redemptioner.

[a] Deed to redemptioner passes title which would have gone to purchaser, though re-

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demption money is insufficient, if accepted as sufficient.—Abadie v. Lobero, 36 Cal. 396.

[b] Redemptioner, by paying redemption money, becomes an equitable assignee of the certificate of sale.—Abadie v. Lobero, 36 Cal. 396.

[c] One redeeming from sale under execution, when the purchaser was the plaintiff in execution, does not acquire any interest in the judgment debt or security therefor, but only the right to compel the issuance of a deed on the expiration of the period of redemption.—Abadie v. Lobero, 36 Cal. 390.

[d] Redemption from sheriff's sale is transfer of certificate of sale; and if a redemption is made to the satisfaction of the purchaser, and the person redeeming was entitled to redeem, the sheriff's deed to the redemptioner passes the same title that it would have passed to the purchaser if executed to him without redemption, even if the statutory requirements were waived by the purchaser, and he received less than he was entitled to.—Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256-n.

D. CONVEYANCE AND PROCEEDS.

1. Conveyance, §§ 165-177.
2. Proceeds, §§ 178-182.

1. Conveyance.

NECESSITY AND NATURE OF CONVEYANCE, IN GENERAL, § 165.
AUTHORITY TO MAKE CONVEYANCE, § 166.
—— BEFORE EXPIRATION OF PERIOD FOR REDEMPTION, § 167.
—— RESTRAINING MAKING OR DELIVERY, § 168.
RIGHT TO CONVEYANCE, § 169.
—— PERSONS ENTITLED, § 170.
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FORM AND CONTENTS, § 172.
—— COVENANTS OF WARRANTY, § 173.
EXECUTION AND DELIVERY, § 174.
CONSTRUCTION AND OPERATION, § 175.
—— CONCLUSIVENESS OF RECITALS, § 176.
—— RELATION BACK, § 177.

§ 165. Necessity and Nature of Conveyance, in General.

[a] The title to real estate, sold at sheriff's sale does not pass until the execution and delivery of the sheriff's deed.—Anthony v. Wessel, 9 Cal. 103.

[b] Until consummation of sale of real property upon execution is made by conveyance from sheriff the estate remains in the judgment debtor. Until then the purchaser possesses only a right to an estate which may afterward be perfected by conveyance. Cummings v. Coe, 10 Cal. 529.

[c] Purchaser does not, by his purchase, acquire title to the land. The title passes by the execution and delivery of the sheriff's deed. The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land.—People ex rel. Mulford v. Mayhew, 26 Cal. 655.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1340; 21 Cent. Dig., cols. 1674-1676, §§ 901, 902.

§ 166. Authority to Make Conveyance.

[a] Authority to sell land, conferred by writ in sheriff's hands, carries with it authority to execute all instruments required by law to complete sale, viz., a certificate, and, in case of no redemption, a conveyance, to the purchaser.—People v. Boring, 8 Cal. 406, 68 Am. Dec. 331.

[b] Where ex-sheriff, who made sale of land under a writ partially executed by him while in office, dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser is to apply to the court for the appointment of a commissioner or master to execute the conveyance.—People v. Boring, 8 Cal. 406, 68 Am. Dec. 331.

[c] The officer who sells the land under execution is the proper officer to give the deed, even if his office subsequently expires, and not his successor.—Anthony v. Wessel, 9 Cal. 103.

[d] A deed by one professing to be a deputy of a sheriff whose term had expired is worthless, unless due authority to the deputy from some one in office be clearly shown.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

[e] There is nothing in the act of 1858 which will prevent a deputy sheriff, after the expiration of his principal's term of office, and in the absence of the latter from the state, from executing a deed to the purchaser at a judicial sale made by the sheriff while in office.—Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74.

[f] In an action based on a sheriff's deed, the fact that the deed was executed after the sheriff's authority had terminated is a valid defense.—Byers v. Neal, 43 Cal. 210.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1341, 1342; 21 Cent. Dig., cols. 1677-1682, §§ 903-911.

§ 167. —— Before Expiration of Period for Redemption.

[a] A sheriff's deed, upon judicial sale, executed before expiration of statutory period of redemption, is absolutely void and not merely voidable.—Gross v. Fowler, 21 Cal. 392; Bernal v. Gleim, 33 Cal. 668; Moore v. Martin, 38 Cal. 428; Hall v. Yoell, 45 Cal. 584.

[b] One whose land has been sold on execution has six full months within which to redeem, under the code. A sheriff's deed, therefore, executed April 5th, the sale hav-

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ing taken place October 5th, held to have been prematurely executed and void.—Perham v. Kuper, 61 Cal. 331.

§ 168. —— Restraining Making or Delivery.

[a] When an execution sale is made, and the delivery of a deed to the purchaser is threatened, an injunction may be properly granted.—Goldstein v. Kelly, 51 Cal. 301.

[b] In an action to enjoin a sheriff from executing a deed of real property alleged to belong to plaintiff, and to have been sold as the property of another person under an execution against him, the omission to aver in the complaint the existence of a judgment, under which such execution issued, is a fatal defect.—Schuyler v. Broughton, 65 Cal. 252, 3 Pac. 870.

§ 169. Right to Conveyance.

[a] To an application by an execution purchaser for a deed from the sheriff, it is no answer to say that by other conveyances the purchaser has a perfect title, and therefore does not need the deed.—People v. Irwin, 14 Cal. 428.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1342, 1343; 21 Cent. Dig., cols. 1683-1687, §§ 912-916; cols. 1261, 1262, § 667.

§ 170. —— Persons Entitled.

[a] Sheriff's deed to one who has assigned sheriff's certificate is void as to assignee.—Ward v. Dougherty, 75 Cal. 245, 17 Pac. 1.

[b] Quitclaim by purchaser before sheriff's deed is given is equivalent to assignment of sheriff's certificate.—Ward v. Dougherty, 75 Cal. 245, 17 Pac. 1.

§ 171. —— Payment of Purchase Price.

[a] Purchaser at a sheriff's sale acquires no right whatever against the sheriff for property sold unless, at the time of the sale, he pays down in cash the whole of the purchase money.—People v. Hays, 5 Cal. 66.

§ 172. Form and Contents.

[a] It is duty of sheriff, under an execution, to levy upon and sell the property and all the right, title, and interest of the debtor therein; and where a deed made by him in pursuance of such sale expressly conveys all of the debtor's right, title, and interest, the purchaser's title to the same will not be prejudiced by the fact that in attempting to describe the nature of the interest the officer, through ignorance or mistake, failed to set it forth fully and correctly.—Dodge v. Walley, 22 Cal. 224.

[b] The officer who makes a sale of land by virtue of an execution, and executes to the purchaser a deed therefor, must, in his deed, make recitals of the recovery of the judgment, the names of the judgment creditor or creditors, and of the judgment debtor or debtors, and of the issuing of an execution on the judgment, and of the levy and sale thereunder. The recital of such facts is essential to show the officer's authority and the transmission of the debtor's title in the property to the purchaser.—Donahue v. McNulty, 24 Cal. 411.

[c] Where a judgment was rendered against several persons, and an execution issued upon it against all the judgment debtors, and the constable levied upon and sold the land of one of the judgment debtors, but in making a deed to the purchaser did not insert the name of the one whose land had been sold as a judgment debtor or recite that his land had been sold, held that the deed was not evidence of title in the purchaser as against the owner of the land.—Donahue v. McNulty, 24 Cal. 411.

[d] A constable's deed of land sold under execution is void if it does not recite the judgment upon which the execution issued.—Wiseman v. McNulty, 25 Cal. 230.

[e] A sheriff's deed need not recite the judgment and execution under which he acted. It is sufficient if it appear in the deed that the sale was made under the authority of a judgment and execution; that is, if the deed recites sufficient to show the authority of the sheriff to sell.—Clark v. Sawyer, 48 Cal. 133.

[f] The statute requiring recitals in a sheriff's deed was not intended to make deeds void which do not contain them, but was only intended to make the recitals evidence of the facts recited; and, when such recitals are full, they dispense with the necessity of introducing the judgment and execution in evidence. So far as such a statute requires recitals beyond what are necessary to show the authority of the officer to sell, it is merely directory.—Clark v. Sawyer, 48 Cal. 133.

[g] It may be regarded as settled in this state that misrecital of execution in an officer's deed will not affect the validity of the deed if the officer had authority to sell. Wilson v. Madison, 55 Cal. 5.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1344-1346; 21 Cent. Dig., cols. 1688-1701, §§ 917-924.

§ 173. —— Covenants of Warranty.

[a] Sheriff cannot bind execution debtor by covenants of warranty.—Kenyon v. Quinn, 41 Cal. 329.

§ 174. Execution and Delivery.

[a] A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff.—Lewes v. Thompson, 3 Cal. 266.

[b] A sheriff's deed takes effect from the time of its actual delivery, and the execution

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of the deed by the sheriff. and information given by him to the grantee that the deed is ready for him do not amount to a delivery.—Jefferson v. Wendt, 51 Cal. 573.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1346; 21 Cent. Dig., cols. 1701-1704, §§ 925, 926.

§ 175. Construction and Operation.

[a] A sheriff's deed, which described the property sold as all the right, title, and interest of the judgment debtor in certain described property, "being a leasehold unexpired," conveys all the interest of the judgment debtor, although he had a fee for such premises.—Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61.

[b] Sheriff's sale of land may be proved by sheriff's recital of the sale in his deed given to the purchaser, even if the return on the back of the execution does not recite a sale. The sheriff's sale may also be proved by his recital made on the back of the execution or in the certificate of purchase.—Hihn v. Peck, 30 Cal. 280.

[c] A sheriff's deed, reciting that it was made by virtue of an execution issued on judgment wherein A was plaintiff and B was defendant, is admissible in evidence as a proof of transmission of title.—Montgomery v. Robinson, 49 Cal. 258.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1348-1351; 21 Cent. Dig., cols. 1711-1728, §§ 935-948.

§ 176. —— Conclusiveness of Recitals.

[a] The officer executing a deed for property sold under execution, and those who claim under the deed, are estopped from denying the truth of the matters recited therein; but the same are not evidence as against strangers or those claiming adversely to the deed.—Donahue v. McNulty, 24 Cal. 411.

[b] It is the official duty of a sheriff to make a recital in his deed of the judgment, the names of judgment debtor and creditor, the execution, and the levy and sale thereunder; and such recitals, when made, are entitled to the same weight as evidence as the return on the execution.—Hihn v. Peck, 30 Cal. 280.

[c] The recitals in a sheriff's deed of land sold on execution are not admissible to prove his power to sell; but, after production of the judgment and execution, such recitals are entitled to the same effect as instruments of evidence as the official return on execution, and are evidence of his acts under the power.—Hihn v. Peck, 30 Cal. 280.

[d] A sheriff's deed executed to a purchaser at a sale of land under execution is not conclusive evidence of his power to sell, but such power must be proved in an action based on a title acquired at the sale by the judgment in execution.—People v. Doe, 31 Cal. 220.

[e] A sheriff's deed is not admissible in evidence as proof of the purchaser's title to property sold under execution, without first introducing the judgment which was the foundation of the sheriff's authority to sell.—Vassault v. Austin, 32 Cal. 597.

[f] A recital in a sheriff's deed, given to the execution purchaser, "that there had been no redemption from the sale," is not conclusive upon a grantee of the judgment debtor, who had made a valid redemption. The grantee may attack such deed in an action of ejectment, without resorting to equity to have it set aside.—Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1349, 1350; 21 Cent. Dig., cols. 1717-1724, §§ 940-945.

§ 177. —— Relation Back.

[a] A sheriff's deed, executed in pursuance of a judgment obtained in an attachment suit, takes effect by relation as of the date at which the attachment was levied, and overreaches any deed made subsequent to such date.—Sharp v. Baird, 43 Cal. 577.

[b] Sheriff's deed, executed in pursuance of an execution sale, under a judgment rendered in an attachment suit, takes effect from the levy of the attachment. The attachment lien, though merged in the judgment, still exists, so as to confer a priority in the lien of the judgment.—Porter v. Pico, 55 Cal. 165.

[c] A sheriff's deed, executed in pursuance of an execution sale under a judgment in an attachment suit, takes effect from the date of the attachment if the levy was such as to create a lien.—Riley v. Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315.

[d] Sheriff's deed takes effect by relation from date of levy.—Woodward v. Brown, 119 Cal. 306, 63 Am. St. Rep. 108, 51 Pac. 2.

[e] Where land is sold under execution in an attachment suit, the sheriff's deed takes effect as of the date of the levy of the attachment, and a conveyance by the attachment debtor after the attachment was levied, and before judgment, vests no title in his grantee.—Robinson v. Thornton, 31 Pac. 936.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1350, 1351; 21 Cent. Dig., cols. 1724-1728, §§ 946-948.

2. Proceeds.

DISPOSITION IN GENERAL, § 178.
STATUTORY PROVISIONS, § 179.
PREFERRED CLAIMS, § 180.
DISTRIBUTION AMONG DIFFERENT EXECUTIONS OR ATTACHMENTS, § 181.
RIGHT TO SURPLUS, § 182.

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§ 178. Disposition in General.

[a] Payment by sheriff to an execution creditor cannot be defeated by showing that money paid was received from another sale.—Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1351; 21 Cent. Dig., cols. 1729-1738, §§ 949-955.

§ 179. Statutory Provisions.

[a] The general statute defines the duties of the sheriff in respect to final process. It declares "that the sheriff shall execute the writ (of fieri facias) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess, he shall return the same to the judgment debtor." These acts are to be construed in pari materia.—Wilson v. Broder, 10 Cal. 486.

FOR AUTHORITIES FROM OTHER STATES:
See 21 Cent. Dig., col. 1738, § 956.

§ 180. Preferred Claims.

[a] Code of Civil Procedure, section 1206, provides that a claim for wages accruing against a judgment debtor within sixty days preceding levy of execution shall be a preferred claim, provided notice is given to the judgment creditor and debtor by the claimant before execution sale, and it is undisputed, and, if disputed, is established by an action brought within ten days. Held, that a judgment creditor, by answering in an action to enforce a claim disputed by him, waived notice.—Taylor v. Hill, 115 Cal. 143, 44 Pac. 336.

[b] A complaint in an action to compel a sheriff to apply the proceeds of a sale of property under execution to the payment of claims for wages against the judgment debtor, which fails to allege that notice of the claims in suit was given to the defendants in the suit in which the property was attached and sold under execution, is insufficient, and a demurrer thereto should be sustained.—Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1354-1357; 21 Cent. Dig., cols. 1744-1765, §§ 960-965.

§ 181. Distribution Among Different Executions or Attachments.

[a] Sheriff is liable to creditor whose execution is first levied, for so much of proceeds of sale as will satisfy judgment.—Johnson v. Gorham, 6 Cal. 196.

[b] When a sheriff receives money on execution sale of property levied on by virtue of attachments it is his duty to apply the money in the order of the attachments. The sheriff has no right to go back of the process and raise the question as to the validity of the attachments.—McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

[c] Proceeds of real estate collected under several executions must be applied first to oldest existing judgment lien.—Bagley v. Ward, 37 Cal. 136, 99 Am. Dec. 256-n.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1357-1359; 21 Cent. Dig., cols. 1765-1779, §§ 966-973.

§ 182. Right to Surplus.

[a] Judgment debtor or his assignee may recover overpayment by sheriff to judgment creditor.—Martin v. Quinn, 37 Cal. 55.

[b] Where at a judicial sale property brings more than the amount of the attachment, it is the duty of the sheriff to pay the excess, or see that it is paid, to the defendant. If he fails to do this, he and the sureties upon his official bond are liable in an action for such excess at the suit of the defendant.—Harvey v. Foster, 64 Cal. 296, 30 Pac. 849.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1359, 1360; 21 Cent. Dig., cols. 1779-1786, §§ 974-980.

VIII. RETURN.

OFFICER WHO MUST MAKE, § 183.
FORM AND REQUISITES, § 184.
—— DESCRIPTION OF PROPERTY, § 185.
AMENDMENT, § 186.
CONSTRUCTION, § 187.
OPERATION AND EFFECT, § 188.
—— EFFECT OF RETURN OR DEFECTS THEREIN ON TITLE OF PURCHASER, § 189.
—— EFFECT OF DELAY IN MAKING, § 190.
—— EFFECT OF FAILURE TO MAKE, § 191.
RECORD, § 192.

§ 183. Officer Who must Make.

[a] The return to an execution by an under-sheriff is void unless done in the name and by the authority of the sheriff.—Joyce v. Joyce, 5 Cal. 449.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1367; 21 Cent. Dig., col. 1816, § 1000.

§ 184. Form and Requisites.

[a] Return is admissible to show a sale, though it shows no levy.—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441.

[b] Political Code, section 4178, provides that the return of a sheriff upon process is prima facie evidence of the facts therein stated. A sheriff released property of defendant seized on attachment, and upon the issue of execution made a return showing that he demanded payment of the execution of defendant, and was informed by the officers of the latter that they had no property of defendant in their possession. Held, that

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the return sufficiently showed that defendant's property released on the bond was not delivered to the sheriff pursuant to its provisions.—Hammond v. Starr, 79 Cal. 556, 21 Pac. 971.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1366-1373; 21 Cent. Dig., cols. 1822-1835, §§ 1006-1014.

§ 185. —— Description of Property.

[a] Term "appurtenances," used in return of levy by a sheriff, is too general, vague, and indefinite to comprehend in its meaning any personal property as the subject of levy; nothing, therefore, is passed by the sale.—Munroe v. Thomas, 5 Cal. 470.

[b] A description, in sheriff's return, of city lots, by numbers, referring to the official city map, is sufficient.—Welch v. Sullivan, 8 Cal. 165.

§ 186. Amendment.

[a] A sheriff has no right, after making a return, to amend so as to affect rights which have already vested.—Newhall v. Provost, 6 Cal. 85.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1373-1375; 21 Cent. Dig., cols. 1835-1844, §§ 1015-1023.

§ 187. Construction.

[a] A sheriff's return on an execution that M., plaintiff's attorney, was the purchaser at one hundred and eighty dollars, and has paid the costs, should be construed to mean that M. purchased as attorney and for the plaintiff.—Moore v. Martin, 38 Cal. 428.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1375, 1376; 21 Cent. Dig., cols. 1844-1848, §§ 1024, 1025.

§ 188. Operation and Effect.

[a] Sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion.—Egery v. Buchanan, 5 Cal. 53.

[b] Remedy for defective return is by appeal or motion, and not by collateral attack. Pico v. Sunol, 6 Cal. 294.

[c] Where a sheriff's return on an execution recited that M., plaintiff's attorney, was the purchaser, at one hundred and eight dollars, and has paid his costs, the sheriff is not thereby estopped from testifying that plaintiff, and not his attorney, was the purchaser, and, if the deed has been lost, that he made the deed to plaintiff, and not to the attorney.—Moore v. Martin, 38 Cal. 428.

[d] Return of sheriff may be contradicted. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 229, 15 Am. St. Rep. 50-n, 22 Pac. 594.

[e] The return of a constable showing that the execution purchaser of property paid the full price bid does not estop the corporation's assignee in insolvency from denying such fact in an action to recover the amount of the bid from the purchaser, since the purchaser was not a party to the proceedings in which the property was sold. Judgment, 56 Pac. 1110, reversed.—Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1377-1382; 21 Cent. Dig., cols. 1852-1881, §§ 1030-1048.

§ 189. —— Effect of Return or Defects Therein on Title of Purchaser.

[a] Title of purchaser does not depend upon sheriff's return.—Low v. Adams, 6 Cal. 277.

[b] The writ of venditioni exponas is a simple order of the court to sell property already levied on under execution. It confers no power to levy, and a recital in the return that the sheriff had levied and sold by virtue of the writ is an unimportant error when it appears that the levy had been previously made under execution.—Welch v. Sullivan, 8 Cal. 165.

[c] The title of the purchaser of real estate at execution sale does not depend upon and is not affected by the sheriff's return upon the writ of execution. The title rests upon the judgment, execution, sale, and deed, and is not impaired by any defect in the return of the officer, or by his failure to make any return.—Clark v. Lockwood, 21 Cal. 220.

[d] The title of a purchaser at an execution sale does not depend on the return on the execution.—Wilson v. Madison, 55 Cal. 5.

[e] On a sale of land under an execution the title of the purchaser does not depend on the sheriff's return to the writ. The title relates back to and takes priority from the date of the judgment lien, and not from the date of any real or pretended statutory levy. Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46.

[f] If shares of stock have been seized and held under attachment, to satisfy judgment, title of purchaser of stock is not affected by failure of officer to show that he levied before selling.—McFall v. Buckeye Grangers' W. Assn., 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253.

§ 190. —— Effect of Delay in Making.

[a] Time in which sheriff makes return to an execution does not affect the validity of the execution or of a sale under it.—Low v. Adams, 6 Cal. 277.

§ 191. —— Effect of Failure to Make.

[a] The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of

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the officer in this respect.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

[b] The making of a return is not essential to the purchaser's title.—(1862) Clark v. Lockwood, 21 Cal. 220.

§ 192. Record.

[a] Upon levy of execution on real estate, copy of execution need not be filed in recorder's office.—Bagley v. Ward, 37 Cal. 122, 99 Am. Dec. 256.

IX. PAYMENT, SATISFACTION AND DISCHARGE.

SETOFF OF EXECUTIONS, § 193.
AUTHORITY OF OFFICER AS TO MEDIUM OF PAYMENT, § 194.
LEVY AND SALE IN GENERAL, § 195.
EVIDENCE OF PAYMENT OR SATISFACTION, § 196.
VACATING OR SETTING ASIDE ENTRY OF SATISFACTION, § 197.

§ 193. Setoff of Executions.

[a] Joint execution cannot be set off against several one; to warrant setoff, parties to both executions must be identical.—Calderwood v. Peyser, 42 Cal. 111.

[b] An execution should have been recalled and amended pending a motion to set off the judgment where the affidavits of the parties showed, without contradiction, the existence of an unsatisfied judgment in favor of the execution debtor against the execution creditor.—Nash v. Kreling, 136 Cal. 627, 69 Pac. 418.

[c] Under Code of Civil Procedure, section 440, providing that cross-demands between persons shall be deemed compensated, so far as they equal each other, an execution creditor against whom the debtor holds an unsatisfied judgment cannot require payment of the balance due as a condition of allowing the setoff.—Nash v. Kreling, 136 Cal. 627, 69 Pac. 418.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1393; 21 Cent. Dig., cols. 1914, 1915, § 1068.

§ 194. Authority of Officer as to Medium of Payment.

[a] United States treasury notes may be received by a sheriff in redemption of land which he has sold on execution, where neither the law nor the judgment of the court directs him to receive a particular kind of money only.—People v. Mayhew, 26 Cal. 655.

§ 195. Levy and Sale in General.

[a] Although it is a general proposition that a levy under an execution upon sufficient personal property to satisfy it amounts to a satisfaction of the judgment, yet such is not the case as to the debtor, if he consents to an application of the proceeds of sale to junior executions.—Barber v. Reynolds, 44 Cal. 519.

§ 196. Evidence of Payment or Satisfaction.

[a] Sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and when he takes a note, indorses it on the execution and returns it satisfied, the return is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note.—Mitchell v. Hackett, 14 Cal. 661.

[b] The plaintiff in an execution may accept of promissory notes by a special agreement as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate.—Mitchell v. Hackett, 25 Cal. 538.

§ 197. Vacating or Setting Aside Entry of Satisfaction.

[a] A return of satisfaction by a sale of property, made by a sheriff on a void execution, the judgment creditor becoming the purchaser, may be vacated as void.—Smith v. Reed, 52 Cal. 345.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1401, 1402; 21 Cent. Dig., cols. 1938-1940, § 1089.

X. SUPPLEMENTARY PROCEEDINGS.

IN GENERAL, § 198.
NATURE AND PURPOSE OF REMEDY, § 199.
PERSONS AGAINST WHOM PROCEEDINGS MAY BE MAINTAINED, § 200.
JURISDICTION AND AUTHORITY OF COURT OR JUDGE, § 201.
PROPERTY OR RIGHTS WHICH MAY BE REACHED, § 202.
PROCEEDINGS FOR EXAMINATION OF DEBTOR, § 203.
PLEADING AND EVIDENCE IN PROCEEDINGS IN AID OF EXECUTION, § 204.
—— TRIAL, § 205.
REFERENCE AND PROCEEDINGS ON EXAMINATION, § 206.
—— WHO MAY ACT AS REFEREE, § 206½.
—— CONDUCT OF EXAMINATION, § 207.
ORDER FOR PAYMENT OR DELIVERY OF PROPERTY, § 208.
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DISOBEDIENCE OF ORDER OR SUBPOENA AS CONTEMPT, § 213.
WAIVER OF DEFECTS AND IRREGULARITIES IN PROCEEDINGS, § 214.

Right to prosecute supplementary proceedings as bar to prosecution of creditor's suit. See Creditors Suit, § 3.

§ 198. In General.

[a] In proceedings supplementary to the execution, the denial of the debt, or the id-

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verse claim to the property by the garnishee, contemplated by the Practice Act, is a claim or denial in good faith, and not one of mere pretense.—Parker v. Page, 38 Cal. 522.

[b] Debts secured by mortgage may be enforced under provisions relating to supplementary proceedings.—McGurren v. Garrity, 68 Cal. 568, 9 Pac. 839.

[c] Order in aid of execution is an order and not a judgment.—Wells v. Torrance, 119 Cal. 441, 51 Pac. 626.

§ 199. Nature and Purpose of Remedy.

[a] Proceedings supplementary to execution, by which a judgment debtor is required to appear before a court or referee to answer concerning his property, are but a substitute for a creditor's bill at common law, and are purely judicial.—McCullough v. Clark, 41 Cal. 298; Pacific Bank v. Robinson, 57 Cal. 520.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1402; 21 Cent. Dig., cols. 1941-1943, § 1091.

§ 200. Persons Against Whom Proceedings may be Maintained.

[a] To proceedings supplementary to execution (Prac. Act, secs. 238-245), the debtor of the judgment debtor, who may ordered to pay to the sheriff, need not be made a party.—Adams v. Hackett, 7 Cal. 187.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1411; 21 Cent. Dig., cols. 1948-1950, § 1095.

§ 201. Jurisdiction and Authority of Court or Judge.

[a] In proceedings supplementary to execution the court has no jurisdiction to make orders relating to persons who are not parties to the proceeding, nor has it power to make an order that one who has, by consent of plaintiff and defendant, borrowed money deposited with the sheriff by defendant to release an attachment, and given his note to a third party therefor, payable when plaintiff recovers judgment, shall pay the money to the plaintiff, when the person who holds the note is not a party to the proceeding, and the note is still in his hands, and not under the control of the court.—Hathaway v. Brady, 26 Cal. 581.

[b] A judgment was recovered and proceedings supplementary to execution were instituted against debtor's wife, alleging that she held lands which belonged to him. On the same day she conveyed to another. The court adjudged that the land belonged to her husband, ordered execution to issue in the original case, and appointed a receiver to take possession and subject the land to the satisfaction of the debt. Held, that these proceedings were beyond the court's jurisdiction, and will be restrained by prohibition.—McDowell v. Bell, 86 Cal. 615, 25 Pac. 128.

[c] Where defendant was summoned in proceedings supplementary to execution against a corporation to appear before a referee and answer concerning money in his hands belonging to the corporation, and afterward the court confirmed the referee's report, and rendered judgment that the money be paid by defendant to plaintiff, though defendant was not a party to the original action against the corporation, the fact that copies of the order requiring him to appear before the referee, and of the affidavit on which it was based, were served on him, and in obedience thereto he appeared and was examined, sufficiently shows that the court had jurisdiction of defendant's person in the supplementary proceedings.—Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254.

[d] The only power of the court in proceedings supplementary to execution, in respect to an action by the judgment creditor, is to make an order authorizing the judgment creditor to institute an action in the proper court to recover indebtedness due to the judgment debtor, and to forbid a transfer pending the action; and such an order is not an adjudication of the rights of the parties.—High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508.

[e] Under the provisions of the Code of Civil Procedure relating to proceedings supplementary to the execution, the court has no jurisdiction to order the grantee of the judgment debtor, who claims title to the property conveyed, to surrender it or to subject it to the satisfaction of the judgment. Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1406, 1437; 21 Cent. Dig., cols. 1951-1958, §§ 1097, 1098.

§ 202. Property or Rights Which may be Reached.

[a] Under our Practice Act (copied from the New York act), upon proceedings supplementary to execution, a debtor, examined before a referee appointed by the court, as to "property" supposed to be concealed, may be ordered by the referee to apply a judgment to pay his judgment creditor as the court shall direct.—Adams v. Hackett, 7 Cal. 187.

[b] Liability to judgment debtor sounding in tort may be reached by proceedings supplemental to execution.—Staples v. May, 87 Cal. 191, 192, 25 Pac. 346, reversed (1890), 23 Pac. 710.

[c] Defendant's testimony as to how his property had been disposed of was unsatisfactory, but no property applicable to the satisfaction of plaintiffs' judgment was shown to be in his hands when the citation was served upon him. Held that plaintiffs were not entitled to an order that defendant turn over property.—Lyons v. Marcher, 119 Cal. 382, 51 Pac. 559.

FOR AUTHORITIES FROM OTHER STATES:

Supplementary proceedings, patent rights may be reached by: 41 Am. Rep. 23,

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note. See, also, 17 Cyc. 1412-1417; 21 Cent. Dig., cols. 1961-1968, §§ 1100-1105.

§ 203. Proceedings for Examination of Debtor.

[a] In supplementary proceedings under section 714 of the Code of Civil Procedure, after an execution has been returned unsatisfied, judgment creditor is entitled to an order directing judgment debtor to appear and answer concerning his property, without making any affidavit therefor.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135.

[b] A judgment creditor, after execution returned unsatisfied, in supplementary proceedings against the debtor, stated in his affidavit that he had assigned his judgment. Held that, even if the proceedings were based upon the affidavit, the order requiring the debtor to appear and answer concerning his property should not be reversed, on the ground that the creditor was not the real party in interest, since the supplementary proceedings could not be regarded as a new action.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1419-1429; 21 Cent. Dig., cols. 1969-1985, §§ 1106-1118.

§ 204. Pleading and Evidence in Proceedings in Aid of Execution.

[a] On general demurrer in supplemental proceedings under Code of Civil Procedure, section 720, which authorizes a judge by order to permit the judgment creditor to institute supplemental proceedings on a judgment against a debtor of the judgment debtor, an allegation in the complaint that the order allowing the proceedings was "duly made" is sufficient, even if the specific facts set out are defective.—High v. Bank of Commerce, 95 Cal. 386, 29 Am. St. Rep. 121, 30 Pac. 556.

[b] The complaint in supplemental proceedings under Code of Civil Procedure, section 720, which authorizes a judge by order to permit the judgment creditor to institute supplemental proceedings on a judgment against a debtor of the judgment debtor, sufficiently shows that judgment was rendered in the principal case, where it alleges that plaintiff "recovered a judgment, . . . which judgment was duly entered," etc.—High v. Bank of Commerce, 95 Cal. 386, 29 Am. St. Rep. 121, 30 Pac. 556.

[c] In supplementary proceedings, evidence that some time prior to the execution there probably was a small balance in a bank, on open account, in favor of one of the execution debtors, will not warrant the supreme court in holding that the bank was indebted to defendant in execution.—High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508.

§ 205. —— Trial.

[a] Court is not bound to make findings in proceedings in aid of execution.—Lyons v. Marcher, 119 Cal. 383, 51 Pac. 559.

§ 206. Reference and Proceedings on Examination.

[a] Where, in proceedings supplemental to execution, it is evident from the examination of a third person that he is acting in bad faith in denying his indebtedness to the judgment debtor, the referee before whom the examination is held may treat such denial as fraudulent, and order him to pay the amount to the judgment creditor.—Parker v. Page, 38 Cal. 522.

[b] Where proceedings supplemental to execution are instituted before a referee, it will be presumed that the referee found the facts necessary to support the judgment, in the absence of explicit findings on material points.—Parker v. Page, 38 Cal. 522.

§ 206½. —— Who may Act as Referee.

[a] The fact that the referee in the proceedings supplementary to execution was the clerk of the attaching creditor is not any considerable evidence of fraud, when the limited duties of the referee are considered.—Adams v. Hackett, 7 Cal. 187.

§ 207. —— Conduct of Examination.

[a] In proceedings supplementary to execution each party is entitled to call and examine witnesses.—McCullough v. Clark, 41 Cal. 298.

§ 208. Order for Payment or Delivery of Property.

[a] Proceedings supplementary to execution are intended to take the place of a creditor's bill, and in such proceedings it is proper to order the execution debtor to assign to a receiver a patent right to an invention.—Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120.

[b] In supplementary proceedings, the judgment debtor is not entitled, under section 386 of the Code of Civil Procedure, to apply for leave to interplead the judgment creditor with other persons, to compel them to litigate their respective claims to the property ordered to be assigned.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135.

[c] Where, in supplementary proceedings against a judgment debtor, he is ordered to assign all his "right, title, and interest" in certain letters patent to his creditor, it is immaterial that he claims to have no property in the patents.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135.

[d] On supplementary proceedings debtor may be ordered to assign seat in stock exchange to receiver authorized to sell it to satisfy judgment.—Habenicht v. Lissak, 78 Cal. 357, 12 Am. St. Rep. 63, 20 Pac. 874.

FOR AUTHORITIES FROM OTHER STATES:

See 17 Cyc. 1444-1451; 21 Cent. Dig., cols. 2020-2030, §§ 1156-1159.

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§ 209. —— Order Against Third Persons.

[a] The court cannot, by virtue of the specific contract act, order a party in whose hands there is money belonging to a judgment debtor to pay over such money in a specific kind of currency, in proceedings supplementary to execution instituted under Practice Act, sections 141-143.—Hathaway v. Brady, 26 Cal. 581.

[b] The court has no authority, under Practice Act, sections 141-143, to make an order for the application of property of a judgment debtor in the hands of a third party to the satisfaction of a judgment, without first ascertaining, by the examination of such third party, whether he has any such property in his possession.—Hathaway v. Brady, 26 Cal. 581.

[c] Court cannot direct that property transferred by debtor be surrendered to receiver and subjected to judgment.—McDowell v. Bell, 86 Cal. 616, 25 Pac. 128.

§ 210. Operation and Effect of Orders in Proceedings in Aid of Execution.

[a] If a judgment debtor is examined concerning his property before a court or referee, on proceedings supplementary to execution, the order made by the tribunal before which the examination takes place, concerning the subject matter, is binding, and estops the parties from again litigating the same matter in another form of action.—McCullough v. Clark, 41 Cal. 298.

§ 211. Receivers.

[a] Purchaser at judicial sale of mining claim may, where judgment debtor remains in possession working claims, and is insolvent, have a receiver appointed to take charge of proceeds during period allowed by statute for redemption.—Hill v. Taylor, 22 Cal. 191.

[b] In proceedings supplementary to execution the court has power, when it has all the parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment debtor, or to such third person as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt. Hathaway v. Brady, 26 Cal. 581.

[c] It is proper in supplementary proceedings against an owner of seats in a stock exchange to appoint a receiver with power to sell the seats.—Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63, 20 Pac. 874, 5 L. R. A. 713.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1451-1473; 21 Cent. Dig., cols. 1992-2001, §§ 1131-1140.

§ 212. Costs.

[a] Where costs of the supplementary proceedings were allowed against the garnishee in the referee's report, but were not allowed by the court in its order of confirmation, they cannot be recovered in an action upon the judgment rendered in the supplementary proceedings, requiring the garnishee to pay to the judgment creditor the amount of his indebtedness to the judgment debtor.—Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254.

§ 213. Disobedience of Order or Subpoena as Contempt.

[a] Attendance on any court as a witness, juror, or party only exempts the party so attending from arrest in a civil action, but not from obeying an order to appear in proceedings supplementary to execution.—Page v. Randall, 6 Cal. 32.

[b] A commitment for refusing to deliver property pursuant to an order in supplementary proceedings will not be quashed merely because that property was exempt from such order, since that made the order at most erroneous, and not void.—McCullough, Ex parte, 35 Cal. 97.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1473-1481; 21 Cent. Dig., cols. 2070-2089, §§ 1195-1204.

§ 214. Waiver of Defects and Irregularities in Proceedings.

[a] After service of affidavit and order on debtor, and after he has appeared before referee, and gone through examination without objection, any irregularity is waived.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135.

FOR AUTHORITIES FROM OTHER STATES:
See 21 Cent. Dig., cols. 2089-2092, §§ 1205, 1206.

XI. EXECUTION AGAINST THE PERSON.

ACTIONS IN WHICH EXECUTION IS AUTHORIZED, § 215.
—— NECESSITY THAT JUDGMENT SHOW LIABILITY TO ARREST, § 216.
CUSTODY OF PRISONER, § 217.
EFFECT OF DISCHARGE, § 217½.

§ 215. Actions in Which Execution is Authorized.

[a] A party cannot be imprisoned under a judgment in a civil action for assault and battery, since Constitution, article 1, forbids imprisonment for debt except in case of fraud.—Prader, Ex parte, 6 Cal. 239.

[b] In an action for the price of goods sold an issue of fraud may be framed and tried, and the defendant, upon proper proof, may be adjudged guilty, and the court may order an execution against the person of the defendant so adjudged guilty of the fraud.—Stewart v. Levy, 36 Cal. 159.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1492-1500; 21 Cent. Dig., cols. 2104, §§ 1214-1223.

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§ 216. —— Necessity that Judgment Show Liability to Arrest.

[a] The writ of arrest is only an intermediate remedy or process, to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found and the fraud stated in the judgment, in order to authorize an arrest on final process.—Matoon v. Eder, 6 Cal. 57.

[b] To authorize arrest of defendant upon execution issued upon judgment recovered in an action upon contract the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment.—Davis v. Robinson, 10 Cal. 411.

§ 217. Custody of Prisoner.

[a] If a judgment is rendered against a defendant in a civil action, convicting him of fraud, and he is imprisoned on an execution issued thereon, the failure of the plaintiff to make a weekly advance to the jailer of money sufficient for the support of the prisoner does not, per se, operate a discharge of the defendant. If the prisoner is adequately supported by the jailer, and the latter is willing to trust the creditor for reimbursement, the purpose of the statute is satisfied. Lamson, Ex parte, 50 Cal. 306.

For Authorities from Other States:

See 17 Cyc. 1513, 1514; 21 Cent. Dig., cols. 2150-2158, §§ 1248-1253.

§ 217½. Effect of Discharge.

[a] Where defendant in a divorce suit is imprisoned for refusing to pay alimony, and is afterward discharged on taking oath that he has no property (Code Civ. Proc., sec. 1148), a subsequent imprisonment till he should pay the alimony accruing before as well as after such discharge is invalid under Code of Civil Procedure, section 1151, providing that a person, "after being so discharged, is forever exempted from arrest or imprisonment for the same debt."—Batchelder, Ex parte, 96 Cal. 233, 31 Pac. 45.

XII. WRONGFUL EXECUTION.

NATURE AND GROUNDS OF LIABILITY, § 218.
PERSONS LIABLE, § 219.
ACTIONS, § 220.
—— TIME TO SUE AND LIMITATIONS, § 221.
—— PLEADING, § 222.
—— EVIDENCE, § 223.
—— DAMAGES, § 224.
—— JUDGMENT, § 225.

§ 218. Nature and Grounds of Liability.

[a] Where real estate is sold on execution, and the judgment is afterward reversed, the former owner may maintain an action of damages against the judgment creditor, who purchased such land.—Reynolds v. Hosmer, 45 Cal. 616.

For Authorities from Other States:

See 17 Cyc. 1570, 1571; 21 Cent. Dig., cols. 2321-2326, §§ 1382-1386.

§ 219. Persons Liable.

[a] Officer is liable to action for enforcing execution against one not a defendant.—Perkins v. Thornburgh, 10 Cal. 189.

[b] Justice, constable and plaintiff are all liable for levy of a void execution against a defendant not served.—Inos v. Winspear, 18 Cal. 397.

[c] In an action by the parties whose property has been wrongfully taken under legal process, all who join or participate in the trespass are jointly liable as joint trespassers. Lewis v. Johns, 34 Cal. 629.

[d] Plaintiffs who indemnify sheriff are jointly liable with him for seizure of property not belonging to defendant.—Lewis v. Johns, 34 Cal. 629.

[e] Where wood held in the possession of a pledgee is wrongfully seized on execution against the pledgor, without the service of any garnishment upon the pledgee, the constable serving the writ becomes a trespasser, and cannot be held in privity with the pledgor; and in an action of trover by the pledgee he is entitled to recover the full value of the property as damages for its conversion.—Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95.

For Authorities from Other States:

See 17 Cyc. 1572-1574; 21 Cent. Dig., cols. 2327-2334, §§ 1389-1393.

§ 220. Actions.

[a] A person whose land is sold on an erroneous judgment, afterward reversed, is not estopped from maintaining an action for damages by having made a motion to set aside the sale, which motion had been denied.—Reynolds v. Hosmer, 45 Cal. 616.

[b] In the absence of any showing of fraud, a creditor who has caused a levy to be made under a valid judgment entered on default, and, on the opening and setting aside of such judgment has returned the property to defendant, is not liable for the seizure and detention, so that he acted without fraud.—White v. Adams, 52 Cal. 435.

[c] Sheriff cannot question an agreement for the sale of personalty unless it were made to hinder, delay, or defraud creditors, and then he must produce both judgment and execution.—Bickerstaff v. Doub, 109 Cal. 109, 79 Am. Dec. 204.

[d] Execution based on void judgment will not protect levying officer having notice of such fact.—Brush v. Smith, 141 Cal. 469, 75 Pac. 55.

[e] Execution containing amendable defects not brought to notice of officer will be accorded same effect with reference to acts

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done in its execution as if it had been amended.—Brush v. Smith, 141 Cal. 470, 75 Pac. 55.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1574-1579; 21 Cent. Dig., cols. 2334-2349, §§ 1394-1406.

§ 221. —— **Time to Sue and Limitations.**

[a] The running of the statute of limitations against an action for the wrongful issuing of an execution on a satisfied judgment is not suspended by injunction proceedings restraining the enforcement of the execution. Wood v. Currey, 57 Cal. 208.

[b] The statute of limitations, in an action for the wrongful issuing of an execution on a satisfied judgment, begins to run from the levy; and subsequently accruing damages do not constitute separate causes of action, and do not postpone the operation of the statute. Wood v. Currey, 57 Cal. 208.

[c] The procuring of a levy of an execution on a satisfied judgment is a tort, and an action thereon is barred in two years.—Wood v. Currey, 57 Cal. 208.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1577; 21 Cent. Dig., col. 2339, § 1398.

§ 222. —— **Pleading.**

[a] In an action for damages caused by the sale of the plaintiffs' real estate under an execution issued on an erroneous judgment, afterward reversed, it is not necessary in the complaint to make a direct averment of the existence of the property if that fact appears by necessary inference drawn from the facts stated.—Reynolds v. Hosmer, 45 Cal. 616.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1576; 21 Cent. Dig., cols. 2340, 2341, § 1400.

§ 223. —— **Evidence.**

[a] A suit in trespass was brought against one furnishing an execution to an officer and against the officer who levied it on the mercantile stock in trade of this plaintiff, malice was charged, and vindictive damages sought. Held, that evidence of the retail value of the goods was inadmissible. The market cost of replacing the goods was the proper basis for damages.—Nightingale v. Scannell, 18 Cal. 315.

[b] Loss sustained by mercantile firm—from the seizure of their property—in the diminution of their business and its consequent profits subsequent to the release of the property from the seizure, is not an element of damage susceptible of computation with any reasonable degree of accuracy, and evidence concerning it is properly excluded from the jury.—Selden v. Cashman, 20 Cal. 56, 81 Am. Dec. 93.

[c] In an action by a wife against a constable and his sureties to recover the value of personal property taken from plaintiff's possession, under execution against her husband, where the answer contains only a general denial and no plea of justification, a mere admission by the plaintiff that the property was seized under an execution issued out of justice's court in a specified action against her husband, does not show any indebtedness of the husband nor any judgment against him, nor the issuance of execution upon such judgment, and does not, in the absence of any other showing, entitle the constable to question the validity of a transfer from the husband to the plaintiff.—Darville v. Mayhall, 128 Cal. 617, 61 Pac. 276.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1576; 21 Cent. Dig., cols. 2341-2342, §§ 1401, 1402.

§ 224. —— **Damages.**

[a] Suit was brought by one of two partners to recover his interest in property taken wrongfully on an execution against the firm. The other partner, refusing to join plaintiff, was joined as a defendant. Held, that a recaption of the goods, whether before or after suit brought, by defendant partner, was in legal effect a recaption on joint account of himself and plaintiff, and to this extent would reduce the damages.—Nightingale v. Scannell, 18 Cal. 315.

[b] Execution having issued on a void judgment, the creditor, not knowing of its invalidity and acting under advice of counsel, caused a seizure of the property to be made under it in the ordinary manner. Held that, in the absence of malice, exemplary damages could not be recovered for such wrongful seizure.—Selden v. Cashman, 20 Cal. 56, 81 Am. Dec. 93.

FOR AUTHORITIES FROM OTHER STATES:
See 17 Cyc. 1577-1579; 21 Cent. Dig., cols. 2342-2347, §§ 1403, 1404.

§ 225. —— **Judgment.**

[a] In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the ad damnum of the writ. The value of the property is only one predicate of the recovery.—Coghill v. Boring, 15 Cal. 213.

EXECUTION AGAINST THE PERSON.

See Execution, XI.

EXECUTION IN BLANK.

See Blank Execution; Deeds, § 41.

EXECUTION OF WRITTEN INSTRUMENTS.

See second set of cross-references under Execution.

EXECUTIVE WARRANT.

For arrest of fugitive from justice. See Extradition, § 5.

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